

## COMMENTS

### REGARDLESS OF MY STATUS, I AM A HUMAN BEING: IMMIGRANT DETAINEES AND RECOURSE TO THE ALIEN TORT STATUTE

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#### INTRODUCTION

Boubacar Bah, a fifty-two-year-old tailor from Guinea with a wife and young children, died in June 2007 in the custody of immigration officials after undergoing emergency surgery for a skull fracture and multiple brain hemorrhages that had left him comatose. When information finally surfaced regarding his treatment in a New Jersey detention facility run by the Corrections Corporation of America, details emerged about how he had been “shackled and pinned to the floor of the medical unit as he moaned and vomited [and] then left in a disciplinary cell for more than thirteen hours, despite repeated notations that he was unresponsive and intermittently foaming at the mouth.”<sup>1</sup> A confidential video showed him handcuffed, face down in the medical unit crying out in his native Fulani, “Help, they are killing me!”<sup>2</sup>

Mr. Bah’s story is just one of the many tragic stories reported on by Nina Bernstein,<sup>3</sup> a writer for the *New York Times* who published a

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1 Nina Bernstein, *Few Details on Immigrants Who Died in U.S. Custody*, N.Y. TIMES, May 5, 2008, at A1.

2 Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1 (internal quotation marks omitted).

3 Nina Bernstein received the 2009 Hillman Prize for Newspaper Journalism for her work exposing immigrant deaths in detention. *2011 Hillman Prize for Newspaper Journalism*, SIDNEY HILLMAN FOUND., <http://www.hillmanfoundation.org/hillman-prizes/hillman-prize-newspaper-journalism> (last visited Dec. 2, 2011). In her acceptance speech at the awards ceremony, she referred to the immigration detention system as a “secretive billion dollar system; a patchwork of profit-making prisons, county lock-ups, and federal jails virtually devoid of the due process safeguards that people who watch ‘Law & Order’ take for

series of scathing exposés of conditions at government and privately run immigration detention centers. Each story is unbelievably more horrific than the next: A twenty-two-year-old detainee at the Bergen County Jail in New Jersey committed suicide because of “unbearable, untreated pain.”<sup>4</sup> A thirty-four-year-old computer engineer and father of two died from undiagnosed and untreated cancer that ultimately metastasized to cover his entire body.<sup>5</sup> A mentally ill man with a history of schizophrenia died on August 22, 2004, after hanging himself with a bed sheet. While detainees must be checked on every thirty minutes, this man had been dead “for at least four to six hours before his body was found.”<sup>6</sup> A German-born forty-eight-year-old man, who had spent forty-two years in the United States, died in November 2008 in immigration detention from endocarditis, an infection of the heart valve that is easily cured by antibiotics.<sup>7</sup> Immigration officials allowed his treatable infection to rage out of control: “the bacteria colonizing his heart broke loose, creating abscesses in his brain, liver and kidneys.”<sup>8</sup> His incredible pain, which caused him to sob through the night, went unacknowledged by immigration detention officials.<sup>9</sup> Had they afforded him the medical attention he deserved, he would most probably still be alive.

All of the above stories share a common thread: a complete lack of humanity towards immigrant detainees and desperate attempts to cover up abuses and deaths.<sup>10</sup> The United States government has in-

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granted.” HillmanFoundation, *2009 Hillman Prize for Newspaper Journalism Awards Ceremony—Nina Bernstein*, at 2:37, YOUTUBE (June 10, 2009), <http://www.youtube.com/watch?v=VQ0wdyCZ00U>.

4 Bernstein, *supra* note 2, at A1.

5 Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1.

6 AMNESTY INT’L, *JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 41* (2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf> (internal quotation marks omitted).

7 Nina Bernstein, *Another Jail Death, and Mounting Questions*, N.Y. TIMES, Jan. 28, 2009, at A14.

8 *Id.*

9 *Id.*

10 According to Nina Bernstein’s review of deaths in immigration detention centers, “[n]o government body is required to keep track of deaths and publicly report them. No independent inquiry is mandated.” Bernstein, *supra* note 1, at A18. Critics and many members of Congress have openly stated that this process “leaves too much to the agency’s discretion, allowing some deaths to be swept under the rug while potential witnesses are transferred or deported.” *Id.* A more recent review of the conditions within immigration detention facilities reveals that not much has improved. See ACLU OF ARIZ, *IN THEIR OWN WORDS: ENDING ABUSE IN ARIZONA IMMIGRATION DETENTION CENTERS 3* (2011), available at <http://acluaz.org/sites/default/files/documents/detention%20report%202011.pdf> (providing a report on the inhumane treatment of immigrant detainees in Arizona).

creased its use of civil detention for noncitizens<sup>11</sup> and with that increase has come a corresponding decrease in adherence to detention standards. Common complaints include “inadequate health care, physical and sexual abuse, overcrowding, discrimination, and racism.”<sup>12</sup> Additionally, while the Obama Administration has announced an overhaul of the immigration detention system, it has concurrently refused to create legally binding rules, arguing that “rule-making would be laborious, time-consuming and less flexible” than a simple overhaul.<sup>13</sup>

Another contributing factor to deteriorating conditions of confinement has to do with economics: the business of immigration detention is booming. As the federal government continues to target, detain, and deport noncitizens, the demand for more immigration detention beds has increased exponentially.<sup>14</sup> The GEO Group, an international private prison operator that controls about a quarter of the United States private prison industry, is adding thousands of beds to its detention centers nationwide, while Corrections Corporation of America, which manages more than 50% of all prison beds under private contract in America, saw its revenue from its federal customers increase by almost 5%.<sup>15</sup> These corporations are cramming as many beds as they can into their facilities to fulfill increased demand.

As these corporations thrive and prosper, the detained noncitizens they house suffer. On any given day, more than 32,000 people are held in detention while the government decides whether to deport them, with the annual total reaching an astounding 407,000

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11 This Comment will endeavor to use the term “noncitizen” instead of “alien” when referring to non-nationals because of the dehumanizing qualities associated with the term “alien.” That term will only be used when necessary, as when in direct quotations.

12 SUNITA PATEL & TOM JAWETZ, ACLU, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 1 (2007), available at [http://www.aclu.org/files/pdfs/prison/unsr\\_briefing\\_materials.pdf](http://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf).

13 Nina Bernstein, *Documents Reveal Earlier Immigrant Deaths*, N.Y. TIMES, Jan. 9, 2010, <http://www.nytimes.com/2010/01/10/nyregion/10detainside.html?ref=incustodydeath> (internal quotation marks omitted).

14 Interestingly, the private prison industry itself has helped to facilitate an increase in demand for prison beds. According to a report by National Public Radio, members of this industry waged a “quiet, behind-the-scenes effort to help draft and pass Arizona Senate Bill 1070,” which would require police to detain anyone they stopped who could not show proof of a legal entry into this country. See Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741>.

