LAND OF THE FREE: HUMAN RIGHTS VIOLATIONS AT IMMIGRATION DETENTION FACILITIES IN AMERICA

by

CAITLIN J. MITCHEL

(Under the Direction of Daniel Bodansky)

ABSTRACT

In America today, aliens who commit even minor visa violations can be detained in one of many immigration detention facilities throughout the U.S. These detainees may be transferred to a facility far away from their homes, families, and attorneys. While imprisoned in these detention facilities, some detainees are treated as and housed with criminals. Their substantive and procedural rights are limited and their human rights are violated. The U.S. laws that should protect them are the very laws that strip them of their rights to court proceedings, challenges of decisions regarding detention, and judicial review. By issuing substantial reservations, declarations, and understandings to human rights treaties, the U.S. has created loopholes through which it is able to violate detainees' human rights, and yet avoid accountability. Instead, however, America should meet its international obligations and regain its position as a global leader in the promotion and protection of human rights.

INDEX WORDS: abuse, administrative custody, alien, asylum, detain, detention, detention facilities, deportable, due process, Habeas Corpus, human rights, immigrant, immigration, Immigration and Nationality Act, imprisonment, inadmissible, International Covenant on Civil and Political Rights, judicial review, mistreatment, procedural, removable, substantive, Universal Declaration of Human Rights

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DEDICATION

To my parents, Brent and Shauna, thank you for your conditional love and support throughout my life and education. Your generosity and kindness have enabled me to achieve more than I ever thought possible. You have sacrificed everything so that your children could follow their dreams. You are the best parents any child could ever hope for and I love you to infinity.

To my brothers, Colin and Cameron, thank you for putting up with my ranting and whining this year. You kept me anchored to the real world when I risked floating off into a world of statutes and treaties. I couldn't ask for better brothers or better friends: you guys rock!

To my best friend Beth, you are wonderful. I cannot thank you enough for your patience and understanding throughout this process. I am so very grateful that you are in my life.

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1. Introduction

America is the land of the free, at least, for American citizens. Americans have always espoused the ideals of freedom, liberty, and justice. Yet many actions by the American government are in direct opposition to these ideals. Such actions include the mistreatment of aliens in U.S. immigration detention facilities, in contravention of international human rights laws. Today, if you give America your tired, your poor, your huddled masses yearning to breathe free,[1] they might end up in jail.[2]

In the post-September 11 world, America's laws and policies have become more oppressive and less tolerant of individuals who are not American citizens (aliens). This has been done under the guise of protecting national security.[3] America's preference of protecting national security over individual human rights has become painfully obvious in light of the Abu Ghraib Prison and Guantanamo Bay Detention Center abuse scandals. Yet while a great deal of media attention has been paid to the Abu Ghraib and Guantanamo interrogation scandals, far less attention has been paid to the treatment of those people within the United States who have been detained here by the U.S. government.

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[1] Emily Lazarus, *New Colossus*, 1883. This sonnet is engraved on a plaque affixed to the pedestal of the Statue of Liberty.

[2] Mary Dougherty, Denise Wilson & Amy Wu, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *ANN. REP.:* IMMIGRATION ENFORCEMENT ACTIONS: *2005*, at 1 (2006), *available at* *http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf*. In fiscal year 2005, more than 1,291,000 foreign nationals were apprehend by the Department of Homeland Security, and 238,000 were detained by the Bureau of Immigration and Custom Enforcement.

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. Law 107-56, 115 Stat. 350 (2001); Detainee Treatment Act of 2005, 42 U.S.C. §2000dd *et seq.* (2005), Real ID Act, Pub. L. 109-13, 119 Stat. 231 (2005); Military Commissions Act of 2006, Pub.L. No. 109-366 (2006).

Whether having entered America legally or illegally, thousands of aliens are being placed in detention centers across America while awaiting deportation (removal), asylum, or other immigration proceedings. These detention centers are often local, state, or federal jails and correctional facilities, and many have histories of detainee abuse. Yet, many of these detainees are not criminals whose incarceration is necessary to protect the lives and safety of ordinary Americans. Some of these aliens are refugees seeking asylum in the U.S. For some, they are imprisoned because they have committed an immigration violation relating to entering or staying in the U.S. without a valid visa. To date, there is very little oversight of these facilities and there has been little instruction provided to the facilities' personnel as to the international human rights of the detainees. During fiscal year 2005 alone, the Bureau of Immigration and Customs Enforcement's "average daily [] population [of detained aliens] was 19,619."[4]

Chapter 2 of this paper will focus on the treatment of detainees and look at the substantive and procedural issues arising from the conditions and treatment of detainees at immigration detention facilities. Chapter 3 will identify the U.S. laws that govern the detention of immigrants, including any constitutional protections they may have. Chapter 4 will survey the international human rights laws that protect the detainees and address whether detainees' human rights are being violated. Finally, Chapter 4 will explore how the U.S. can be held accountable for the mistreatment of detainees.

[4] Dougherty, *supra* note 2, at 4.

2. The Treatment of Detainees: Substantive and Procedural Issues

Aliens who are detained based on their status as non-citizens are held in the custody of the Bureau of Immigrations and Customs Enforcement (ICE), a branch of the Department of Homeland Security (DHS). ICE is the successor agency to the former Immigration and Naturalization Service (INS). For the purposes of this paper, the term alien refers to individuals in the U.S. or at a U.S. port-of-entry who are not U.S. citizens. Such aliens may also be referred to as immigrants, migrants, or foreign-nationals. Aliens in ICE's custody are held in immigration detention facilities; thus, they are in effect imprisoned. This imprisonment raises both substantive and procedural issues that must be addressed. Many of these aliens suffer inhumane detention conditions, lack of access to communication with family and attorneys, and mistreatment and abuse in the detention facilities. They are also subject to arbitrary detention and arrest, limited access to the courts and fair hearings, lack of access to legal representation, and indefinite detention.

These aliens are in held in 'administrative custody' and not 'punitive correctional custody,' meaning that they are not being held for criminal violations and should be afforded specific rights and privileges based on their custody status.[5] Aliens held in administrative custody by ICE are referred to as 'detainees.' On the other hand, aliens who have been charged with or convicted of a crime are imprisoned with other suspected or convicted offenders regardless of their immigration status. They are not in the custody of ICE. All such incarcerated suspected or convicted criminals, whether U.S. citizens or aliens, are referred to as 'inmates' for

[5] David M. Zavada, DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-07-01, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES, at 31 (2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf.

the purposes of this paper. Regardless of terminology, detainees are imprisoned and suffer living conditions and restrictions on freedom that are tantamount to incarceration.

There are three types of detention facilities where ICE houses aliens. The first type of the detention facilities are known as Service Processing Centers (SPC). SPCs are run by ICE and detain only aliens. Second, detainees are also held in private detention facilities that are operated by private contractors and that house only detainees.[6] Finally, some detainees are imprisoned in local and state jails and federal correctional facilities through intergovernmental service agreements between ICE and the facilities or the Bureau of Prisons.[7] Through these agreements, detention facilities are reimbursed by ICE for housing detainees.[8] For the purposes of this paper, all three types of facilities will be referred to as immigration detention facilities.

2.A. Substantive Issues

Detainees are supposed to be held according to standards laid out in ICE's Detention Operations Manual. Because detainees are in 'administrative custody,' they are not inmates and are not to be treated as inmates.[9] Detainees' imprisonment is not intended to be punishment. Despite the requirement that detainees be given rights and privileges specific to their status as detainees,[10] detainees are often treated as and detained with criminal inmates. In these detention facilities, as with criminal inmates, detainees are required to where uniforms, they are housed in cells, they are monitored by guards, they have no privacy,[11] in some facilities they are exposed to 24-hour lights,[12] in some facilities they are under constant surveillance,[13] their personal property

[6] Zavada, *supra* note 5, at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 31.
[10] *Id.*
[11] Nina Bernstein & Marc Santora, *Asylum Seekers Treated Poorly, U.S. Panel Says*, N.Y. TIMES, Feb. 8, 2005, at A1.
[12] Bernstein, *supra* note 11.
[13] *Id.*

and attire is confiscated, they are given minimal amounts of time a week to visit with family members, and they are guaranteed only one hour a day of outdoor recreation, although they rarely receive even that.[14]

In addition to the general conditions of confinement in an immigration detention facility, some detainees are housed in the same cells with inmates.[15] This mixing of the detainee population with the inmate population of a detention facility is against ICE standards.[16] Similarly, detainees are supposed to be housed separately based on three classification levels,[17] level one being the lowest level, up to level three which is a high-risk detainee who should be placed in medium to maximum security housing.[18] Level one detainees are not supposed to be housed with level three detainees.[19] But, in practice, according to a recent audit report by the Office of the Inspector General (OIG) for the Department of Homeland Security,[20] at a number of the facilities, many detainees were not classified, or they were classified, but then not segregated, or not properly segregated.[21] The audit report also found that there were numerous instances of level one detainees being housed with level three detainees and level two detainees being housed with level three detainees.[22]

On a different note, not only are individual adults detained by ICE, but so are children and families. There are two separate immigration detention facilities where entire families are

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[14] Zavada, *supra* note 5, at 22.
[15] *Id.* at 30.
[16] Obviously the mixing of detainees with inmates occurs only in immigration detention facilities that have inmate populations, i.e. local, state, and federal jails and prisons.
[17] Zavada, *supra* note 5, at 17.
[18] *Id.*
[19] *Id.* at 18.
[20] This Audit Report discloses the results of an audit and inspection of facilities in each of the three categories of detention facilities. Statistical sampling was not used in the preparation of this Audit Report, therefore results are not to be projected to all other immigration detention facilities.
[21] Zavada, *supra* note 5, at 17.
[22] *Id.* at 18.

held while they await determination of whether they will be deported.[23] While the issue of children arriving in the United States without caretakers and being placed in the immigration detention system is beyond the scope of this paper, it is important to note that there has been at least one well-publicized case of a child being detained for almost nine months in an adult correctional facility and suffering the conditions of confinement described above, because immigration officials refused to believe he was a child.[24] As well, in a recent visit to U.S. immigration facilities U.N. Special Rapporteur on the Human Rights of Migrants Jorge Bustamente observed the temporary detention of children in adult detention facilities.[25]

Another reason for the treatment of detainees as inmates is due to lack of proper training. In some instances, guards have not been trained to deal with detainees, moreover some guards have been trained simply to treat both detainees and inmates the same.[26] Given that detainees are incarcerated with inmates, sometimes issued inmate handbooks at the detention facility,[27] and some guards are not aware that there are separate ICE standards and policies for detainees,[28] it is perhaps unsurprising then that detainees have been treated as inmates.

Yet, whether treated as a detainee or as an inmate, a detainee is still a prisoner. The recent audit report by the Department of Homeland Security's OIG identified numerous deficiencies in conditions at immigration detention facilities, violations of ICE detainee standards, and

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[23] Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center That Critics Liken to a Prison*, N.Y. TIMES, Feb. 10, 2007, at A1. The two family detention facilities are the T. Don Hutto Family Detention Center in Texas and the Berks Family Shelter Care Facility in Leesport, Pennsylvania.

[24] Malik Jarno was an immigrant fleeing Guinea because his father, a political activist, was killed by the government. He came to the U.S. at age 15, as proved by his birth certificate, which was later authenticated. However, INS decided he was not a minor and detained him in an adult correctional facility for eight months before he was went before an immigration judge to apply for asylum. *See* Cate Doty, *Teenage African Immigrant is Freed After 3 Years in Detention*, N.Y. TIMES, Dec. 25, 2003, at A17.

[25] *Special Rapporteur on Human Rights of Migrants Ends Visit to United States*, U.N. OFFICE AT GENEVA, May 21, 2007, *available at* *http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/E28217714A83E792C12572E2002E7C5A?OpenDocument*.

[26] Zavada, *supra* note 5, at 31.

[27] *Id.* at 31, 32.

[28] *Id.* at 31.

mistreatment of detainees. However, critics and detainees argue that the report did not go far enough and that ignored the most serious allegations of abuse and mistreatment including "physical beatings, medical neglect, food shortages."[29]

Additionally, detainees in a number of immigration detention facilities have also had to deal with inhumane living conditions. One aspect of inhumane living conditions that some detainees have experienced is that of overcrowding. The American Civil Liberties Union (ACLU) has recently filed suit concerning the severity of overcrowding[30] in one particular immigration detention facility[31] in Otay Mesa, California. In its lawsuit, the ACLU alleges that it is routine for the facility to engage in double or triple-bunking the detainees, meaning that cells built for two persons are actually housing three.[32] Because the cells are built for two, the third person has to sleep on the floor by the toilet.[33]

Detainees also face unsanitary conditions in immigration detention facilities. For example, at one facility, clothes are laundered only once or twice a week, at another facility, when it is time for laundry, clean clothes are not provided, so detainees have to wait in their underwear until their clean clothes are returned hours later.[34] There are also reports and documentation of pests and vermin, including rats/mice and cockroaches at some of the

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[29] Spencer S. Hsu, *Immigrants Mistreated, Report Says*, WASH. POST, Jan. 17, 2007, at A8; *see also* Henry, *supra* note 62. *See also, U.S. Audit: Conditions At Immigrant Detention Centers Inadequate*, DOW JONES INT'L NEWS, Jan. 17, 2007.

[30] Greg Moran, *Some 230 Otay Mesa Detainees are Moved; ACLU Fears Immigrants in Suit were Singled Out*, SAN DIEGO UNION-TRIB., Jan. 30, 2007, at B1.

[31] The immigration detention facility that is the subject of this ACLU lawsuit is the San Diego Correctional Facility in Otay Mesa, California.

[32] Moran, *supra* note 30. *See also* Richard Marosi, *Crowding in Detainee Lockup Alleged; ACLU Files Suit Saying a Federal Immigration Detention Center in San Diego is Unsafe*, L.A. TIMES, Jan. 26, 2007, at B5.

[33] Marosi, *supra* note 32.

[34] Zavada, *supra* note 5, at 22.

facilities.[35] The investigators from the OIG observed that detainees were served undercooked poultry at one of the facilities,[36] and that there were instances when 'hot' food was served cold.[37]

On a related note, detainees' health and physical well-being have also been compromised in some immigration detention facilities due to lengthy daily confinement in their cells and a lack of proper medical treatment. Detainees at some facilities have not been given their one hour of recreation a day, in violation of the ICE standards for detainees.[38] Moreover, detainees have also not received proper medical treatment in some facilities. Deficiencies included a lack of initial medical screenings and physical examinations, inadequate monitoring of some detainees on suicide watches and hunger strikes, and a failure to respond in a timely manner to large numbers of non-emergency medical requests by detainees.[39]

On top of living in the conditions discussed above, detainees in immigration detention facilities nationwide have had to deal with isolation from their friends, families, and even attorneys. The lack of access to communication is both a substantive issue for detainees, as well as a procedural one and will be discussed more fully relating to communication with attorneys later on. As a substantive matter, detainees' ability to contact their families and attorneys only lends to the isolation that is inherent in imprisonment. This is exacerbated by conditions at immigration detention facilities, which hinder or even prevent communication. In some instances, detainees have had to file formal grievances to request emergency phone calls so that they can notify their families that they have been detained.[40] The OIG investigation discovered that in some facilities many of the phones were not operational.[41] Also, detainees did not have

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[35] *Id.* at 9.
[36] *Id.* at 10.
[37] *Id.*
[38] *Id.* at 22.
[39] *Id.* at 4.
[40] *Id.* at 24.
[41] *Id.*

access to phones where privacy was afforded to them, even when calls were relating to legal matters.[42] This lack of privacy was because the phones available to detainees were located in areas that did not provide privacy, they did not have privacy panels, or the detainees were accompanied by a facility staff member while making calls.[43] Notably, detainees cannot receive incoming calls at some detention facilities.

Not only do detainees have difficulty in communicating with their families telephonically, but their ability to see family members in person is also strictly limited by the facilities. While the ICE standard for detainees is that detainees are to be granted a minimum of 30 minutes for a family visitation, the OIG observed that even this small amount of time is not being granted at all of the facilities.[44] Furthermore, at some facilities, detainees are not allowed to have physical contact with their families during visits, but instead must speak to them while separated by a glass partition.[45]

The ability to communicate with family and lawyers is also greatly hindered by ICE's practice of transporting detainees to be held in areas far from where they are seized. This means that detainees are moved to different cities, states, or even regions of the country, away from their communities, lawyers, and family. For example, 49 detainees in an Albuquerque, New Mexico detention facility have filed claims against the government for their detention, most of these men were seized in New York or Los Angeles; none of the men were from Albuquerque.[46]

This transportation is done with little or no notice to the families or attorneys and detainees and detainees are not necessarily given the opportunity to contact them. The practice

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[42] *Id.*
[43] *Id.*
[44] *Id.* at 25.
[45] *Id.*
[46] Michael Gisick, *Inmates Can't be Deported; U.S. Detain/Release Policy has Foreigners in Limbo,* ALBUQUERQUE TRIB., Nov. 7, 2006, at A1.

was clearly and disturbingly exhibited in December of 2006 when ICE raided numerous Swift & Co. meatpacking plants across the country. Those aliens arrested in plants in Iowa, Nebraska, and Minnesota were detained and deported or moved out-of-state within days.[47] While family members and attorneys were not notified, ICE did advertise a toll-free number to call to determine the status and location of detainees.[48] However, this number was either busy and overloaded, or the only information that could be provided by the phone service was identifying the state where the detainee was arrested.[49] This meant that not only could families not find out where their relatives were being held, but attorneys could not find out where their clients were or under what charges they were being held. When interviewed about this specific transportation of aliens, Kathleen Walker, president-elect of the American Immigration Lawyers Association said, "[y]ou can't even find these individuals to provide legal representation for them."[50] A local immigration lawyer, Jim Benzoni, says the government is moving workers and keeping them from lawyers, because if they are moved, then defense lawyers cannot file habeas corpus petitions seeking justification of their arrests.[51]

ICE's practice of transportation not only has the result of further isolating detainees, possibly to prevent them from obtaining legal representation, but there are accusations that this practice has been used in retaliation against detainees who speak out against the conditions in the immigration detention facilities. In the case of the Otay Mesa detention facility discussed above, 230 detainees were transferred to other facilities after the ACLU filed a lawsuit for overcrowding.[52] One of those transferred was the lead plaintiff in the lawsuit. To the ACLU the

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[47] Jennifer Jacobs, *U.S. Officials Start Moving Detained Swift Workers*, DES MOINES REG., Dec. 15, 2006, at 1A.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Moran, *supra* note 30.

transfers were not a response to the overcrowding, which had occurred for months, but were intended to move complaining detainees. David Blair-Loy, ACLU legal director in San Diego, California, said that the detainees were moved with almost no notice. He said they woke the detainees up at 2 a.m., and then kept them in holding cells until 10 p.m.[53] The ACLU is concerned because it appears to be retaliation for complaints and that the facility is trying to interfere with the ACLU attorney's access to the client.[54] More disturbingly, the executive director of the Florida Immigrant Advocacy Center, Cheryl Little recently told the National Prison Rape Elimination Commission that some female detainees who had reported sexual abuse in the detention facilities were then transferred to maximum security jails.[55] Little said "[t]he message is clear: If you complain, you will be transferred to a place far removed from your lawyer and loved ones."[56]

In addition to suffering the conditions of imprisonment in the immigration detention system as described above, detainees also suffer mistreatment and abuse within the facilities.[57] However, it is impossible to know the exact extent of such abuse, in part because of the nature of imprisonment where detainees are under the constant control of those who may be abusing them. As well, as discussed above, many detainees may not report abuse or speak with investigators at the facilities for fear of retaliation.[58] Abuse may also not have been reported because, as of December 2006, ICE did not have standards addressing the rights of detainees to report abuse or violations of their civil rights.[59] Even had detainees wanted to report abuse, if there was a

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[53] *Id.*
[54] *Id.*
[55] Peter Y. Hong, *Woman Recalls Attack by Jail Guard; Mayra Soto Describes her Ordeal to a Federal Panel Examining Prison Rape. Immigrants are Particularly Vulnerable to such Abuses*, L.A. TIMES, Dec. 14, 2006, at B3.
[56] *Id.*
[57] MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004); MICHAEL WELCH, DETAINED: IMMIGRATIONS LAWS AND THE EXPANDING INS JAIL COMPLEX (2002).
[58] Zavada, *supra* note 5, at 30; *see also* Hong, *supra* note 55.
[59] Zavada, *supra* note 5, at 1, 28.

procedure in place for them to do so, they may not have been aware of it. Who knows how much abuse actually occurs when there is no procedure set up for complaint of such abuse?

Language may also be a barrier in the reporting of abuse at detention facilities. At immigration detention facilities, all detainees are supposed to receive a detainee-appropriate handbook for the facility. Such handbooks are supposed to be available in English as well as Spanish or the "most prevalent language(s) spoken in the facility;" however, this has not occurred.[60] Moreover, what about aliens who don't speak English, Spanish, or the "prevalent language," especially considering detainees are not necessarily detained in the area where they were seized? How does a detainee know he has the right to report abuse or how to report the abuse when he does not speak English, Spanish, or the prevalent language?

The OIG report reveals allegations by detainees of physical, sexual, and verbal abuse at the hands of the correctional facilities' staff at all of the facilities it investigated.[61] Yet, OIG spokeswoman Tamara Faulkner said that, "[i]n many cases, we could not conclude that the abuse did or did not occur because there was not sufficient evidence available to meet the evidence standards established by the GAO's (U.S. Government Accountability Office's) Government Auditing Standards."[62] One wonders how detainees are supposed to accumulate evidence against their very captors when they are confined to their cells 23 hours a day, have limited access to their attorneys, and may not speak the language?

Among the allegations of abuse that the OIG discovered in its investigation were numerous allegations of physical abuse.[63] One of these allegations was that a detainee had been

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[60] *Id.* at 32.
[61] *Id.* at 28.
[62] Samantha Henry, *Passaic County Jail Officials Deny Allegations*, HERALD NEWS (Passaic County N.J.), Jan. 26, 2006, at A1, *available at* http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFlZUVFeXkzJmZnYmVsN2Y3dnFlZUVFeXk3MDY0NzU4.
[63] Zavada, *supra* note 5, at 28.

subjected to a physically abusive 'pat down' search by a correctional officer, and was then strip-searched in view of the other detainees.[64] Another allegation was that of a handicapped detainee being dislodged from his wheelchair by a correctional officer.[65] In addition to the abuses cited by the OIG, a report by the Office of the Inspector General at the Department of Justice found that detainees held at the Metropolitan Detention Center in Brooklyn after the September 11th attacks faced "a pattern of physical and verbal abuse."[66]

Numerous other allegations of physical abuse have been made by current and former detainees. One former detainee, Sami Alshahin, claims that he was beaten while held at an immigration detention facility for 14 months and that he witnessed other detainees being beaten.[67] Similar to Alshahin's claims are those of Sadek Awaed, an Egyptian immigrant. Awaed asserted that he was held down and severely beaten by a correction facility guard in March of 2004, while in the presence of 12-15 other guards.[68] Hospital records confirm treatment for his injuries, as well as those of Fathi Ganmi, another detainee who was allegedly beaten.[69] Officials did not deny the beatings, but claimed that Awaed was a 'problematic inmate.'[70] Not only is this an example of the physical abuse detainees have suffered at the hands of detention facilities' staff, but it again reveals the treatment that detainees receive when perceived as inmates as opposed to detainees. Also, because detainees are imprisoned with

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[64] *Id.*
[65] *Id.* at 29.
[66] Eric Lichtblau, *Threats and Responses: Government Report; U.S. Report Faults the Roundup of Illegal Immigrants After 9/11*, N.Y. TIMES, June 3, 2003, at A1.
[67] Henry, *supra* note 62.
[68] Jonathan Miller, *Calling off the Dogs*, N.Y. Times, Dec. 5, 2004, 14NJ-1.
[69] *Id.*
[70] *Id.*

criminal inmates, some detainees have suffered attacks and physical abuse at the hands of the inmates with whom they are housed.[71]