15 Renee Feltz, *Focus on “Criminal Aliens” Increases Demand for Immigration Detention Business*, HUFFINGTON POST, Nov. 5, 2009, [http://www.huffingtonpost.com/renee-feltz/focus-on-criminal-aliens\\_b\\_347303.html](http://www.huffingtonpost.com/renee-feltz/focus-on-criminal-aliens_b_347303.html).

people.<sup>16</sup> The current immigration practices are supported by President Obama, who signed the Department of Homeland Security's 2010 budget into law. The budget included \$2.5 billion for detention and removal operations and another \$200 million for the Secure Communities program, which screens for undocumented immigrants by taking the fingerprints of anyone booked into local jail and matching them with fingerprints in an Immigration and Customs Enforcement ("ICE") database in an effort to maximize immigrant detention and removal.<sup>17</sup>

These individuals, regardless of their immigration status, are human beings deserving of the same dignity and respect afforded to citizens of the United States. Immigration detention, now a thriving business in the United States, allows private contractors to make money off of treating noncitizens worse than caged animals, which does not fit well with the world's notion of the United States as a beacon of morality.

This Comment will argue that while detained noncitizens do have some constitutional rights that allow them to protest their arbitrary detention, including the duration of their confinement, those rights do not fully extend to protecting them from the cruel, inhuman, and degrading treatment they are subject to while in custody. Additionally, even though rights to lodge due process arguments exist under the Constitution, it is incredibly difficult to obtain relief, and the cases generally require much litigation, which is especially expensive since immigrant detainees do not have a right to counsel.

Thus, this Comment proposes that noncitizen detainees lodge Alien Tort Statute ("ATS") claims based on the customary international norm prohibiting cruel, inhuman, and degrading treatment. After discussing a brief history of the constitutional protections now afforded to detained noncitizens and the incredible difficulty of basing a compensation claim on constitutional violations, this Comment will then discuss the development of ATS litigation, its increased re-

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16 See *In-Custody Deaths*, N.Y. TIMES, Oct. 21, 2011, [http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration\\_detention\\_us/incustody\\_deaths/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html) (stating that over 407,000 noncitizens were held in detention in the United States in 2008).

17 See Feltz, *supra* note 15 (describing the screening efforts of the Secure Communities Program). See also Press Release, U.S. Immigration & Customs Enforcement, FY2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Clear Priorities Including Threats to Public Safety and National Security (Oct. 18, 2011), available at <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>, for information on the government's most recent data on removals during fiscal year 2011. ICE touted its removal of 396,906 immigrants as a great policy achievement, one that follows the United States' policy to detect, detain, and remove those without status from this country. *Id.*

levance to cases of abuse in immigration detention, and some potential issues that detainees will need to address to lodge successful claims.

### I. WHAT DOES THE CONSTITUTION SAY?

The Constitution does not completely abandon noncitizens. Many detained noncitizens have successfully brought due process claims under the Fifth Amendment challenging the duration of their confinement. These cases, along with the recent spur of Guantanamo cases, have helped to delineate the boundaries of appropriate behavior regarding the confinement of noncitizens, whether within the United States or abroad. Additionally, the Court has allowed plaintiffs to recover damages for constitutional violations committed by federal agents in certain, highly limited circumstances. However, this Comment will show that these constitutional remedies have proven to be ineffective and nearly impossible to achieve when lodging a claim protesting conditions of confinement in immigration detention centers.

#### A. *Brief History*

The movement towards greater constitutional protections for noncitizens essentially started with *Yick Wo v. Hopkins*,<sup>18</sup> where the Supreme Court stated that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .”<sup>19</sup> Around ten years later, when addressing the Fifth Amendment in *Wong Wing v. United States*,<sup>20</sup> the Court concluded that “all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] [A]mendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury.”<sup>21</sup> The Court then extended its sentiments almost a century later in *Mathews v. Diaz*<sup>22</sup> when it proclaimed:

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18 118 U.S. 356 (1886).

19 *Id.* at 369.

20 163 U.S. 228 (1896).

21 *Id.* at 238.

22 426 U.S. 67 (1976) (confirming the Constitution’s recognition of aliens even while rejecting the due process claim challenging a five-year residency requirement for noncitizens seeking federal medical benefits).

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.<sup>23</sup>

The Fifth Amendment itself proclaims that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law”<sup>24</sup> and has been heavily employed by noncitizens detained in immigration detention centers for long periods of time. Thus, from this provision has sprouted a veritable fountain of case law dealing with the procedural and substantive protections due noncitizens, including those who are not officially considered as having entered the United States.

### B. What Exactly Is “Civil Confinement”?

Before considering the case law, it is first important to understand the nature of civil confinement in the United States. The Supreme Court has enunciated some basic principles applicable to the civil confinement of noncitizens. In a recent decision, the Court stated that “‘government detention violates th[e Due Process] Clause’ unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or ‘in certain special and narrow non-punitive circumstances.’”<sup>25</sup> The Court then went on to explain what it meant by “special” and “non-punitive” detention and stated that such detention is “permissible *only* where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or [a] flight risk;<sup>26</sup> (2) is dangerous because of a ‘harm-threatening mental illness’ that impairs his ability to control his dangerousness;<sup>27</sup> or (3) is an enemy alien during a declared war.”<sup>28</sup> Thus, “civil detention must be measured and tempered by individualized

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<sup>23</sup> *Id.* at 77 (citations omitted).

<sup>24</sup> U.S. CONST. amend. V.

<sup>25</sup> David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1010 (2002) (alterations in original) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)) (internal quotation marks omitted).

<sup>26</sup> *Id.* (citing *Zadvydas*, 533 U.S. at 688; *United States v. Salerno*, 481 U.S. 739, 752–53 (1987); *Carlson v. Landon*, 342 U.S. 524, 541–42 (1952)).

<sup>27</sup> *Id.* (citing *Zadvydas*, 533 U.S. at 690; *Kansas v. Crane*, 534 U.S. 407, 412–13 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997)).

<sup>28</sup> *Id.* (citing *Ludecke v. Watkins*, 335 U.S. 160, 171–73 (1948)).

decision making and by finding that the individual presents a ‘danger to the community’ or a ‘flight risk.’”<sup>29</sup>

Immigration detention is thus meant to serve a very limited function, one distinct from the penal nature of criminal incarceration.<sup>30</sup> Its purpose is to “hold, process, and prepare individuals for removal,”<sup>31</sup> with its most severe form, mandatory detention with no possibility of an individualized bond determination, only passing constitutional muster because it is “premised on the idea that immigration detention is so limited in scope, purpose, and duration.”<sup>32</sup> These conceptions of immigration detention also comport with international law, which requires that “detention pending removal must be justified as a necessary and proportionate measure in each individual case and should only be used as a measure of last resort and be subject to judicial review.”<sup>33</sup>

The reality of immigration detention though is neither limited in purpose nor scope. The Immigration and Nationality Act of 1952 (“INA”), in Section 1226 for example, creates a presumption of detention for people apprehended by the federal government at the border who lack documents for admission, regardless of whether or not they pose a flight risk.<sup>34</sup> This includes the mandatory detention of “asylum seekers, torture survivors, victims of human trafficking, longtime lawful permanent residents, and the parents of U.S. citizen children.”<sup>35</sup>

After apprehension then, access to some sort of judicial review depends on whether the individual was apprehended at the border, apprehended within the United States, or convicted of certain crimes while in the United States.<sup>36</sup> For those captured at the border, decisions regarding detention are made by immigration officers as these

29 Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 14 (2010).