Perhaps even more disturbing than the numerous allegations of physical abuse at immigration detention facilities are the allegations of sexual abuse. The OIG report disclosed one such rape allegation in which a female detainee claimed that she was sexually assaulted by a guard while on work detail.[72] Detainees are not only in danger of sexual abuse by correctional officer, but also by inmates in the facilities. In 2003 the National Prison Rape Elimination Commission was created, after a congressional investigation estimated that between the years of 1983 and 2003, 1 million inmates were raped in U.S. prisons and jails.[73] Again, detainees are housed in jails and prisons with inmates, and are even housed in cells with such inmates. While sexual abuse is rampant in the U.S. prison system, detainees are particularly vulnerable because they may not speak English, Spanish, or a language spoken at the facility, they have limited access to communications, and they may be deported before they can report offenses.[74] The same obstacles and deterrents to reporting other abuses, including fear of retaliation as discussed above, also inhibit the reporting of sexual abuse.[75]

Detainees have also suffered emotional abuse, including humiliation and verbal abuse at the immigration detention facilities.[76] Sami Alshahin, a detainee mentioned above, claims that not only was he beaten at the detention facility, but he was also verbally abused and detainees

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[71] *Id.* For example, former detainee Akhil Sahchdeva claims he was punched in the face by an inmate as the guards watched.
[72] Zavada, *supra* note 5, at 28. As a result of this incident the guard was fired, but he was not prosecuted. *See also* Hong, *supra* note 55. In the case of Mayra Soto, a transgender woman was sexually assaulted by a guard and forced to perform oral sex on him while in immigration custody.
[73] Hong, *supra* note 55.
[74] *Id.*
[75] *Id.*
[76] Lichtblau, *supra* note 66.

were subjected to racial, religious, and anti-immigrant insults.[77] Detainees have also been subjected to the terror and intimidation of the use of dogs at some facilities to control the population.[78] In fact, two detainees in New Jersey were bitten by the guard dogs.[79] However, after that incident, ICE stated that it would no longer detainees to facilities that utilize dogs for patrols.[80]

Humiliation of detainees at the immigration facilities is a particularly rampant form of emotional abuse the detainees suffer. This humiliation often coincides with or arises from other forms of mistreatment of detainees. For example, as discussed above, such humiliation for detainees includes detainees having to wait in their underwear for hours while their clothes are laundered,[81] being strip-searched within view of other detainees,[82] and being intentionally dislodged from a wheelchair by a correctional officer.[83] There are even allegations by detainees that a correctional officer took pictures on his cell phone of them sleeping in their cells and coming out of the bathroom and shower.[84] The detainees allege that the correctional officer held up his cell phone, pointed it at them, and would laugh.[85]

Besides the abuses suffered by detainees at immigration detention facilities, detainees are also the victims of other mistreatment by correctional facility staff. One such mistreatment is the theft of detainees' funds and personal property by staff at the facilities. In the OIG report, it acknowledged that,

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[77] Henry, *supra* note 62.
[78] Miller, *supra* note 68.
[79] *Id.*
[80] *Id.*
[81] Zavada, *supra* note 5, at 22.
[82] *Id.* at 28.
[83] *Id.* at 29.
[84] *Id.*
[85] *Id.* Despite denials by the correctional officer involved, another correctional officer stated that he had seen correctional officers using personal cell phones in the location where personal cell phones are prohibited.

> Independent of our work at the five detention facilities, our Office of Investigations recently completed an investigation at the Monroe County Jail detention facility where they determined that detainees' funds and personal property had been stolen. Specifically, the property control officer was convicted of theft of over $308,736 in U.S. currency, as well as numerous personal property items such as jewelry, watches, and credit cards.[86]

This instance of the theft of vast sums of money and property occurred at a single immigration detention facility. Considering the large number of immigration detention facilities nationwide, even assuming that theft does not occur at most of them, the potential amount of funds and personal property confiscated and never returned to detainees is staggering.

Another form of mistreatment of detainees is that of excessive or inappropriate punishment. The OIG inspection discovered that at one immigration detention facility a 24-hour lock down was the punishment for minor violations, including for wearing a religious head garment.[87] The OIG also found that detainees were placed in disciplinary segregation for far longer than allowed before they were granted disciplinary hearings.[88] On a related note, ICE's standards require incident reports by officers who witness or suspect a violation and such reports must be investigated prior to discipline; but at some facilities there were disciplinary actions taken, but no incident reports or incident reports being done three months later.[89]

The cumulative effect of the conditions of imprisonment and the mistreatment and abuse of the detainees is a profound psychological impact on the individual detainees. As Philip Zimbardo discovered in his infamous *Stanford Prison Experiment* over 25 years ago, individuals who are held in captivity, even for brief periods of time, can suffer extreme psychological effects. Detainees suffer anger, frustration, a sense of isolation, and depression. The

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[86] *Id.* at 19.
[87] *Id.*, at 14.
[88] *Id.*
[89] *Id.* at 14-15.

psychological damage of incarcerating asylum seekers, especially with criminal inmates, can be particularly severe, as many of these individuals have already been traumatized in the countries from which they are fleeing.[90] In 2003 alone, 5,585 male and 1015 female asylum seekers were jailed.[91]

The psychological effects and suffering of the detainees are only exacerbated by the lengthy and possibly indefinite detention they experience. For asylum seekers who have been detained pending a determination of their asylum claim, the average detention is 64 days.[92] For more than a third of these detainees their detention was longer than 90 days,[93] and some asylum seekers were detained for years. Not knowing if or when you will be released greatly adds to the suffering already experienced, including the sense of hopelessness that one will never be released. As well, a lengthy incarceration for an asylum seeker, or a detainee held on a minor immigration violation can be particularly damaging because it is disproportionate to the reason for their detention and it may evoke strong feelings of injustice and distrust in the detainee. Finally, a lengthy or indefinite detention is more traumatic to detainees simply because the longer their detention, the longer they suffer all of the aforementioned conditions, mistreatment, and abuse.

2.B. Procedural Issues

On the other hand, procedural issues facing detainees are of the utmost importance in that they relate to who is detained, the length of detention, the ability to challenge detention, and whether the detainees will eventually be removed. This paper will focus on the issues of the arbitrary detention of aliens and the due process rights they are afforded or denied.

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[90] Bernstein, *supra* note 11.
[91] *Id.*
[92] *Id.*
[93] *Id.*

In fiscal year 2005, "DHS apprehended more than 1,291,000 foreign nationals."[94] For the same year, ICE itself detained 237,667 aliens.[95] The arbitrary nature of this apprehension and detention is revealed by who is detained, where they are detained, and who achieves release. Currently, aliens who have been convicted of a crime, after serving their sentences are automatically detained pending removal, regardless of their flight risk or risk to the community. This detention is mandatory. In 2005, 89,406 detainees were removed as criminal aliens.[96] ICE also uses its discretion to detain non-criminal aliens without release on bond, despite there being no risk to the community or of flight. ICE also detains those who have agreed to voluntary removal until such removal can be achieved. It can take years for such voluntary removal to occur if the detainee's home country refuses to allow the detainee to return.

There is also a huge disparity in who is released, detained, or granted asylum depending on where they seek refuge, what country they are from, or if they are represented by legal council.[97] In a 2005 report released by the United States Commission on International Religious Freedom (USCIRF), the Commission found that for fiscal years 2000-2004, only 3.8% of asylum seekers were released from the detention center in Elizabeth, New Jersey and only 8.4% of asylum seekers were released in Queens, New York.[98] On the other hand, 94% of asylum seekers were released from the detention center in San Antonio, Texas and 81% were released in Chicago, Illinois. It also found that detainees with legal representation "were up to 30 times more likely to gain asylum."[99] Unfortunately for the detainees, less than half of them had legal representation in some places.[100]

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[94] Dougherty, *supra* note 2, at 1.
[95] *Id.* at 4.
[96] *Id.* at 1.
[97] Bernstein, *supra* note 11.
[98] *Id.*
[99] *Id.*
[100] *Id.*

Not only is the location where an individual seeks asylum important, but the report also found that there were large disparities in decisions to detain and release asylum seekers based on their countries of origin. For the fiscal years 2000-2004, over 80% of Cubans and 60% of Iraqis were granted the right to stay in the U.S.[101] However, just over 10% of Haitians and less than 5% of El Salvadorians were allowed to stay.[102] This is notable because during this time the U.S. government was at odds with the political regimes in Cuba and Iraq, but not those of El Salvador and Haiti. Thus, this disparity is particularly troubling because it suggests that the granting of asylum may depend more on U.S. political policies than on an asylum seeker's fear or threat of persecution in their homeland.

Detainees' rights and access to due process in the U.S. immigration detention system are also of particular concern. First and foremost, because detainees are imprisoned in criminal facilities and in the same conditions as criminals, such imprisonment is punitive in nature and not in accordance with the Constitution's Fifth Amendment due process guarantees.[103] Among the due process rights which detainees are denied is the right to a fair hearing. Detainees are denied access to the courts due to a number of policies and laws. The most extensive denial of hearings is through the 'expedited removal' process at airports and borders. Through this process, aliens are sent back to their countries of origin immediately upon arriving in the U.S., without a hearing in front of an immigration judge, unless they claim U.S. citizenship or can show a 'credible fear' of persecution to the Customs and Border Protection officer right then.[104] In 2005 alone, 72,911 aliens were removed from the U.S. through expedited removal.[105] Detainees are also denied

[101] *Id.*
[102] *Id.*
[103] Wong Wing v. United States, 163 U.S. 228 (1896).
[104] Customs and Border Protection is a branch of the Department of Homeland Security. Its officers are tasked with protecting America's borders and ports-of-entry.
[105] Dougherty, *supra* note 2, at 1. This was for the 2005 fiscal year.

hearings in the cases of former criminal detainees, whose detention upon their release from jail is mandatory. As well, the Department of Homeland Security's discretionary decisions to detain aliens and deny bonds are unchallengeable in court. Finally, there are a number of detainees now unable to challenge their removal and in some cases even their detention because Congress has specifically removed the right to file a writ of Habeas Corpus.[106]

Another hindrance to achieving a fair trial is the lack of legal representation. Individuals with attorneys to assist them in navigating America's complex immigration laws are far more likely to be released during the determination of their claims to stay and during the processing of their removal.[107] Detainees are given the right to attorney, but because they are not charged with criminal violations, they do not have the right to an attorney at the government's expense.[108] However, as detainees are incarcerated with and treated as criminals, it is manifestly unjust that they are given fewer rights than those criminals in obtaining legal representation if they cannot afford it in order to avoid or be released from detention. Of the 314,000 immigration cases decided in fiscal year 2005, 2/3 were pro se.[109]

Similarly, detainees' access to legal representation is greatly hindered by the conditions of their confinement in immigration detention facilities. For example, the OIG discovered that some numbers for legal representation and consulates were posted at facilities, but most of those numbers did not work, or required a calling card.[110] As well, at some facilities detainees cannot receive incoming phone calls, even from their attorneys.[111] Even if a detainee is fortunate enough to have an attorney, their ability to communicate with their attorney is also limited by the

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[106] *See* Military Commissions Act and Real ID Act.
[107] Bernstein, *supra* note 11. For example, immigrants with attorneys are 30 times more likely to be granted asylum.
[108] The U.S. Constitution's Sixth Amendment only guarantees the assistance of counsel in criminal prosecutions.
[109] Karin Bruilliard, *Battling Deportation Often a Solitary Journey; Without Legal Assistance, Thousands Are Expelled Unfairly, Critics of System Say*, WASH. POST, Jan. 8, 2007, at A1.
[110] Zavada, *supra* note 5, at 25.
[111] *Id.*

detention facilities. The OIG investigators found that in one instance it took at least 16 business days for a detainee's request to call an attorney was granted.[112] They also found that at some of the facilities, detainees' mail marked as legal correspondence had been opened by facility staff without the permission and outside the presence of the detainees.[113]

As well, because immigration proceedings are civil in nature and not criminal, there is no right to a speedy trial. Given the length of administrative procedures, including extensions, docketing, appeals, etc., such proceedings and thus detentions will last several months or even years.[114] This is particularly troublesome because it can lead to the 'indefinite detention' of some detainees. This occurs when the government has attempted to, but cannot, remove a detainee from the U.S. For example, in the case of Chinese detainees, the U.S. has difficulty deporting people to China because the Chinese government often takes years to issue the required travel documents or simply refuses to issue them. Currently, approximately 40,000 Chinese citizens have been ordered deported, but cannot be removed because they have yet to be issued the necessary documents; however, not all of these 40,000 are detained.[115]

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[112] *Id.* at 24.
[113] *Id.* at 18.
[114] Dougherty, *supra* note 2, at 3.
[115] Gisick, *supra* note 46.

3. U.S. Laws Governing Aliens

Having looked at the conditions and treatment of detainees in immigration detention facilities, it is important to consider under what authority detainees have been imprisoned. The following section reviews the U.S. statutes governing aliens' entry and exit from the United States and those authorizing and even requiring detention. This section will also identify the Constitutional rights and protections due to aliens that limit those statutes.[116]

3.A. Statutes

It has long been held that Congress has plenary power over immigration in the United States.[117] Over the years, Congress has defined and significantly limited aliens' rights and has treated aliens very differently from citizens. America's current system of immigration laws arose in 1952 with the passage of the Immigration and Nationality Act (INA).[118] The INA opened America's doors to world wide immigration after a long period of isolationism. This act, as amended, is the major legislation governing the classification, admission, exclusion, and detention of aliens in the U.S. Particularly important for the purposes of this paper is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[119] which amended the INA. IIRAIRA was a retroactive law that greatly expanded the process of 'expedited removal' by drastically increasing the number of aliens considered inadmissible.

Two other laws greatly affecting aliens' rights were created in response to the attacks of September 11, 2001. The first was the USA PATRIOT Act, which expanded the government's

[116] Zadyvdas v. Davis, 533 U.S. 678, 695 (2001) (citing INS v. Chadha, 462 U.S. 919, 941-42 (1982)).
[117] The Chinese Exclusion Case, 130 U.S. 581 (1889).
[118] Immigration and Nationality Act of 1952 (INA) (codified as amended at 8 U.S.C. § 1101 *et seq.*).
[119] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009, PL. 104-208.

powers to infringe upon individuals' rights, particularly those of aliens, for the sake of national security interests.[120] Extensive discussion of the USA PATRIOT Act is beyond the scope of this paper, in that most of its provisions relating to aliens are aimed at terror suspects and threats to national security. However, for the purposes of this paper, the USA PATRIOT Act is significant in that its provisions allow for the continued detention of aliens under certain circumstances beyond the removal period.[121] Secondly, the Homeland Security Act fundamentally changed the immigration system in the United States by abolishing what had been the Immigration and Naturalization Services.[122] The Homeland Security Act created the Department of Homeland Security and placed within its control three distinct immigration bureaus: Immigration and Customs Enforcement, Customs and Border Protection, and Citizenship and Immigration Services.[123]

Under U.S. immigration laws, admission into the U.S. means that a person is inspected and granted authorization to enter the U.S. by immigration officers.[124] A person who entered the U.S. without gaining admission, whether they are physically present or not, is not considered to be present in or admitted to the U.S. under the immigration laws. While this distinction may appear illogical and irrelevant, for the purposes of due process and protection of the laws, this distinction is significant. An alien's admission status is particularly significant when it comes to the detention and removal of aliens. Removal is the process of expelling an alien from the United States.

For the purposes of detention and removal, under the INA, there are three types of aliens: deportable, inadmissible, and those seeking asylum. A deportable alien is one who has been

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[120] USA PATRIOT Act, 8 U.S.C. § 1226a (2001).
[121] *Id.* § 412(a), 8. U.S.C. § 1226a(a)(6).
[122] Homeland Security Act, 6 U.S.C. §§ 101 *et seq.* (2002).
[123] *Id.*
[124] INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A); *see also* 8 U.S.C. § 1225(a)(3).

admitted to the United States, but now may be removed.[125] For an alien who has been admitted and is now deportable, the procedures for removing that alien occur in large part in the immigration courts.[126] This means that the deportable alien usually has access to an administrative hearing to determine whether he should be removed. At such removal hearings, the burden of proof is on the government to show that the alien is deportable.[127] This is an important distinction for the due process rights provided to deportable aliens because it gives deportable aliens the opportunity to have a hearing before an immigration judge regarding not just their removal, but also their detention.

In the immigration court, detainees have the right to legal representation, although not at the government's expense.[128] Detainees may also utilize an interpreter at these proceedings, although again not at the government's expense. Detainees will at least have the opportunity to bring to the immigration judge's attention the violation of their due process rights at the facilities including transfers away from their legal representation, limitations on phone access and use, and the opening of their legal correspondence, as well as other mistreatment and abuse described in Chapter 2.

On the other hand, an inadmissible alien, also known as an 'excludable' alien, is one who does not meet the INA's requirements for admission.[129] An inadmissible alien may face a number of different processes for removal: an administrative hearing in front of an immigration judge, withdrawal of his application for admission, or expedited removal proceedings.[130] An alien who was never admitted or who is inadmissible generally does not have access to an

[125] *Id.* § 237, 8 U.S.C. § 1227.
[126] *Id.* § 240, 8 U.S.C. § 1229a.
[127] *Id.* § 240(c)(3)(A), 8 U.S.C. § 1229a(3)(A).
[128] *Id.* § 240(b)(4)(A), 8 U.S.C. § 1229a(4)(A).
[129] *Id.* § 212, 8 U.S.C. § 1182.
[130] Dougherty, *supra* note 2, at 1.

administrative hearing in the immigration courts. Instead, such aliens will be subject to expedited removal, a process by which an immigration officer orders the alien's removal without further hearings or review.[131] This means the detainee has no access to an impartial decision-maker to whom the detainee might complain about the conditions of his treatment or abuse. Due to the nature of the expedited removal proceeding and the lack of further hearings or review, the detainee has no recourse to obtain a fair hearing, utilize an interpreter, or otherwise remedy the mistreatment described in Chapter 2. The burden of proof is on the alien, whether the inadmissible or yet-to-be admitted alien faces an immigration court[132] or expedited removal.

If an alien has committed a crime for which he would be considered inadmissible if seeking entry into the U.S., then he may be subject to expedited removal, even if he has already been admitted.[133] This is true regardless of when the crime was committed and even if the sentence was already served. There are numerous crimes included in this statute allowing for expedited removal of 'criminal' aliens,[134] including minor crimes committed years ago. This law authorizes DHS to hold expedited removal proceedings while aliens are incarcerated for their criminal charges, or aliens can be seized and subjected to expedited removal after serving their criminal sentences.[135] Thus, after serving a criminal sentence, a criminal alien released from a correctional facility will be taken into custody by DHS to be removed.

Aliens seeking asylum, regardless of whether they are admitted or inadmissible, are a defined class of aliens whose status and procedural rights are distinct from all other aliens.[136] As a general matter, if an asylum seeker arrives at a U.S. border or port-of-entry and is inadmissible,

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[131] *See generally* INA § 235, 8 U.S.C. § 1225.
[132] *Id.* § 240(c)(2)(A), 8 U.S.C. § 1229a(2)(A).
[133] *Id.* § 238, 8 U.S.C. § 1228; *see also* United States v. Hernandez-Vermudez, 356 F.3d 1011 (9th Cir. 2004).
[134] INA § 237, 8 U.S.C. § 1227(a)(2)(A)(iii)(B),(C), or (D), 8 U.S.C. 1227(a)(2)(A)(ii). See definition of "aggravated felony" at 8 U.S.C. § 1101(a)(43).
[135] *Id.* § 238, 8 U.S.C. § 1228(a)(1).
[136] *Id.* § 101(a)(42), 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1158(a).

if that asylum seeker can establish that she has a 'credible fear' of persecution to the CBP immigration officer, then she will not face expedited removal. Instead, that asylum seeker will have the opportunity to have her asylum claim heard in an immigration court. It is outside the scope of this paper to discuss the additional specific procedural rights guaranteed to asylum seekers delineated under specific provisions of the INA[137] and the Convention on the Status of Refugees.[138] However, asylum seekers' rights and treatment will be discussed generally as aliens who are subject to detention. Again, these asylum seekers are often detained for a lengthy amount of time awaiting a determination of their asylum claim. During this detention they suffer the same conditions of confinement and mistreatment described in Chapter 2.

Whether an alien is deportable, inadmissible, or an asylum seeker, it is the removal process which allows for the detention of aliens. There are two types of detention permitted under the INA: detention before and during removal proceedings and detention after removal proceedings. Under INA §236, aliens can be placed in immigration detention facilities, even before they have been ordered removed. Not only can DHS detain aliens prior to their removal proceedings, but in the case of criminal aliens, detention is mandatory.[139] Thus these aliens have no way to avoid detention or the mistreatment attendant to it. DHS may use its discretion in determining whether to detain or release non-criminal aliens.[140] Unfortunately for those non-criminal aliens who DHS decides to detain, such decision is not subject to review and cannot be set aside.[141] Thus, these detainees have no right to a hearing to determine whether they should be detained or released until their removal proceedings occur.[142] Given the caseload of the

[137] *Id.* § 208, 8 U.S.C. § 1158; *id.* § 101a(42), 8 U.S.C. § 1101(a)(42).
[138] Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.
[139] INA § 236(c), 8 U.S.C. § 1226(c)(1).
[140] *Id.* § 236(a), 8 U.S.C. § 1226(a).
[141] *Id.* § 236(e), 8 U.S.C. § 1226(e).
[142] *Id.* § 236(e), 8 U.S.C. § 1226(e); *id.* § 242(a)(2)(B)(ii), 8 U.S.C. § 1252 (a)(2)(B)(ii).

immigration courts and the huge numbers of detainees,[143] it can take a substantial length of time before removal proceedings actually begin. Until they do begin, detainees are forced to endure previously discussed conditions and mistreatment at immigration detention facilities with little recourse. Moreover, while detainees have the opportunity in their removal proceedings to argue for their release pending the proceedings, if this is not granted, detainees will continue to be detained through the removal proceedings which could take several months or even years.[144]

After removal proceedings have occurred, if a detainee is ordered removed, DHS can continue to hold that individual pending the execution of that order.[145] As with pre-removal proceedings detention, detention for criminal aliens is mandatory.[146] Again, the definition of criminal aliens is very broad and includes non-violent, minor convictions. Once a detainee is ordered removed, DHS is supposed to remove the detainee from the U.S. within 90 days.[147] However, a number of circumstances exist that might delay this removal and extend the length of time DHS has to execute the removal. First and foremost, DHS is given an extension on this length of time when there is a 'significant likelihood that the alien will be removed in the reasonably foreseeable future.'[148] As was discussed above, many detainees are held for periods of time long past the 90 days time frame because they are unable to obtain the necessary travel documents to return home.

Furthermore, DHS is authorized to continue detention for detainees under 'special circumstances,'[149] even if it is unlikely that the detainee will be removed in the reasonably

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[143] Dougherty, *supra* note 2, at 1.
[144] *Id.* at 3.
[145] INA § 241, 8 U.S.C. § 1231.
[146] *Id.* § 241(a)(2), 8 U.S.C. § 1231(a)(2).
[147] *Id.* § 241(a)(1), 8 U.S.C. § 1231(a)(1).
[148] 8 C.F.R. § 241.13
[149] *Id.* § 241.14(a). *See also* 8 C.F.R. § 241.13(e)(6), "[i]f the Service determines that there are special circumstances justifying the alien's continued detention nowithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14."

foreseeable future. Examples of such special circumstances include detainees who: have a highly contagious disease that is a threat to public safety, would cause serious adverse foreign policy consequences, have engaged in or are likely to engage in an activity that endangers national security, are especially dangerous, or pose a risk of terrorism.[150] Thus, a detainee's opportunity to be free from the conditions and mistreatment of confinement described in Chapter 2 is sacrificed in these 'special circumstances' in favor of public safety and national security.