30 N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, LOCKED UP BUT NOT FORGOTTEN 3 (2010) [hereinafter *Locked Up But Not Forgotten*], available at [http://graphics8.nytimes.com/packages/pdf/nyregion/20100429\\_detentionreport\\_April2010.pdf](http://graphics8.nytimes.com/packages/pdf/nyregion/20100429_detentionreport_April2010.pdf).

31 DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

32 LOCKED UP BUT NOT FORGOTTEN, *supra* note 30, at 3.

33 AMNESTY INT’L, *supra* note 6, at 6.

34 See Immigration and Nationality Act of 1952, 8 U.S.C. § 1226(a) (2006) (“[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”).

35 AMNESTY INT’L, *supra* note 6, at 3.

36 *Id.* at 6.

individuals are not entitled to judicial review of their detention.<sup>37</sup> The situation for those apprehended inside the United States is functionally equivalent to those captured at the border because even though these individuals are entitled to review by an immigration judge, this review oftentimes does not take place or is greatly delayed.<sup>38</sup> Finally, those individuals who have resided in the United States for many years and are oftentimes legal permanent residents are subject to mandatory detention if convicted of committing a specified type of crime. They are not afforded a hearing to determine their status and are automatically detained while awaiting deportation. The process itself is flawed in that with increasing frequency, U.S. citizens and legal permanent residents have spent months or years in detention before being able to prove that they are not deportable.<sup>39</sup>

### C. Constitutional Case Law

It is from this expansive use of civil confinement<sup>40</sup> that a series of Supreme Court cases emerged challenging the authority of the federal government both to detain noncitizens for extended periods of time and to hold them in conditions that did not conform with established standards. *Zadvydas v. Davis*<sup>41</sup> is the first in a series of major cases highlighting the Court's desire to exert some sort of restraint on the broad authority brandished by immigration authorities. Kestutis Zadvydas immigrated to the United States from a displaced persons camp in Germany at the age of eight.<sup>42</sup> As a resident noncitizen, he accrued a lengthy criminal record that culminated in a cocaine distribution conviction that rendered him deportable after he fi-

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7.

<sup>40</sup> John Morton, the Assistant Secretary of ICE, in a statement before the U.S. House of Representatives Committee on Appropriations regarding proposed budget increases for the fiscal year 2012, boasted of a 40% increase in the average daily detention population at ICE facilities and the overall arrest of 55,212 individuals in 2011 as support for the work ICE does and its continued need for funds. See *U.S. Immigration and Customs Enforcement FY 2012 Budget Request Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 112th Cong. (2011) (statement of John Morton, U.S. Immigration and Customs Enforcement), available at <http://www.ice.gov/doclib/news/library/speeches/031111morton.pdf>. Nina Bernstein's article on immigration detention further confirms the expansive use of civil confinement. She states that the immigration detention system "continues to detain some 400,000 people a year." Nina Bernstein, *Sick Detained Immigrant to Appeal to U.N. for Help*, N.Y. TIMES, June 25, 2010, at A27.

<sup>41</sup> 533 U.S. 678 (2001).

<sup>42</sup> *Id.* at 684.

nished serving his criminal sentence.<sup>43</sup> However, given the circumstances of his birth, Mr. Zadvydas did not possess citizenship in any other country and consequently, the United States was unable to identify any country willing to accept him.<sup>44</sup> While Section 241 of the INA provides that a removal order must be effectuated within ninety days, it also provides that the Attorney General can determine that certain noncitizens “may be detained beyond the removal period.”<sup>45</sup> Thus, the government argued that this provision permitted them to detain Mr. Zadvydas indefinitely while they continued to identify a country willing to accept him,<sup>46</sup> which in turn prompted Mr. Zadvydas to file a writ of habeas corpus challenging his detention on Fifth Amendment grounds.<sup>47</sup>

The Court held that “a statute permitting indefinite detention of an alien would raise a serious constitutional problem” and that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”<sup>48</sup> But, in declining to overrule *Shaughnessy v. United States ex rel. Mezei*,<sup>49</sup> the Court did also make a significant distinction between those noncitizens who had already entered the United States, like Zadvydas, and those whose extended departure required them to seek reentry into the United States, as was the case in *Mezei*. According to the Court in *Zadvydas*, being treated “as if stopped at the border” made all the difference.<sup>50</sup> However, once noncitizens officially enter the country, “the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>51</sup> In addition to this distinction, the Court also limited the executive de-

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43 *Id.*

44 *Id.* (“In 1994, Germany told the INS that it would not accept Zadvydas because he was not a German citizen . . . Lithuania refused to accept Zadvydas because he was neither a Lithuanian citizen nor a permanent resident. . . . [T]he INS asked the Dominican Republic (Zadvydas’ wife’s country) to accept him, but this effort proved unsuccessful.”).

45 *Id.* at 706 (Kennedy, J., dissenting) (quoting 8 U.S.C. § 1231(a)(6)(Supp. V 1994) (internal quotation marks omitted)).

46 *Id.* at 689.

47 *Id.* at 686.

48 *Id.* at 690.

49 345 U.S. 206 (1953).

50 *Zadvydas*, 533 U.S. at 693 (quoting *Mezei*, 345 U.S. at 213, 215) (internal quotation marks omitted); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (stating that the Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries).

51 *Zadvydas*, 533 U.S. at 693.

tention power to “a period reasonably necessary to bring about that alien’s removal from the United States,” which it held to be six months “in light of the Constitution’s demands.”<sup>52</sup>

After its landmark decision in *Zadvydas*, the Court in subsequent decisions, both narrowed and expanded its holding.<sup>53</sup> In *Demore v. Kim*, a five-to-four majority held that a permanent resident alien, who had conceded removability due to a conviction, could be detained during the pendency of the removal proceedings and the administrative appeal.<sup>54</sup> The Court determined that mandatory detention without the possibility of bond during removal proceedings, even if the particular individual posed no flight risk, was not an unconstitutional deprivation of liberty. It assumed that the detention period would be brief, relying on agency data that indicated that the vast majority of immigration cases were decided in less than forty-seven days.<sup>55</sup> But in *Clark v. Martinez*,<sup>56</sup> the Supreme Court broadened its holding in *Zadvydas* so that it applied to inadmissible noncitizens as well.<sup>57</sup> The Court reiterated its holding in *Zadvydas*, stating that the “presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is ‘no significant likelihood of removal in the reasonably foreseeable future.’”<sup>58</sup> It then extended the application of its holding to “inadmissible alien[s].”<sup>59</sup>

#### D. A New Era in Constitutional Litigation: The Guantanamo Cases

Jurisprudence regarding the rights due to noncitizens and the conditions of their confinement has reached an apex in what some are terming “The Guantanamo Era.”<sup>60</sup> This term connotes a time pe-

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<sup>52</sup> *Id.* at 689.

<sup>53</sup> See Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 141 (2010) (speculating that the difference in the Supreme Court’s approach in *Zadvydas* as compared with *Demore* was the events occurring on 9/11).

<sup>54</sup> 538 U.S. 510 (2003).

<sup>55</sup> See *id.* at 527–29 (stating the Executive Office for Immigration Review statistics that 85% of all detained cases were completed within an average of forty-seven days and the median was thirty days of detention).

<sup>56</sup> 543 U.S. 371 (2005).

<sup>57</sup> *Id.* at 386.

<sup>58</sup> *Id.* at 378 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)).

<sup>59</sup> *Clark*, 543 U.S. at 372.

<sup>60</sup> See Kidane, *supra* note 53, at 140.

riod punctuated by new legislation like the Patriot Act of 2001<sup>61</sup> and the Real ID Act of 2005<sup>62</sup> which have made some revisions to existing laws relating mainly to terrorism and have significantly expanded the Attorney General's authority to arrest, detain, and deport immigrants. But this time period has also been marked by a period of unexpected response by the judiciary, whose decisions have been more closely aligned with *Zadvydas* in an effort to more closely protect the rights of noncitizens against arbitrary decision-making by the executive and legislative branches. The following cases focus on unconstitutional restrictions on the writ of habeas corpus and, although the claims that follow were lodged by individuals designated enemy combatants or detainees held in Guantanamo Bay, the case holdings are significant since habeas review has historically played an important role as a means for noncitizen immigrant detainees to challenge removal orders.<sup>63</sup>

In *Rasul v. Bush*, the first of many Guantanamo cases, the Court struck down the executive's efforts to indefinitely detain aliens in Guantanamo Bay, holding that the Constitution prohibited such indefinite detention of aliens without due process.<sup>64</sup> *Hamdan v. Rumsfeld* articulated the amount of process necessary to be deemed acceptable by holding that the executive's attempt to use a military commission with questionable procedural safeguards was inadequate.<sup>65</sup> Finally the Court, in the landmark decision of *Boumediene v. Bush*, held that noncitizens detained by United States authorities outside of the territorial United States have a constitutional right to habeas corpus, in spite of being designated as enemy combatants by the Combatant Status Review Tribunal.<sup>66</sup> That holding is sure to have widespread effects on the state of immigration detention, especially

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61 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

62 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

63 See *INS v. St. Cyr*, 533 U.S. 289, 305–06 (2001) (“[B]efore and after the enactment in 1875 of the first statute regulating immigration . . . [federal habeas corpus] jurisdiction was regularly invoked on behalf of noncitizens, particularly in the immigration context.” (citations omitted)).

64 *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (“Congress extended the protections of the writ [of habeas corpus] to ‘all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.’” (citations omitted)).

65 *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (concluding that “the military commission convened to try Hamdan lacks power to proceed”).

66 *Boumediene v. Bush*, 553 U.S. 723, 739–54 (2008).

since the Court indicated that its analysis was not limited to habeas review for Guantanamo detainees and should extend to other forms of executive detention as well.<sup>67</sup>

The *Boumediene* holding has also had reverberating effects on two doctrines crucial to the understanding of immigration detention: the plenary power doctrine and the entry fiction doctrine. The plenary power doctrine essentially states that Congress and the executive branch must have “unfettered authority to admit, exclude, or deport aliens.”<sup>68</sup> In response to the plenary power argument advanced by the government in *Boumediene*, the Court stated that “[t]o hold the political branches have the power to switch the Constitution on and off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not the Court, say ‘what the law is.’”<sup>69</sup>

The entry fiction doctrine developed to prevent unauthorized aliens from obtaining increased constitutional protections just by virtue of their physical presence in the United States.<sup>70</sup> With regard to this doctrine then, it has been argued that the functional approach articulated by the Court in *Boumediene*, that “whether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it,’”<sup>71</sup> should be used to provide a check on the executive and legislative powers with respect to the treatment of inadmissible aliens. The approach should be used as a means to extend constitutional protections to those noncitizens physically present within the United States.<sup>72</sup>

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67 *Id.* at 787–88.

68 Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1128 (1995) (discussing the legal challenges to U.S. detainment policies and procedures).

69 *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that Section 13 of the Judiciary Act of 1789 is unconstitutional on the grounds that Congress cannot pass laws that are contrary to the Constitution, and it is the role of the judicial system to interpret what the Constitution permits)).

70 Charles Ellison, *Extending Due Process Protections to Unadmitted Aliens Within the U.S. Through the Functional Approach of Boumediene*, 3 CRIT. 1, 36 (2010) (discussing the potential for affording due process rights to unadmitted aliens).

71 *Boumediene*, 553 U.S. at 759 (quoting *Reid v. Covert*, 354 U.S. 1 (1957) (holding that the Constitution supersedes all treaties ratified by the U.S. Senate)).

72 Ellison, *supra* note 70, at 45. *But see* *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 109 (2010) (restricting the use of the *Boumediene* holding for those detainees who wish to constitutionally protest the conditions of their confinement and stating that “the [*Boumediene*] Court expressly declined to ‘discuss the reach of the writ [of habeas corpus] with respect to claims of unlawful conditions of treatment or confinement’ . . . which clearly

*E. Challenges to Conditions of Confinement*

With the Supreme Court's holdings in decisions like *Zadvydas* and *Boumediene*, it is clear that detained noncitizens, both inside and outside the United States, have some constitutional protections, especially when contesting the duration of their detention. But the extension of constitutional due process protections to those noncitizens challenging conditions of confinement is not as clear. The Supreme Court has not really addressed this issue, and those circuit courts that have are not in perfect alignment with one another. While there has been some recognition of a noncitizen's constitutional right to humane treatment, the bar to prove mistreatment has been set quite high in some circuits.

In an important Fifth Circuit case that has been the law of that circuit for over two decades,<sup>73</sup> *Lynch v. Cannatella*<sup>74</sup> considered whether sixteen Jamaican nationals who had entered the United States illegally by stowing away aboard a barge<sup>75</sup> were entitled to any protection under the Due Process Clause of the Fifth Amendment. The *Lynch* plaintiffs claimed that the officers detaining them, the New Orleans Harbor Police, had beaten them, showered them with stun gas, deprived them of food, sprayed them with a fire hose, and left them with only wet clothes and bedding materials.<sup>76</sup> The Harbor Police claimed qualified immunity, which required a showing that "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>77</sup> They argued that since excludable aliens were not entitled to due process protection, the plaintiffs did not have a "clearly established" constitutional right to be protected from abuse or mistreatment while in custody.<sup>78</sup> The court struck down that argument.

While the court acknowledged that excludable aliens had limited constitutional rights "with regard to immigration and deportation proceedings," it held that that precedent "does not limit the [constitutional] right of excludable aliens detained within the United States

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strips courts of jurisdiction over claims relating to 'any aspect of . . . treatment . . . or conditions of confinement'") (citations omitted)).

<sup>73</sup> Ellison, *supra* note 70, at 43.

<sup>74</sup> 810 F.2d 1363 (5th Cir. 1987).