There are additional statutory limitations on detainees' due process rights relating to their detention and removal. Notably, there are restrictions on the reviewability of certain decisions made and actions taken by DHS. Among the matters not subject to judicial review are expedited removals under INA §235,[151] any discretionary decision by the Attorney General or the Secretary of Homeland Security (i.e. DHS decisions to release or detain aliens), denials of adjustment, denials of cancellation of removal, or the detention of criminal aliens.[152] Finally, if an alien reenters the U.S. illegally, after having been removed or voluntarily departed under an order of removal, that prior removal order is reinstated.[153] The alien is to be immediately removed by DHS with no hearing and there is no judicial review of this removal.[154] The limitation of judicial review means detainees' abilities to argue against their detention and mistreatment is greatly hindered or even removed. This lack of access to redress and the lack of accountability of ICE insures that detainees have no recourse to improve the conditions of their treatment or ensure protection of their due process rights.

[150] 8 C.F.R. § 241.14.
[151] INA § 235, 8 U.S.C. § 1225.
[152] *Id.* § 242, 8 U.S.C. § 1252.
[153] *Id.* § 241(a)(5); 8 U.S.C. § 1231(a)(5).
[154] *Id.* § 241(a)(5); 8 U.S.C. § 1231(a)(5).

Detainees' substantive rights and their treatment at immigration detention facilities are addressed by ICE's *Detention Operations Manual*.[155] This manual provides standards and guidelines for the treatment of detainees at immigration detention facilities. It is these standards that the OIG Audit Report acknowledged were violated by the conditions of confinement and mistreatment of detainees at immigration detention facilities. However, the standards of this manual are not enforceable regulations. These standards are not codified as administrative agency rules, DHS regulations, or federal statutes and there are no additional statutes that regulate the treatment of detainees or the conditions of their civil confinement. As such, there is no legal recourse for detainees on statutory grounds, because no statute has been violated. Consequently, the National Lawyers Guild and other immigrants' rights groups have recently petitioned DHS to make the ICE standards for detention enforceable regulations.[156]

3.B. Constitutional Rights

While the statutory immigration laws discussed above govern the treatment and detention of aliens in the U.S., such laws must be consistent with the rights and protections afforded by the Constitution. However, aliens are not afforded all of the rights and protections of the Constitution. In a number of cases the Supreme Court has recognized that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[157] Thus, while the statutes described above would certainly

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[155] BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, *available at* http://www.ice.gov/partners/dro/opsmanual/index.htm.

[156] The petition was filed by the National Immigration Project of the National Lawyers Guild, the American Immigration Lawyers Association, the American Immigration Law Foundation Legal Action Center, Casa de Proyecto Libertad, the Catholic Legal Immigration Network, Inc., Families for Freedom, the National Immigrant Justice Center, and eighty-four individual detainees. This petition requests the promulgation of enforceable detention standards pursuant to the Administrative Procedures Act, 5 U.S.C. § 553. The petition can be found at http://www.nationalimmigrationproject.org/detention_petition_final.pdf.

[157] Matthews v. Diaz, 426 U.S. 67, 79-80 (1976).

fail to meet constitutional due process requirements for citizens, this is not true in the case of aliens.

As it relates to aliens' removal and detention, the two most important constitutional provisions are the Fifth Amendment's due process clause and the Writ of Habeas Corpus. The Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property without due process of law."[158] In the landmark case *Zadyvdas v. Davis*, the Supreme Court decided that "[t]he due process clause applies to all 'persons' within the U.S. including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[159] However, the Supreme Court noted the importance of having being admitted (entered) to the U.S. and the additional protections it confers, namely, the protections of the Fifth Amendment's due process clause.[160] For the purposes of a detainee's constitutional right to due process, such right is only guaranteed to detainees who have been admitted to the U.S. Yet this seems to be at odds with INA §238, which allows for the expedited removal of criminal aliens who were previously admitted.[161] But, federal appeals courts have found this expedited removal process to meet due process requirements and the Supreme Court has refused to hear a further appeal of this issue to reverse such decisions.[162]

On the other hand, aliens who have not been admitted, even if they are physically present in America, will be treated as though they are outside of the geographic territory of the U.S. Thus, the law is less favorable for those aliens who are inadmissible or who have not been admitted. The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the

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[158] U.S. CONST., amend. V.
[159] *Zadvydas*, 533 U.S. at 693.
[160] *Id.*
[161] INA § 238, 8 U.S.C. § 1228.
[162] United States v. Benitez-Villafuerte, 186 F.3d 651 (5th Cir. 1999), *cert. denied* 528 U.S. 1097 (2000).

power to admit or exclude aliens is a sovereign prerogative."[163] It has long been the rule that it is within Congress's power to determine the procedural due process rights of such aliens.[164] Thus, there is no constitutional protection for detainees who have not been admitted to challenge the procedures of their removal proceedings. It is within Congress's power to authorize expedited removals or limit judicial review of orders for these detainees.

Considering the statutory limitations on review and the unenforceability of DHS standards, perhaps the only viable claim that detainees have regarding the conditions of confinement and mistreatment discussed in Chapter 2 is a constitutional argument against punitive detention as violations of their due process rights.[165] The Supreme Court has ruled more favorably for detainees, whether admitted or not, when it comes to their detention rather than their removal. First of all, the Supreme Court long ago ruled that punitive measures or conditions cannot be imposed on detained aliens without a judicial trial.[166] As to whether the conditions of confinement are punitive, such an assessment depends on the intent and purpose of the government. The Supreme Court has held that "if a restriction or condition is not reasonably related to a legitimate goal –if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally inflicted upon detainees *qua* detainees."[167] Although the detention of some detainees, for example those who are a flight risk or a danger to the community, may be reasonably justified, the mandatory detention of those who do not pose such risks is arbitrary. As well, the Court has ruled that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and

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[163] Landon v. Plasencia, 459 U.S. 21, 32 (1982).
[164] U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); *see also* Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 215 (1953).
[165] The exception to this is for a criminal violation by detention facilities staff. For example, a detainee can pursue criminal charges against a correctional officer that sexually assaults him.
[166] *Wong Wing*, 163 U.S. 228.
[167] Bell v. Wolfish, 441 U.S. 520, 539 (1979).

conditions of confinement than criminals whose condition of confinement are designed to punish."[168] Detainees are similarly situated to such involuntarily committed individuals in that they are civilly committed against their will, and should thus receive similar protections. However, as detainees are treated as and housed with inmates, clearly they are not granted more considerate treatment and conditions of confinement.

On a related note, the ACLU has recently filed a lawsuit concerning inhumane living conditions due to severe overcrowding at the San Diego Correctional Facility in Otay Mesa, California.[169] In its complaint, the ACLU alleges that the overcrowding, as described in Chapter 2, deprives detainees of basic human needs, such as adequate shelter. The ACLU argues that such inhumane conditions are a violation of detainees' due process rights as discussed above. The ACLU hopes to obtain certification for this case as a class action to remedy conditions not just at this facility, but at immigration detention facilities nationwide.

However, the ACLU's complaint relies in large part on the case of *Jones v. Blanas.*[170] In that case, the U.S. Court of Appeals for the Ninth Circuit decided that the detention conditions for civil detainees cannot be punitive and should be superior to those in the criminal system.[171] The distinction between civil and criminal detainees in the *Jones* case was based on a California state law regarding the commitment and treatment of sexual offenders. As Congress has plenary authority over the detention of aliens and the standards of such detention have been set out in the ICE manual as previously discussed, it is unclear whether the Ninth Circuit Court of Appeals will find the *Jones* case applicable for immigration detainees who are held pursuant to federal immigration statutes, or extend any such protections to individuals outside of its jurisdiction.

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[168] Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982).
[169] Kiniti v. Myers, Case No. 3:05-cv-01013-DMS-PCL (S.D. Cal.).
[170] Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004), *cert. denied,* 126 S.Ct. 351 (2005).
[171] *Jones*, 393 F.3d at 932.

On the other hand, the Supreme Court has recently limited DHS's ability to indefinitely detain aliens beyond the statutorily authorized 90 day post-removal period. In the *Zadyvdas* case mentioned above, if an admitted detainee is not a danger to society or a flight risk, and "there is no significant likelihood of removal in the reasonably foreseeable future," then his continued detention is not authorized under the law.[172] The Supreme Court decided that six months was a reasonable time within which to remove the detainee and if such removal had not occurred within that time, then the detainee could file a habeas corpus challenge.[173] This holding was initially limited to deportable detainees, but has since been expanded to protect inadmissible detainees as well.[174]

However, it is important to note that this limitation on indefinite detention is narrow. These decisions apply only to the detention of aliens after removal proceedings. There is no such limitation on the length of detention for a detainee prior to or during removal proceedings. Again, detainees are thus subject to the conditions described in Chapter 2, such as being treated as inmates and suffering mistreatment and abuse at the immigration detention facilities for the duration of the removal process. There are also numerous exceptions to this protection, in that a detainee may still be detained if he is a threat to society, a flight risk, or if DHS determines that there is a significant likelihood of removal in the foreseeable future. Another exception that may allow for the extended detention of a detainee is if he is suspected of being a national security threat or involved in a terrorist activity.[175] An analysis of the due process rights of detainees who are considered 'enemy combatants' is outside the scope of this paper. Yet, even in cases of

[172] *Zadvydas*, 533 U.S. at 699.
[173] *Id.* at 701.
[174] Clark v. Martinez, 543 U.S. 371 (2005).
[175] USA PATRIOT Act § 412(a), 8 U.S.C. § 1226a(a)(6).

such detainees, the Supreme Court has determined that they cannot be held indefinitely and they must have some procedural due process.[176]

Finally, the other constitutional provision that may be utilized by detainees to challenge their detention is the Writ of Habeas Corpus. The Constitution states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[177] There is also a statutory right to Habeas Corpus, under which detainees may file a claim in federal court that they are being held in violation of the U.S. Constitution or laws.[178] Although Congress has repeatedly attempted to strip aliens of this right in a number of settings,[179] it still exists in certain circumstances. Under the Zadvydas case discussed above, the Supreme Court decided that "§2241 habeas corpus proceedings review is available as a forum for statutory and constitutional challenges to post-removal-period detention."[180] Habeas Corpus has also been used to challenge the legitimacy of a deportation order, in order to get review by the Circuit Court of Appeals.[181] Despite Congress's limitations, the Supreme Court has been as of yet unwilling to deny this right to detainees whose other means of judicial review have been removed. Therefore, Habeas Corpus is still the saving grace for detainees, in that if all other avenues for redress have been removed, they still have the right to file this if they are detained. However, this right is only available if detainees are aware of it, which is arguable considering the lack of legal representation and language barriers facing many detainees.

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[176] Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).
[177] U.S. CONST., art. 1, §9.
[178] 28 U.S.C. § 2241.
[179] Military Commissions Act of 2006, Pub. L. No. 109-366, Oct. 17, 2006; Real ID Act, Pub. L. 109-13, 119 Stat. 231, May 11, 2005; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208.
[180] *Zadvydas*, 533 U.S. at 688.
[181] INS v. St. Cyr, 533 U.S. 289, 300-02 (2001).

Through the numerous statutes described above, Congress has authorized the detention and removal of aliens with limited judicial review. The conditions of confinement and treatment of detainees described in Chapter 2 are in violation of ICE standards and regulations. However, as such standards are not legally enforceable, the conditions of confinement and mistreatment discussed in Chapter 2 is not in violation of U.S. law. Although the Supreme Court has limited the indefinite detention of aliens and Congress's ability to completely remove the right to judicial review through Habeas Corpus, it is still within Congress's plenary power to disregard the other substantive and procedural issues facing aliens. Even if detainees could show that their rights had been violated, considering the length of time it takes for petitions to go through the judicial process, detainees subject to deportation or expedited removal may have already been expelled from the U.S. by the time their claims could be heard.