<sup>75</sup> *Id.* at 1367, 1370. Because they were never inspected and admitted, they were treated as though they were at the border. *Id.*

<sup>76</sup> *Id.* at 1367.

<sup>77</sup> Taylor, *supra* note 68, at 1144 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>78</sup> *Lynch*, 810 F.2d at 1372-74 (relying on *Garcia-Mir v. Meese*, 788 F.2d 1446, 1449 (11th Cir. 1986) (holding that Mariel Cubans seeking parole could not claim due process protection)).

territory to humane treatment.”<sup>79</sup> The court further stated that there are no conceivable “national interests that would justify the malicious infliction of cruel treatment on a person in [the] United States . . . simply because that person is an excludable alien.”<sup>80</sup> Thus the court concluded that “whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the [F]ifth and [F]ourteenth [A]mendments to be free of gross physical abuse at the hands of state or federal officials.”<sup>81</sup>

*Lynch* seemingly proclaimed that regardless of their status under immigration law, excludable noncitizens could claim due process protections to challenge the conditions of their confinement. However, this proclamation was not adhered to by all circuits and some later cases narrowed this holding by suggesting that excludable aliens must show “malicious infliction of cruel treatment” or “gross physical abuse” to state viable due process claims,<sup>82</sup> essentially making it impossible for detainees to challenge the conditions of their confinement in a civil suit.

Following its holding in *Lynch*, the Fifth Circuit considered *Medina v. O’Neill*, a case involving twenty-six Colombian noncitizens who attempted to enter the United States as stowaways.<sup>83</sup> Once discovered, they were detained together for twenty-four hours a day in a single cell designed for six people in a private facility, conditions that drove them to mount an escape attempt that resulted in the death of one and the injury of another.<sup>84</sup> The stowaways then claimed that because immigration authorities had not monitored the detention facilities they had been placed in, their detention inflicted punishment in violation of the Due Process Clause of the Fifth Amendment.<sup>85</sup> The Fifth Circuit, having previously differentiated between the treatment to be afforded to deportable versus inadmissible noncitizens in detention, found that while under INA § 1252(c), the Attorney General must provide appropriate detention facilities to deportable aliens, there is no such statutory duty to ensure that proper facilities are also provided for inadmissible aliens.<sup>86</sup> Thus, despite the fact that one stowaway was shot and another was injured, the court held that in

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79 *Id.* at 1373.

80 *Id.* at 1374.

81 *Id.*

82 Taylor, *supra* note 68, at 1148 (internal quotation marks omitted).

83 838 F.2d 800, 801 (5th Cir. 1988).

84 *Id.*

85 *Id.*

86 *Id.* at 802.

terms of their substantive due process rights, there was no evidence of intentional cruel treatment being maliciously inflicted upon them or that they suffered gross physical abuse.<sup>87</sup> Their allegations against the INS officials were found to be no more than claims of negligence, insufficient to state a violation of due process rights.<sup>88</sup>

The significance of the *Medina* holding and its import to detained immigrants who wish to challenge the conditions of their confinement (especially in the Fifth Circuit) is that it seems to “convert the factual allegations in *Lynch* into a threshold standard for all excludable alien detainees . . . . [T]he *Medina* court suggested ‘malicious infliction of cruel treatment’ or ‘gross physical abuse’ were prerequisites for excludable aliens to state a due process violation.”<sup>89</sup>

Two years later, in *Adras v. Nelson*,<sup>90</sup> the Eleventh Circuit, like *Medina*, “extracted language from *Lynch* to set an unusually high threshold for excludable aliens seeking to challenge the condition of their confinement.”<sup>91</sup> The Haitian plaintiffs in *Adras* challenged the conditions of their confinement at the Krome Detention Center in southern Florida,<sup>92</sup> claiming that they were subjected to “severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care.”<sup>93</sup> The court first noted that immigration policies regarding the rights of inadmissible noncitizens were to be determined by Congress and the executive branch, not the judiciary.<sup>94</sup> However, the court could determine whether the Haitian detainees could claim that they had suffered “gross physical abuse” or “intentional and ma-

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<sup>87</sup> *Id.* at 803.

<sup>88</sup> *Id.*; see also Taylor, *supra* note 68, at 1148 (suggesting that the *Medina* court misapplied the leading Supreme Court decision delineating the analysis to be used when pretrial detainees bring due process challenges to the conditions of their confinement); *id.* at 1147 n.308 (explaining that under *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), pretrial detainees are protected from any mistreatment “amount[ing] to punishment of the detainee”). But the *Medina* court concluded that the Bell “punishment” standard was undermined by later cases holding that simple negligence did not amount to a due process violation. 838 F.2d at 803. Thus the defendants in *Medina* succeeded in their argument that they had never been to the facility and had no reason to believe it to be inadequate. *Id.*

<sup>89</sup> Taylor, *supra* note 68, at 1148 (citations omitted).

<sup>90</sup> 917 F.2d 1552 (11th Cir. 1990).

<sup>91</sup> Taylor, *supra* note 68, at 1149.

<sup>92</sup> *Adras*, 917 F.2d at 1553.

<sup>93</sup> *Id.* at 1559 (internal quotation marks omitted).

<sup>94</sup> *Id.* at 1556 (citing *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir. 1986) (holding that the Criminal Justice Act, 18 U.S.C. § 3006A, does not authorize the appointment and compensation of counsel in a habeas corpus action brought by an excludable alien challenging the Attorney General’s refusal to parole him)).

licious infliction of harm by INS agents” under the *Lynch* standard.<sup>95</sup> It then reasoned that while “any type of detention causes humiliation, disgrace and injured feelings . . . . Still, the detention was lawful at all times.”<sup>96</sup> The court found no conflict between its ruling and that of *Lynch* because “[t]here [wa]s no allegation of ‘gross physical abuse’ or intentional and malicious infliction of harm by INS agents.”<sup>97</sup>

Thus, the legacy post-*Lynch* is one that places a heavy burden on detained immigrants attempting to achieve some sort of judicial recognition of their mistreatment. While other circuits that have deliberated cases involving noncitizens challenging their conditions of confinement have not articulated as stringent a standard as the Fifth and Eleventh Circuits, their varied decisions still fall short of adequately remedying the widespread inhumane treatment that most immigrants in detention centers experience. The Third Circuit, in an unpublished opinion, stated that immigration detainees are to receive the same due process protections as pre-trial criminal detainees but then explained that “the test is whether the challenged conditions amount to punishment under the Due Process Clause” and that “[a]bsent a showing of express intent to punish, the determination will normally turn on whether the conditions have an alternative purpose and whether the conditions appear excessive in relation to that purpose.”<sup>98</sup> Here again, the burden of proof placed on immigrant detainees is incredibly difficult to satisfy.

The Second Circuit has failed to articulate one standard when dealing with immigrant detainee claims. In a recent district court case, *Adekoya v. Holder*, the court stated that “[d]eliberate indifference to the medical needs of an immigrant detainee in certain circumstances gives rise to a cognizable claim under the Due Process Clause of the Fifth Amendment.”<sup>99</sup> But, it remains unclear whether unadmitted noncitizens are entitled to the same level of protection as pre-trial criminal detainees or whether they are entitled to the “gross physical abuse” standard articulated in *Lynch*.

A ray of light for detained noncitizens can be found in the Ninth Circuit, which has held that conditions of confinement for civil detainees must be superior not only to convicted prisoners, but also to pre-trial criminal detainees.<sup>100</sup> Conditions of confinement which are

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95 *Id.* at 1559 (internal quotation marks omitted).

96 *Id.*

97 *Id.*

98 *Dahlan v. Dep’t of Homeland Sec.*, 215 Fed. App’x 97, 100 (3d Cir. 2007).

99 751 F. Supp. 2d 688, 694 (S.D.N.Y. 2010).

100 *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005).

found to be identical to, similar to, or more restrictive than those under which pre-trial detainees or convicted prisoners are held, are presumptively punitive and unconstitutional.<sup>101</sup> And, importantly, in the Ninth Circuit, civilly confined persons need not prove deliberate indifference to demonstrate a violation of their constitutional rights.<sup>102</sup> However, although the Ninth Circuit has taken a stride in the right direction, it is not a comprehensive enough remedy to fully afford relief to the many immigrants currently held in detention throughout the United States.

Thus, detained nonimmigrants still face incredible burdens when attempting to prove mistreatment while in custody. The standard articulated by the Fifth and Eleventh Circuits, that noncitizen detainees allege “deliberate cruelty or severe physical abuse” to overcome a qualified immunity defense, or even state a viable claim,<sup>103</sup> which was rejected as too stringent by the Supreme Court for convicted prisoners challenging the conditions of their confinement under the Eighth Amendment, leaves alien detainees with very thin constitutional protections against inhumane treatment.<sup>104</sup>

#### F. *Potential Remedy Already in Existence?*

At first glance, there appears to be a solution for detained noncitizens protesting the conditions of their confinement in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>105</sup> where the Supreme Court held that under certain circumstances, a plaintiff may be entitled to recover money damages for injuries suffered as a result of a government actor’s violation of the Constitution.<sup>106</sup> The claim can essentially be analyzed as a “personal injury action for infringements of constitutional rights.”<sup>107</sup> But upon further reflection, it will become clear that the *Bivens* action is not a viable option for detained noncitizens, most importantly because a *Bivens* claim must be grounded in some sort of constitutional violation and, as demonstrated above, couching complaints regarding conditions of confinement in constitutional terms is almost impossible. So while there exists a potential constitutional remedy, it is just not adequate to fulfill the

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101 *Id.* at 934.

102 *Id.*

103 Taylor, *supra* note 68, at 1151.

104 *Id.* at 1152.

105 403 U.S. 388 (1971).

106 *Id.* at 397.

107 Steve Helfand, *Desensitization to Border Violence & the Bivens Remedy to Effectuate Systemic Change*, 12 BERKELEY LA RAZA L.J. 87, 108 (2001).

needs of detained noncitizens who wish to protest the conditions of their confinement.

In *Bivens*, six federal agents of the Federal Bureau of Narcotics unlawfully entered the plaintiff's apartment and conducted an illegal search of the premises.<sup>108</sup> *Bivens* asserted a claim under the Fourth Amendment and the Court held that the Fourth Amendment created a general right to file actions for damages in cases where federal officials violate constitutional or statutory rights.<sup>109</sup> Soon after, lower courts began applying the *Bivens* remedy to other constitutional violations of the Fifth and Eighth Amendments.<sup>110</sup>

In determining whether to recognize a remedy in *Bivens*, the Court found that the plaintiff could recover monetary damages as long as there existed “no special factors counseling hesitation in the absence of affirmative action by Congress” and “no explicit congressional declaration[s] that persons injured by a federal officer[] . . . may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”<sup>111</sup> When no alternative remedy exists, courts must then “pay[] particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation,”<sup>112</sup> and in the wide array of cases the Supreme Court has heard post-*Bivens*, it has oftentimes “identified multiple ‘special factors’ to discourage courts from implying a remedy, and, in most instances, has “found a *Bivens* remedy unjustified.”<sup>113</sup>

The Court once again denied the grant of a *Bivens* remedy in its recent decision *Hui v. Castenada*,<sup>114</sup> where it reversed the Ninth Circuit's grant of a *Bivens* remedy to the family of Francisco Castenada,

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108 *Bivens*, 403 U.S. at 389.

109 *Id.* at 392.

110 See Sripiya Narasimhan, Comment, *Does “Keep Out!” Mean “Stay Out!”?: The Immigration and Nationality Act's Effect on Access to Federal Courts for Constitutional Actions*, 12 U. PA. J. CONST. L. 1443, 1450 (2010) (“The Court quickly signaled to the lower courts and potential plaintiffs that *Bivens* could be applied to other constitutional violations.”); see also *Davis v. Passman*, 442 U.S. 228, 244 (1979) (holding that the plaintiff in the case had a *Bivens* cause of action for a violation of her Fifth Amendment Due Process rights).

111 *Bivens*, 403 U.S. at 396–97.

112 *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 111 (2010) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

113 *Id.* (citing *Wilkie v. Robbins*, 551 U.S. 537, 549–50 (2007)). In *Wilkie*, the Court made a clear statement regarding its view of *Bivens* actions: “[W]e have . . . held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest . . . .” *Wilkie*, 551 U.S. at 550.

114 130 S. Ct. 1845, 1855 (2010).

who died of cancer in immigration detention when officers consistently denied his requests to see a physician for a biopsy.<sup>115</sup> The Court was generally hesitant to imply a new remedy where one potentially existed and then dismissed the case on a technicality, finding that 42 U.S.C § 233(a) granted “absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment by barring all actions against them for such conduct.”<sup>116</sup> The Court did not directly state that detained immigrants protesting conditions of confinement cannot make use of the *Bivens* remedy, but by allowing health officials’ qualified immunity to protect them against suit, the remedy does not seem to have the strength that is necessary to alleviate the suffering of detained noncitizens.

Thus overall, recourse to *Bivens* is not a viable option for detained noncitizens eager to challenge the conditions of their confinement.<sup>117</sup> In addition to having to base the claim in a violation of some constitutional right, the Supreme Court has also been extremely hesitant to grant the remedy for fear of opening up the floodgates to enormous amounts of litigation in the federal courts. While it may seem as though noncitizens have a perfectly viable option in *Bivens*, that is not the case, and some other method is needed for them to effectively challenge the deplorable conditions of their confinement.

## II. THE SOLUTION: THE ALIEN TORT STATUTE

While noncitizens have some constitutional means of protesting the duration and conditions of their detention, the remedy is imperfect and does not fully compensate detained immigrants forced to live in squalid, inhumane conditions for long periods of time with little or no access to their families and legal counsel. Recourse to international human rights law and the Alien Tort Statute in these conditions could prove to be a useful tool for these detained immigrants to receive recognition of their plight while also receiving compensation for their suffering. This Part will discuss a brief history of the Alien Tort Statute, the human rights norms that could sustain a claim, how that claim would be structured, and what obstacles might need to be overcome.