4. International Human Rights Laws

Having reviewed the condition and treatment of detainees, as well as the U.S. laws that govern such conditions and treatment, we now look to international human rights laws to determine whether and how the detainees' human rights have been violated. The modern era of international human rights law began with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[182] The UDHR's creation and adoption was the international community's response to the horrors of World War II. The UDHR declares that "[a]ll human beings are born free and equal in dignity and rights,"[183] and lists numerous substantive and procedural rights that all human beings should be granted, regardless of where they are from or where they are in the world. Although the UDHR is not binding on states, it has been the foundation for numerous binding human rights conventions and domestic constitutions, and its importance has been acknowledged by numerous states. Upon recent release of the U.S. State Department's annual report on other countries' human rights, U.S. Secretary of State Condoleezza Rice said that the reports "speak to America's continued support of those fundamental freedoms embodied in the Universal Declaration of Human Rights…[t]hese basic rights should be the source of justice in every society."[184]

Those fundamental freedoms embodied in the UDHR are reflected in a number of other conventions and declarations, including but not limited to: the International Covenant on Civil

[182] Universal Declaration of Human Rights, G.A.Res. 217 A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR].
[183] UDHR, *supra* note 182, at art. 1.
[184] *United States of America: Single Day, Double Standards*, AMNESTY INT'L, Mar. 9, 2007, *available at* http://web.amnesty.org/library/print/ENGAMR510392007.

and Political Rights (ICCPR),[185] the International Covenant on Economic, Social, and Cultural Rights (ICESR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[186] the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT),[187] and the Convention Relating to the Status of Refugees.[188] However, the U.S. is not a party to all of these treaties.

Unfortunately for individuals, there are a number of methods by which a state may limit its human rights obligations. The most obvious way to limit a state's obligations is by refusing to sign a particular human rights treaty. The U.S. has chosen this route and has yet to sign a number of human rights treaties including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[189] By refusing to sign an international human rights convention, the U.S. is not bound by its provisions and has no obligation to individuals to protect any of the rights embodied in that specific convention. As well, a state may sign a treaty, but not ratify it. According to the Vienna Convention on the Interpretation of Treaties, a state that signs but does not ratify a treaty is not bound to the provisions of the treaty, but instead must simply refrain from actions that frustrate the object and purpose of the treaty.[190] The U.S. has chosen to sign, but not ratify, both the American Convention on Human Rights and International Covenant on Economic, Social, and Cultural Rights.[191]

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[185] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].
[186] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter ICERD].
[187] U.N. Convention on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 2, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].
[188] Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.
[189] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990).
[190] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
[191] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force, Jan. 3, 1976) [hereinafter ICESCR]; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 123.

Another means by which the U.S. has been able to limit its obligations under international treaties is by issuing reservations, declarations, and understandings to the treaties and their provisions. Most significantly for the purposes of the human rights of detainees, America has filed reservations to the human rights treaties that it has signed and ratified. These reservations drastically limit U.S. obligations because they restrict the rights guaranteed in the treaties. For example, under the U.S. reservations to the Convention against Torture[192] and the ICCPR,[193] the U.S. considers the term 'cruel, inhuman or degrading treatment or punishment' to mean the same thing as 'cruel and unusual punishment' under U.S. law. Thus, the rights and terms are interpreted according to the standards of U.S. domestic laws. Such reservations have drawn criticism from non-governmental human rights groups, who have expressed concern "that the U.S. has failed to withdraw the limiting reservations, declarations and understandings attached to its ratification of the ICCPR, the effect of which is to ensure that the treaty offers no greater protection than already exists under US law."[194] By issuing these reservations, the United States has attempted to limit its international legal obligations while violating what should be protected as detainees' international human rights.

The following discussion will address the applicable provisions of some of these treaties to the detainees in immigration detention facilities and what rights are due to them in the international system. Specifically, it will analyze how the conditions and treatment of detainees as discussed in Chapter 2 are violations of the detainees' substantive and procedural human

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[192] *Executive Session*, 101st Cong. 2nd Sess., 136 Cong Rec S 17486, Oct. 27, 1990 (legislative day of Oct. 2, 1990) [hereinafter U.S. Reservations to CAT], *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html.

[193] *Executive Session: International Covenant on Civil and Political Rights*, 102nd Congress, 2nd Sess., 138 Cong Rec S 4781, Apr. 2, 1992 (legislative day of Mar. 26, 1992) [hereinafter U.S. Reservations to ICCPR], *available at* http://www.umn.edu/humanrts/usdocs/civilres.html.

[194] Amnesty Int'l, *Updated Briefing to the Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights*, § 2.2, AI Index AMR 51/111/2006, July 13, 2006 [hereinafter Updated Briefing], *available at* http://web.amnesty.org/library/print/ENGAMR511112006.

rights. Finally, it will identify where U.S. obligations are failing to meet international human rights standards and the accountability of the U.S. regarding these violations.

4.A. Human Rights Violations

4.A.1. Substantive Rights

First and foremost, detainees, as human beings, are guaranteed the right to "liberty and security of person."[195] This right is provided for in many human rights treaties, including the ICCPR's Article 9.1. Since "[t]he obligations of the [ICCPR] in general [] are binding on every State Party as a whole,"[196] the U.S. as a state party to the ICCPR is bound by its provisions. Moreover, the U.S. did not file a reservation to Article 9. Yet, it is this right to liberty guaranteed by Article 9.1 that is violated by the administrative detention of aliens. As was discussed in Chapter 2, detainees are imprisoned in facilities and under such conditions that all personal freedoms are removed. Detainees are restricted in where they live, what they wear, what they eat, and how and with whom they may communicate.

These restrictions also violate their right to be treated with humanity. Under Article 10.1 of the ICCPR, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[197] Being stripped of their liberty and placed in detention facilities where they are housed with and treated as criminals, detainees are certainly not treated with humanity, nor with any respect for their inherent dignity as human beings. Again, there is no U.S. reservation limiting its obligation to treat detainees with dignity, and yet detainees suffer physical, emotional, and sexual abuse at immigration detention facilities. Despite the more notorious human rights issues surrounding the treatment of detainees in

[195] UDHR, *supra* note 182, at Art. 2; ICCPR, *supra* note 185, at Art. 9.
[196] U.N. Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.13, (Mar. 29, 2004)[hereinafter General Comment 31].
[197] ICCPR, *supra* note 185, at Art. 10.1.

Guantanamo, secret CIA prisons, and extraordinary rendition, non-governmental organizations have expressed their concern with the detainees' treatment. In an updated briefing to the Human Rights Committee about ICCPR rights, Amnesty International has stated that it

> [C]ontinues to be greatly disturbed by ill-treatment of asylum-seekers in US detention, and by poor conditions including inadequate medical treatment….[t]hese cases [of abuse] seem to be part of a larger pattern of mistreatment, medical neglect and poor conditions. Amnesty International is also concerned by detainees' lack of access to telephones, legal counsel, and human rights reports.[198]

Further, housing detainees with and treating them as inmates violates detainees' human rights under a separate provision of the ICCPR.[199] Article 10.2 states that "[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted [sic] persons."[200] Thus, pre-trial inmates who have not been convicted of a crime are supposed to be segregated from the convicted inmate population and treated differently. Again, detainees are administrative detainees. Their detention is civil, not criminal. Their rights and treatment should be greater than both convicted inmates and accused criminal inmates. However, the U.S. has entered an understanding "[t]hat the United States understands the reference to 'exceptional circumstance' in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waiver their right to segregation from convicted persons…"[201] A reasonable reading of Article 10.2 certainly suggests that civil detainees, who are neither accused nor convicted of any crime, should not be imprisoned with convicted persons at all. Regardless, there is nothing to suggest that the mixing of civil detainees with convicted persons in local,

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[198] Updated Briefing, supra note 194, at § 8.
[199] Zavada, *supra* note 5, at 30.
[200] ICCPR, *supra* note 185, at Art. 10.2.
[201] U.S. Reservations to ICCPR, *supra* note 193, at II(3).

state, and federal jails and prisons is due to exceptional circumstances. As well, even under the U.S. understanding, low level non-security threat detainees should not be mixed with high level detainees or inmates.[202] Imprisoning detainees with dangerous detainees or inmates is a clearly a violation of detainees' human rights. The U.S. is failing to live up to its international human rights obligations in this instance.

There are also numerous treaties and conventions which prohibit subjecting individuals to "torture and other cruel, inhuman or degrading treatment or punishment."[203] Most importantly among these are the U.N. Convention on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and Article 7 of the ICCPR.[204] However, there is no definition of 'torture,' or 'cruel, inhuman or degrading treatment or punishment,' in the ICCPR, CAT or the UDHR.[205] While the conditions and mistreatment of detainees identified in Chapter 2 do not rise to the level of torture under the CAT or the other human rights instruments, such conditions and mistreatment may qualify as cruel, inhuman or degrading treatment.

Despite the lack of defined terms, the U.N. has established standards of treatment for prisoners, the violations of which may qualify as cruel, inhuman, or degrading treatment. One such set of standards is the Standard Minimum Rules for the Treatment of Prisoners (SMRTP).[206] Under the SMRTP, The treatment of civil prisoners must not be "less favourable

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[202] Zavada, *supra* note 5, at 18, 30, 34.
[203] CAT, *supra* note 187, at Art. 2; ICCPR, *supra* note 185, at Art.7; *See also* UDHR, *supra* note 182, at Art. 5.
[204] CAT *supra* note 187.
[205] HUMAN RIGHTS INSTRUMENTS, *Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies*, at 31, ¶ 4, HRI/GEN/1/Rev.1, July 29, 1994, *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/pdf/G9418963.pdf?OpenElement. "The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."
[206] First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, Geneva, Switz., 1955, *approved by* the Economic and Social Council by its Resolution 663 C (XXIV) of 21 July 1957 and 2076 (LXII) of 13 May 1977 [hereinafter SMRTP], *available at* http://www.unhchr.ch/html/menu3/b/h_comp34.htm.

[sic] than that of untried prisoners,"[207] or convicted persons. That being said, civil detainees should be kept separated from criminal detainees,[208] juveniles should be separated from adults,[209] there should be no overcrowding,[210] and they should also receive at least one hour of outdoor exercise each day.[211] All of the standards have been violated in U.S. immigration detention facilities, where detainees are housed with inmates,[212] juveniles are housed with adults,[213] facilities are overcrowded,[214] and detainees are not giving sufficient exercise time outside.[215]

In addition to these basic requirements, the SMRTP requires that prisoners be provided with written information about the detention facility, including the rules and regulations of their detention, as well as the methods for complaints.[216] Yet the OIG inspection revealed that detainees in a number of facilities were not provided with facility handbooks,[217] or information about their rights and status as detainees,[218] and detainees certainly were not given information about complaint procedures,[219] if such procedures even existed. Also, complaints made by prisoners should be dealt with promptly,[220] which clearly has not occurred at U.S. immigration detention facilities.[221] The SMRTP also requires that prisoners be granted certain rights when it come to communication with their families. Not only do prisoners have the right to visits with

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[207] *Id.* ¶ 94.
[208] *Id.* ¶ 8(c).
[209] *Id.* ¶ 8(d).
[210] *Id.* ¶ 9(1).
[211] *Id.* ¶ 21(1).
[212] Zavada, *supra* note 5, at 30.
[213] Doty, *supra* note 24; *Special Rapporteur*, *supra* note 25.
[214] *See* Moran, *supra* note 30; Marosi, *supra* note 32, *Kiniti v. Myers*.
[215] Zavada, *supra* note 5, at 22.
[216] SMRTP, ¶ 35(1).
[217] Zavada, *supra* note 5, at 32.
[218] *Id.*
[219] *Id.* at 1, 28.
[220] SMRTP, ¶ 36(4).
[221] Zavada, *supra* note 5, at 4, 12.

their friends and families,[222] but they also have the right to notify their families when they are transferred.[223] There are numerous instances where these rights to communication with families are violated at U.S. immigration detention facilities,[224] particularly when detainees are transferred.[225]

The standards established by the SMRTP are the minimum protections that should be afforded to detainees. The numerous violations of these standards, as well as the instances of physical, emotional, and sexual abuse at immigration detention facilities, surely violate the prohibition against cruel, inhuman, or degrading treatment. On top of this, the U.N. Human Rights Committee has long since determined that prolonged or indefinite administrative detention is not compatible with this prohibition.[226] Thus, not only are the conditions and mistreatment of detainees a violation of their human rights, but the lengthy duration of their confinement is also a violation.

The violation of the prohibition against torture or cruel, inhuman, or degrading treatment has been hotly debated in recent years. The CAT requires that state parties prevent torture within their territory and that

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[227]

Yet after September 11, 2001, the U.S. decided to flout this obligation by unilaterally defining the term 'torture or other cruel, inhuman or degrading treatment' in a very restrictive fashion.

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[222] SMRTP, ¶37, 92.
[223] *Id.* ¶ 44(3), 92.
[224] Zavada, *supra* note 5, at 24-25.
[225] *Id.* at 24; Jacobs, *supra* note 47.
[226] U.N. Human Rights Committee, *Annual Report*, Vol. 1, ¶ 317, Un.Doc. A/53/40 (1998). This report determined that prolonged or indefinite administrative detention was not compatible with Article 7 of the ICCPR; the provision prohibiting torture and other cruel, inhuman or degrading treatment or punishment.
[227] CAT, *supra* note 187, at Art. 16.1

The non-governmental human rights organization Amnesty International addressed this issue in a briefing to the Human Rights Committee by stating that the "fundamental problem is that the U.S. authorities are employing definitions of humane treatment that do not meet international law and standards."[228]

While this controversy arose specifically relating to individuals suspected in the 'war on terror,' there are no enforceable U.S. guidelines that prevent such mistreatment of detainees in immigration detention facilities. As well, the U.S. also has reservations to CAT[229] and the similar prohibition in Article 7 of the ICCPR.[230] The U.S. reservation to CAT states,

> That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term 'cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[231]

Thus, the U.S. is eschewing international human rights standards by limiting its obligation to simply abiding by its own laws; laws which may be unilaterally altered, interpreted, or rescinded. Amnesty International has stated that the reservation "could still leave the US open to a narrower interpretation of what constitutes such treatment than is recognized under international standards. The US should therefore withdraw its reservations to [ICCPR] Article 7 and the corresponding reservations to the UN Convention Against Torture."[232] Notably, this narrower interpretation by the U.S. makes no provision for degrading treatment. This is particularly frustrating for detainees, whose mistreatment and abuse, although in some situations may not constitute torture, cruel, or inhuman treatment, can certainly be classified as degrading.[233]

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[228] Updated Briefing, *supra* note 194, at § 6.1(a). Although this report was focused on rights recognized in the ICCPR, it also addressed the treatment of individuals in violation of other human rights treaties, including CAT.
[229] U.S. Reservations to CAT, *supra* note 200, at I(1).
[230] U.S. Reservations to ICCPR, *supra* note 201, at I(3).
[231] U.S. Reservations to CAT, *supra* note 200, at I(1).
[232] Updated Briefing, *supra* note 194, at § 6.1(a).
[233] Zavada, *supra* note 5, at 22, 28, 29; Lichtblau, *supra* note 66 ; Henry, *supra* note 62.

However, the Human Rights Committee has specifically addressed the issue of reservations to provisions such as the prohibition against torture and cruel, inhuman, or degrading treatment or punishment. It has stated that, "provisions in the covenant that represent customary international law may not be subject to reservations. Accordingly, a state may not reserve the right to subject persons to cruel, inhuman, or degrading treatment or punishment."[234] Since the U.S. reservation seeks to unilaterally redefine and narrow the terms of the treaties and limit its obligations to prevent abuses, such reservation unacceptable. Therefore, the U.S. cannot rely on the reservation to limit its human rights obligations. Instead, the provisions of the treaties are binding on the U.S., regardless of its reservation. The U.S. is still bound by the treaties because, "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation."[235]

4.A.2. Procedural Rights

The procedures and laws by which the U.S. administratively detains aliens are also in violation of international human rights laws and standards. First of all, Article 9.4 of the ICCPR states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[236] The U.S. has filed no reservations to this article and is thus obligated to uphold this provision. But, the right to court

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[234] U.N. Human Rights Committee, General Comment No. 24, *Issues Relating to Reservations made upon ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relations to Declarations under Article 41 of the Covenant*, at 3, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment 24].
[235] U.N. Human Rights Committee, General Comment No. 23, *Article* 27, at 8,9, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) [hereinafter General Comment 23].
[236] ICCPR, *supra* note 185, at Art. 9.4.

proceedings, which might be utilized to redress the conditions and mistreatment discussed in Chapter 2, is denied to detainees in a number of ways. Not only may it take a substantial amount of time before detainees are able to challenge their detention in an immigration court, but detainees subject to expedited removal have no such right to court proceedings. There are also numerous congressional limitations on the judicial review of certain discretionary decision to detain or release alien. Although there are circumstances under which habeas claims may be filed for such purposes, such claims may not even be heard prior to the removal of the detainee.

Encompassed within the right to court proceedings is that such proceedings will be fair. Under the UDHR, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations."[237] This right to an independent and impartial tribunal is further codified in ICCPR Article 14, and has been held by the Human Rights Committee to be an absolute right.[238] Yet, detainees subject to expedited removal can hardly be said to have been heard by an independent and impartial tribunal. The 'tribunal' for purposes of expedited removal proceedings consists of DHS immigration officers. Not only does DHS conduct the expedited removal proceedings, but it is also in charge of detention, enforcement, and removal, under U.S. immigration laws.

In addition to the denial of their right to a fair hearing, many detainees are denied equal protection of the law under U.S. immigration laws. According to ICCPR Article 2.1,

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status* (emphasis added).[239]

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[237] UDHR, *supra* note 182, at Art. 10.
[238] *Gonzales del Rio v. Peru*, Human Rights Comm., ¶ 5.1, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, Nov. 2, 1992.
[239] ICCPR, *supra* note 185, at Art. 2.1.

In fact, the Human Rights Committees has acknowledged that it is a general rule that "each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens."[240] Hence, detainees should be granted the same human rights and protections as citizens. As it relates specifically to individuals within a state's territory, the Human Rights Committee has further stated that,

> States Parties are required by article 2, paragraph 1, to respect and to ensure the [ICCPR] rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[241]

There is no reasonable interpretation of this provision other than to ensure the rights of all those individuals who are physically present in and subject to the jurisdiction of the U.S. Thus, there is no distinction allowed under this article for disparate treatment between those detainees who status is that of an 'admitted' alien versus those classified as 'inadmissible' aliens. Whether detainees have been admitted or not, they are still persons who are equal under the law, who deserve equal protections of the law, and who must be treated equally before the courts.[242]

Unfortunately, the U.S. has attempt to limits its international obligations under this provision by issuing an understanding that,

> The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in Article 2, paragraphs 1 and Article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.[243]

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[240] U.N. Human Rights Committee, General Comment No. 15, *The Position of Aliens under the Covenant*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003) [hereinafter General Comment 15].
[241] General Comment 31, *supra* note 195, at ¶10.
[242] ICCPR, *supra* note 185, at Articles 14 & 26. *See also* UDHR, *supra* note 182, at Art. 7; *Cf.* ICERD, *supra* note 186, at Art. 5. While Article 5 of the ICERD requires "equal treatment before the tribunals and all other organs administering justice," which would not allow for distinctions between detainees, it does allow for disparate treatment between citizens and non-citizens.
[243] U.S. Reservation to ICCPR, *supra* note 193, at II(1).

Although the U.S. has titled this restriction an 'understanding,' such a limitation on America's obligation to ensure the other treaty rights to individuals in a non-discriminatory manner is clearly a 'reservation.'[244] According to the Human Rights Committee, "a State may make a reservation provided it is not incompatible with the object and purpose of the treaty."[245] But, "a reservation to the obligation to respect and ensure the rights [of the ICCPR], and to do so on a non-discriminatory basis (article 2(1)) would not be acceptable." Therefore, the U.S. understanding that it may discriminate amongst individuals as long as there is a 'legitimate governmental objective' that is 'rationally related' to the distinction is unacceptable. Such an understanding would allow the U.S. to discriminate whenever it choose to and for whatever purpose it deemed valid. This understanding is against the object and purpose of the provision, i.e., the non-discriminatory protection of rights of all persons within the state's territory. Thus, this understanding is severable, as discussed above, and the U.S. is bound by Article 2.1. Consequently, its laws and policies providing for the disparate treatment and rights of detainees based on their status as aliens and their further classification as 'admitted' or 'inadmissible,' are violations of its obligations under this provision.

Sadly for detainees, the violation of their human rights regarding judicial hearings and equal protection of the laws also limits their ability to redress another violation of their human rights, that of arbitrary arrest and detention. ICCPR Article 9 also includes the right to be free from arbitrary arrest and detention and such right is recognized in numerous other human rights instruments as well.[246] Despite its recognized significance, a large number of detainees suffer the

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[244] General Comment 24, *supra* note 233, at 2, ¶ 3. "If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation."
[245] *Id.* at 3, ¶6 (citing Article 19(3) of the Vienna Convention on the Law of Treaties).
[246] ICCPR, *supra* note 185, at Art. 9; UDHR, *supra* note 182, at Art. 9; *See also* American Convention on Human Rights, 1144 U.N.T.S. at 147.

violation of this human right. The distinction between those who have been admitted and those who have not is arbitrary and unjust. The idea that there are individuals who are physically present in the U.S., and yet who are not considered to be in the U.S. is a legal fiction that has no validity as it related to these individuals' human rights. While there may be justification for distinguishing between persons who have undergone inspection and been authorized to enter the country and those who have not as it relates to domestic privileges, there should be no distinction as to the human rights granted to these individuals. The arbitrary nature of the immigration detention system is further reflected in the large disparities between which detainees are released and which are detained that are based on where they seek refuge, what country they are from, or if they are represented by legal council.[247]

On a related note, the U.N. Working Group on Arbitrary Detention (Working Group) has established guidelines for determining whether the detention of an individual is arbitrary. The Working Group has identified ten guarantees that should be provided to detainees. The Working Group analyses the detention of detainees to determine whether detainees received some or all of the guarantees. At least five of the ten guarantees are not enjoyed by detainees in the U.S. or their enjoyment is severely limited. The guarantees that detainees in U.S. immigration detention facilities do not enjoy are:

> Principle 2: Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.
> Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.
> …
> Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

[247] Bernstein, *supra* note 11.

> …
> Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.
> …
> Principle 9: Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.[248]

Regarding Principle 2, detainees' abilities to communicate with their family and legal representation have been severally limited.[249] Principle 3 is not guaranteed for detainees as it may take a considerable amount of time before detainees are brought before a judicial or other authority once detained. As has been discussed previously, Detainees have not received the information about facility rules and regulations as guaranteed in Principle 5.[250] There is no maximum period of time detainees may be held prior to and during their removal proceedings and there are exceptions to limitations on their detention after removals proceedings, as such Principle 7 is not enjoyed by detainees. Finally, Principle 9 is clearly not met in that there are privately owned and operated immigration detention facilities,[251] and detainees are housed in facilities with criminal inmates.[252]

The Working Group has also released an opinion concerning the post-9/11 detention of Ahmed Ali.[253] Ali was detained after 9/11 and subsequently went through the immigration detention system. The opinion focuses on the procedural issues Mr. Ali faced in attempting to challenge his detention and the disproportionate amount of time he was detained. It also

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[248] U.N. Econ. and Soc. Council, Working Group on Arbitrary Detention, *Report: Civil and Political Rights, Including Questions of Torture and Detention*, at 30, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999), *available at http://daccessdds.un.org/doc/UNDOC/GEN/G99/165/70/PDF/G9916570.pdf?OpenElement*.
[249] Zavada, *supra* note 5, 24, 25.
[250] Zavada, *supra* note 5, at 32.
[251] *Id.* at 2.
[252] *Id.* at 30.
[253] U.N. Econ. and Soc. Council, Working Group on Arbitrary Detention, *Opinion No. 21/2005, Communication addressed to the Government of the United States of America on 28 January 2005, Civil and Political Rights, Including the Question of Torture and Detention*, at 70-73, U.N. Doc. E/CN.4/2006/7/Add.1 (Oct. 19, 2005), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G05/164/78/PDF/G0516478.pdf?OpenElement.

specifically addressed the conditions of detention and procedural issues, which other detainees suffer as described in Section 1. The Working Group determined that the treatment of Mr. Ali, and the restrictions on his ability to seek redress from a competent authority amounted to arbitrary detention in violation of ICCPR Article 9.[254]

Finally, the ICCPR, ICERD, and UDHR, all guarantee the right to an effective remedy for actions that violate individuals' human rights.[255] ICCPR Article 2.3 states that "[e]ach State Party to the present Covenant undertakes: [] [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[256] There are no U.S. reservations or understandings limiting America's obligations under this article. Yet this obligation, perhaps more than any other, is not met in the case of detainees. The U.S. fails to live up to this obligation when detainees' other procedural due process rights are violated. There is no effective remedy to the violations of detainees' substantive human rights if detainees do not have fair hearings, impartial tribunals, equal protection of the law, or are held arbitrarily and indefinitely with no access to judicial review. In addition to the violations of all of the detainees' other human rights, the violation of this right means that for the detainees, there is no justice. This lack of an effective remedy is further discussed below as it relates to U.S. accountability for human rights violations.