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115 *Id.*

116 *Id.* at 1851.

117 *See* *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that implied damages actions recognized in *Bivens* should not be extended to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons).

A. *The Alien Tort Statute: A Brief History*

The Alien Tort Statute (“ATS”), adopted by Congress in 1789 as part of the first Judiciary Act and codified at 28 U.S.C. § 1350, reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>118</sup> The statute remained in the shadows for over two hundred years<sup>119</sup> but was put in the spotlight in 1980 in *Filartiga v. Peña-Irala*,<sup>120</sup> a landmark decision that interpreted the statute to permit claims for modern human rights violations, opening the door for such litigation in U.S. courts.<sup>121</sup> In that case, a Paraguayan national was tortured to death by Peña-Irala, the Inspector General of Police in Asunción.<sup>122</sup> When Peña came to the United States, the victim’s sister and father filed suit, invoking the ATS and seeking damages.<sup>123</sup> The main issue litigated was whether a government’s torture of its own citizens constituted a “violation of the law of nations.”<sup>124</sup> The Second Circuit, in “[c]onstruing this rarely-invoked provision,” held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>125</sup> The court ruled that the ATS incorporated modern, evolving international law norms and closed with a ringing endorsement of the power of human rights norms:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. . . . Indeed, for purposes of civil liability, the torturer has become—like the pirate and slaver trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.<sup>126</sup>

The court in *Filartiga* essentially held that customary international law is federal common law, thus “instruct[ing] American courts that established norms of international human rights under customary in-

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118 28 U.S.C. § 1350 (2006).

119 William A. Fletcher, Judge, U.S. Court of Appeals for the Ninth Circuit, International Human Rights in American Courts, Ola B. Smith Lecture at the University of Virginia School of Law (Apr. 20, 2006), in 93 VA. L. REV. 653, 656 (2007).

120 630 F.2d 876 (2d Cir. 1980).

121 *Id.*

122 *Id.* at 878.

123 *Id.* at 878–79.

124 *Id.* at 880 (internal quotation marks omitted).

125 *Id.* at 878.

126 *Id.* at 890.

ternational law were binding on all American courts as federal common law.”<sup>127</sup> It declared that these established norms of international law may first “be ascertained by consulting the work of jurists . . . or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law,”<sup>128</sup> and then confirmed as “a settled rule of international law” by “the general assent of civilized nations” over many years.<sup>129</sup>

Later cases, following in *Filartiga*’s footsteps, often adopted its “passionate tone,” finding that the ATS covered a “small core of actionable human rights violations in addition to torture, including summary execution, disappearance, war crimes, crimes against humanity, slavery, and arbitrary detention.”<sup>130</sup>

However, it was not until 2004 in *Sosa v. Alvarez-Machain*<sup>131</sup> that the Supreme Court issued a definitive statement regarding the future of ATS litigation and its reliance upon international human rights norms. The case involved a civil lawsuit brought by Dr. Alvarez-Machain, a Mexican national, who alleged that he was abducted by Sosa at the behest of the U.S. Drug Enforcement Agency and forcibly brought into the United States to stand trial; he brought suit against Sosa, his abductor, along with the DEA and the United States government.<sup>132</sup> The Court began its opinion by clarifying that the ATS is a jurisdictional statute, enacted on the understanding that “the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability.”<sup>133</sup> The Court then went on to clarify specifically what kinds of violations of international law the statute covered, concluding that the “narrow class of international norms” actionable under the ATS are those “of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>134</sup> Thus, the Court, while affirming the validity and usefulness of ATS litigation, made sure to limit its use to a specified set of norms, those with definite content and widespread

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127 Fletcher, *supra* note 119, at 657.

128 *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. 153, 160–61 (1820)) (internal quotation marks omitted).

129 *Filartiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)) (internal quotation marks omitted).

130 Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOKLYN L. REV. 533, 537 (2004).

131 542 U.S. 692 (2004).

132 *Id.* at 697.

133 Stephens, *supra* note 130, at 546 (internal quotation marks omitted).

134 *Sosa*, 542 U.S. at 724–25, 729.

acceptance.<sup>135</sup> But, the Court continued on to state that “the door is still ajar subject to vigilant doorkeeping.”<sup>136</sup>

In its discussion of those norms it considered to be widely accepted and specifically defined, the Court conducted a review of the norm of arbitrary detention in response to Alvarez-Machain’s claims that his arrest violated international law because it “exceed[ed] positive authorization to detain under the domestic law of some government, regardless of the circumstances.”<sup>137</sup> The Court disagreed with his broad definition of arbitrary detention and instead set forth what appeared at first glance to be a damning analysis of what many in the global community considered to be a well-established and well-supported norm of international law: “It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>138</sup>

However, to interpret the Court’s proclamation in this case as undermining the status of the prohibition against arbitrary arrest and detention would be incongruous. The “physical security of persons against arrest and imprisonment without due process of law has long been considered a basic human right and a fundamental principle of liberal democracy”<sup>139</sup> and it is important to note that at no point did the Court “declare that the arrest and detention of Alvarez-Machain had been lawful, only that he had failed to prove that his treatment violated an international norm.”<sup>140</sup> Thus, it was not necessarily the case that the Court disapproved of the use of the norm against arbitrary detention as an anchor for ATS litigation but more that Alvarez-Machain’s individual situation did not meet the standard.<sup>141</sup>

As the door is still ajar, detained immigrants with both arbitrary detention and conditions of confinement claims should not shy away

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<sup>135</sup> Stephens, *supra* note 130, at 551.

<sup>136</sup> *Sosa*, 542 U.S. at 729.

<sup>137</sup> *Id.* at 736.

<sup>138</sup> *Id.* at 738.

<sup>139</sup> Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2279 (2004).

<sup>140</sup> *Id.* at 81 (2004).

<sup>141</sup> *See Sosa*, 542 U.S. at 737 (“Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority.”). From this it is obvious that the Court does not believe that the prohibition against arbitrary detention is not an established norm but just that in this particular situation, Alvarez-Machain’s treatment did not meet the high standard.

from asserting their claims in federal court, especially given the new wave of ATS litigation concerning suits against corporate defendants. As seen from the history of the use of the ATS, it is constantly changing and adapting to the needs of the people at the time, and given the recent public spotlight on the conditions faced by detained immigrants in U.S. detention facilities, it is highly plausible that the right ATS claim might just spur another revolution in the future of ATS litigation.<sup>142</sup>

*B. The Logistics of Bringing a Claim under the ATS*

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>143</sup> This statement regarding how all detained human beings should be treated asserts a standard that, sadly, the United States has failed to realize, necessitating the use of ATS claims based on this and other international human rights provisions on behalf of detained immigrants. In order to successfully argue a claim under the ATS protesting the conditions of confinement, a detained immigrant first needs to base the claim in either customary international law or a treaty of the United States. Prohibitions against cruel, inhuman, or degrading treatment can be found in The Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Torture Convention”).<sup>144</sup> While the United States is a party to both the ICCPR and the Torture Convention, its accession is subject to various reservations, understandings, and declarations.