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[254] *Id.* at 73. Another example of a Working Group decision that detainees in the U.S. immigration detention system were detained arbitrarily is the case of Benamar Benatta. *See* U.N. Econ. and Soc. Council, Working Group on Arbitrary Detention, *Opinion No. 18/2004 (United States of America), Communication addressed to the Government on 7 May 2004, Civil and Political Rights, Including the Question of Torture and Detention*, at 67-70, U.N. Doc. E/CN.4/2005/6/Add.1 (Nov. 19, 2004) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G04/165/70/PDF/G0416570.pdf?OpenElement.

[255] UDHR, *supra* note 182, at Art.8; ICCPR, *supra* note 185, at Art. 2, ¶ 3; ICERD, *supra* note 186, at Art. 6.

[256] ICCPR, *supra* note 185, at Art. 2.3.

4.B. Accountability

Given the numerous international human rights violations suffered by detainees under the laws and policies of the U.S., in what ways can the U.S. be held accountable for such violations? Although detainees' human rights, as provided for in the international treaties and declarations discussed above, have clearly been violated, the U.S. has taken a number of steps to limit its accountability to individuals and in the international community. For example, the U.S. has issued declarations specifying that substantive provisions of the CAT, ICCPR, and ICERD are not self-executing. This means that even upon signature and ratification by the U.S., claims for violations of the provisions of such treaties cannot be raised directly in U.S. courts. Thus, there is no cause of action in the U.S. under the provisions of the treaty until the implementing legislation is passed. In practice, this declaration of non-self-executing provisions is a violation in and of itself, because it limits individuals' abilities to seek redress for violations of treaty provisions in U.S. courts. ICCPR Article 2.2

> [R]equires that States Parties take the necessary steps to give effect to the [ICCPR] rights in the domestic order…Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.[257]

This does not mean that the ICCPR provisions must be made directly applicable in domestic courts as distinct causes of action. But, if individuals' human rights provided for in the ICCPR are not protected, then domestic legislation needs to be added or changed. Moreover, "[t]he requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural, or economic considerations within the State."[258]

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[257] General Comment 31, *supra* note 195, at ¶ 13.
[258] *Id.* ¶ 14.

Not only has the U.S. limited individuals' abilities to complain of human rights violations in U.S. courts, but the U.S. has also limited individuals' access to redress in the international community. The U.S. has done this by refusing to sign the ICCPR's First Optional Protocol, which would allow for individual complaints before the Human Rights Committee. Although not addressing the U.S. specifically, the Human Rights Committee has stated that "when there is an absence of provision to ensure the [ICCPR] rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the commit under the first Optional Protocol, all the essential elements of the [ICCPR] guarantees have been removed."[259] Not only is the U.S. violating detainees' human rights, but they have effectively eliminated detainees' abilities to redress such violations.

Additionally, the U.S. has limited its accountability in the international community by limiting its exposure to international courts, committees, or agencies. Under its reservations to CAT, the U.S. removes other states' abilities to refer disputes involving the U.S. to the International Court of Justice.[260] Similarly, the U.S. reservation to the ICERD states"[t]hat with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."[261] These limitations on the abilities of individuals and states to hold the U.S. accountable for human rights violations are

[259] General Comment 24, *supra* note ??, at 5, ¶ 12.
[260] U.S. Reservation to CAT, *supra* note 192, at I(2). "[P]ursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case."
[261] International Convention on the Elimination of All Forms of Racial Discrimination, 103rd Cong. 2nd Sess., 140 Cong. Rec. S 7634, at I(3), June 24, 1994 (legislative day of June 7, 1994), *available at* http://www.umn.edu/humanrts/usdocs/racialres.html.

disturbing and not in accordance with America's supposed support of international human rights.[262]

U.S. has also managed to limit its accountability on a practical level by limiting human rights groups, the media, and even attorneys' access to immigration detention facilities. Furthermore, the government has managed to limit its accountability by limiting detainees' ability to report and lodge complaints about poor conditions, mistreatment, and abuse and by failing to keep adequate records of any such complaints. While there is an ICE standard of procedures for informal and formal contact between ICE and facility staff and the detainees, and a standard allowing detainees to make written requests to ICE and supposedly to get an answer within an acceptable period of time, the investigation by the OIG found that there was a lack of adequate record keeping to show whether this was done.[263] In addition to limiting detainees' contact with ICE staff members, another way of restricting detainees' abilities to actually report abuse is by not having a formal or uniform grievance procedure for immigration detention facilities through which to lodge complaints about abuse or even to make detainees aware of procedures to report abuses.[264] Detainees are also discouraged from filing grievances because complaints they do file are not acted upon in a timely manner.[265] Again, as was discussed in Chapter 2, many detainees may not speak a language spoken at the facility and many detainees fear retaliation for complaints.[266]

Although in some fields and sectors self-regulation is an acceptable way to hold individuals, corporations, or even states accountable for their actions, this is clearly not the case as it relates to the treatment of detainees in the U.S. ICE's own Office of Detention and Removal

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[262] *United States of America: Single day, Double Standards*, *supra* note 184.
[263] Zavada, *supra* note 5, at 12.
[264] *Id.*, at 28, 31.
[265] *Id.* at 21.
[266] *See* Hong, *supra* note 55; Moran, *supra* note 30; Zavada, *supra* note 5.

Operations annually inspects the immigration detention facilities, and gave all of the facilities that the OIG audited an 'Acceptable' rating. This is despite the clear violations of both human rights and ICE standards as discussed above. As well, the Office of Detention and Removal Operations failed to identify the facilities' non-compliance with health care and conditions of confinement that the OIG observed.[267] Clearly such review is at the very least insufficient or incompetent. This is particularly troubling considering that even the minimal protections afforded detainees (which still allow for violations of their human rights), have not been implemented as enforceable regulations by DHS. Thus, there is no recourse for violations of even these minimal standards under domestic laws.

At the moment, there are a number of steps being taken by those within the U.S. to attempt to remedy the conditions at immigration detention facilities and hold the government accountable for its treatment of the detainees. In addition to individual lawsuits by current and former detainees against the government and the immigration detention facilities, the ACLU has filed suit to try to force the government to reduce the overcrowding in the immigration detention facilities and to require better treatment of detainees, as discussed in Chapters 2 and 3.[268] Similarly, the National Lawyers Guild and six other immigrants' rights groups have petitioned DHS to make the ICE standards for detention enforceable regulations.[269]

Lastly, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) has recently placed DHS's mistreatment of detainees in the public's eye. In 2005, the USCIRF issued a report identifying problems with the treatment of asylum seekers detained in U.S. and the expedited removal program. This report made recommendations as to how to remedy these problems. In May, the USCIRF issued a report card on DOJ and DHS actions in response to the

[267] Zavada, *supra* note 5, at 36.
[268] Moran, *supra* note 30. *See also* Marosi, *supra* note 32.
[269] Henry, *supra* note 62.

2005 report. USCIRF determined that "Immigrations and Customs Enforcement (ICE) has taken no steps to improve the prison-like conditions under which asylum seekers are detained or ensure that release criteria are applying uniformly. ICE earned an overall grade of 'D."[270]

Furthermore, the international community has expressed its concern over the treatment of detainees and has begun to look more closely at the U.S. policies and actions. Recently, Jorge Bustamente, the U.N. Special Rapporteur on the Human Rights of Migrants, visited U.S. immigration detention facilities to inspect (and later report on) the detention conditions and the treatment of detainees. Bustamente, as a U.N. Special Rapporteur, is an independent expert appointed by the U.N. Human Rights Council. He visited a number of immigration detention facilities and spoke with detainees and families from April 30 to May 17, 2007.[271] However, during his visit, previously scheduled and approved visits to the Don T. Hutto Detention Facility in Texas and the Monmouth Detention Center in NJ, were cancelled without explanation.[272]

The fact that the U.N. Special Rapporteur was denied access to visit some of the detention sites is a blatant refusal on the government's part to allow for transparency into its treatment of detainees. The ACLU has demanded answers from the government as to why Bustamente was kept out of the detention centers. Jamil Dakwar, Advocacy Director of the ACLU Human Rights Program, said that "[w]e are deeply disappointed that the U.S. government

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[270] U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, Press Release, *USCIRF Finds Disappointing Response from Departments of Justice and Homeland Security to its Recommendations on Expedited Removal Process*, Feb. 8, 2007, *available at* http://www.uscirf.gov/mediaroom/press/2007/february/20070208Response.html.
[271] *U.N. Human Rights Expert Calls on United States to Protect Migrants*, U.N. NEWS CTR., May 21, 2007 [hereinafter U.N. Human Rights], *available at* http://www.un.org/apps/news/story.asp?NewsID=22613&Cr=human&Cr1=rights.
[272] *Special Rapporteur*, *supra* note 25.

is not living up to its human rights commitments…The U.S. government claims it is a beacon for human rights, yet it keeps a shroud of secrecy over its own policies."[273]

Although Bustamente has yet to make his official report to the U.N. Human Rights Committee, he did issue a statement regarding his observations on his visit. Bustamente took note of some of the detention conditions and government practices that are particularly troublingm including the temporary detention of children in adult detention facilities,[274] and that "[t]ransfers of individuals in custody also may occur without notice to the families or attorneys and may result in detention in remote locations, far from families and access to legal support." [275] He also stated that "[a]n over-reliance on, and delegation of authority to local level law enforcement may compromise the ability of the US Government to effectively address issues affecting migrants, and to comply with its human rights obligations under International Law." [276] As to what the U.S. should be doing, Bustamente says that the United States should make sure that its laws and its enforcement of such laws are consistent with its international obligations in the ICCPR, CAT, ICERD, and UDHR,[277] and that it should promote and enforce policies that protect human rights.[278]

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[273] ACLU, Press Release, *U.N. Independent Expert Denied Access to Hutto Detention Center: ACLU Calls for Answers from U.S. Government*, May 4, 2007, *available at* http://www.aclu.org/immigrants/gen/29615prs20070504.html
[274] *Special Rapporteur*, *supra* note 25.
[275] U.N. Human Rights, *supra* note 270.
[276] *Id.*
[277] *Id.*
[278] *Special Rapporteur*, *supra* note 25.

5. Conclusion

In the United States today, aliens who commit even minor visa violations can be subject to detention in one of many immigration detention facilities throughout the U.S. These detainees may be transferred to a facility far away from their homes, families, and attorneys. While imprisoned in these detention facilities, some detainees are treated as and housed with criminals. Their substantive and procedural due process rights are limited and their human rights are violated. The U.S. laws that should protect them are the very laws that strip them of their rights to court proceedings, challenges of decisions regarding detention, and judicial review.

By issuing substantial reservations, declarations, and understandings to human rights treaties, the U.S. has created loopholes through which it is able to violate the human rights of detainees, and yet avoid accountability. This is in direct contradiction the its own statements,

> That it is the view of the United States that States Party to the [ICCPR] should wherever possible refrain from imposing any restrictions or limitation on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.[279]

Since September 11, 2001, the U.S. has repeatedly restricted the rights of aliens, often on national security grounds. But, the failure to protect detainees' human rights can only further damage America's reputation abroad and the bipartisan 9/11 Commission specifically noted that America's ability to fight terrorism depends on its reputation.[280]

In a world where war and terror plague peoples across the globe, America should regain its position as leader in the struggle to promote human rights. To do this, the U.S. government must fully meet its international obligations to protect human rights. America's strength comes

[279] U.S. Reservations to ICCPR, *supra* note 193, at III(2).
[280] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., The 9/11 Commission Reports, 375, 376 (2004).

from its freedoms and such freedoms should be given to all those who are here. America is a nation of immigrants that should once again take the tired, the poor, the huddled masses, and welcome them to the land of the free.

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