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<sup>142</sup> See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) (holding that claims regarding non-consensual medical experimentation fall under the category of customary international law and can thus be used to base ATS jurisdiction).

<sup>143</sup> International Covenant on Civil and Political Rights, art. 10, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 176 [hereinafter ICCPR].

<sup>144</sup> See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) (stating the United Nation’s declaration of the equal and inalienable rights and fundamental freedoms of each human being); ICCPR, *supra* note 143, art. 7, at 175 (presenting the United Nations’ recognition of the equal and inalienable rights of the human family, founded in freedom, justice, and peace); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 113, 116 (1988); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment.”).

The United States' reservations to both the ICCPR and Torture Convention state that it is bound by the cruel, inhuman, or degrading treatment prohibitions only to the extent that those words mimic the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.<sup>145</sup> According to U.S. case law, cruel, inhuman, or degrading treatment occurs in civil detention only "when the alleged treatment constitutes 'punishment,'" a determination that is ultimately made by the fact-finder, such as a judge or jury.<sup>146</sup> Given the state of U.S. immigration detention centers and the fact that they have been described as akin to a prison environment, the problematic conditions can and often do constitute "punishment," thus violating the United States' obligations to refrain from inflicting cruel, inhuman, or degrading treatment on its detainees.<sup>147</sup>

But all of this is seemingly for naught given the United States' declaration that both the ICCPR and Torture Convention are non-self-executing, meaning that they do not create a private right of action absent express congressional legislation.<sup>148</sup> Thus, immigrant detainees cannot directly ground their ATS claims on United States treaty obligations under the ICCPR and Torture Convention, but that does not foreclose their option of using these treaty obligations as strong evidence of a customary international norm against cruel, inhuman, or degrading treatment. Significantly, the Court in *Sosa* recognized this as well, noting that while non-self-executing treaties are not independently enforceable, they may be used as evidence of binding customary international law.<sup>149</sup>

"[O]ver time, it is possible for state practice to create a legally binding rule in the form of customary international law . . . [which]

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145 See 138 CONG. REC. S4781 (daily ed. April 2, 1992) (statement of Sen. Claiborne Pell regarding Senate consideration of the International Covenant on Civil and Political Rights); 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (detailing the Senate's consent to the ratification of The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

146 Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT'L L. & DISPUTE RES. 270, 284 (2008) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

147 *Id.* at 285 (citation omitted) (internal quotation marks omitted).

148 See *Medellín v. Texas*, 552 U.S. 491, 505 (2008) ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.'").

149 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004).

once established, is universally binding.”<sup>150</sup> Generally, customary international law emerges if there is “consistent state practice coupled with *opinio juris*, a belief that such conduct is legally required.”<sup>151</sup> The Torture Convention defines cruel, inhuman, or degrading treatment as “acts which inflict mental or physical suffering, anguish, humiliation, fear, and debasement, which fall short of torture.”<sup>152</sup> When one looks to the sources of international law identified in *Sosa*, treaties, judicial decisions, the practice of governments, and the opinions of international scholars, “it is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment . . . actionable under the AT[S].”<sup>153</sup> The prohibition against cruel, unusual, or degrading treatment or punishment can be found in numerous restatements, declarations, conventions, and treaties.<sup>154</sup> It can also be found in regional human rights instruments and cases from the International Court of Justice, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples’ Rights.<sup>155</sup> The United States has specific international policy guidelines making it clear that abstention from cruel, inhuman, or degrading treatment or punishment is an expectation of other states

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150 Jeffrey Loan, Comment, *Sosa v. Alvarez-Machain: Extraterritorial Abduction and the Rights of Individuals Under International Law*, 12 ILSAJ. INT’L & COMP. L. 253, 267 (2005).

151 *Id.*

152 *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1285 n.1 (11th Cir. 2006) (Barkett, J., dissenting) (citing Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 101-30, 2d Sess. 13 (1990)).

153 *Aldana*, 452 F.3d at 1285 (Barkett, J., dissenting).

154 *See e.g.* Universal Declaration of Human Rights, *supra* note 144, art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); ICCPR, *supra* note 143, art. 7, at 175 (“No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 144, arts. 1, 16 (“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 1.”); American Convention on Human Rights, art. 5, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (“Every person has the right to have his physical, mental, and moral integrity respected”); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, G.A. Res. 3452 (XXX), U.N. Doc. A/10034 (Dec. 9, 1975) (“Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 144, § 702 (“A state violates international law if . . . it practices, encourages or condones . . . cruel, inhuman, or degrading treatment . . .”).

155 *Aldana*, 452 F.3d at 1286 (Barkett, J., dissenting).

and a settled global norm.<sup>156</sup> Finally, numerous U.S. courts have recognized that the prohibition against cruel, inhuman, or degrading treatment or punishment is a norm of customary international law.<sup>157</sup> Thus, there exists a global consensus regarding the status of the prohibition against cruel, inhuman, or degrading treatment as a well-established norm of international law.<sup>158</sup> This widespread evidence from sources both inside and outside the United States should definitely meet the stricter standard set forth in *Sosa* that the norm be “specific, universal, and obligatory.”<sup>159</sup>

### C. Potential Obstacles

Once a basis for jurisdiction under the ATS has been established, the next hurdle is overcoming sovereign immunity. The United States government generally enjoys sovereign immunity, which shields it from civil suits, unless that immunity is waived.<sup>160</sup> While it

<sup>156</sup> *Id.* (citing 7 U.S.C. § 1733(j) (2006), which prohibits agricultural commodities to countries that practice cruel, inhuman, or degrading treatment or punishment; 22 U.S.C. § 262d(a)(1) (2006), which states that U.S. policy is to channel international assistance away from countries that practice cruel, inhumane, or degrading treatment; 22 U.S.C. § 2151n (2006), which prohibits development assistance to countries that practice cruel, inhuman, or degrading treatment or punishment; and 22 U.S.C. § 2304 (2006), which prohibits security assistance to countries that practice cruel, inhuman, or degrading treatment or punishment).

<sup>157</sup> *See, e.g., Doe v. Qi*, 349 F. Supp. 2d 1258, 1321–22 (N.D. Cal. 2004) (holding that cruel, inhuman, or degrading treatment or punishment has been condemned by numerous sources of international law and that conduct that meets its exacting standards may be punishable under the ATCA); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002) (“That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that . . . the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct.”); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at \*8 (S.D.N.Y. Feb. 28, 2002) (finding that cruel, inhuman, or degrading treatment or punishment is actionable under the ATCA).

<sup>158</sup> Currently, the ICCPR has 167 nations that are parties to it, *see International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (last visited Oct. 22, 2011), and the Torture Convention has 149 nations that are parties to it, *see Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (last visited Oct. 22, 2011).

<sup>159</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

<sup>160</sup> *See Gray v. Bell*, 712 F.2d 490, 493 (D.C. Cir. 1983) (affirming that “the United States is protected by the reservation of sovereign immunity in the ‘discretionary function’ exception to the Federal Tort Claims Act”).

has been argued that suits under the ATS would not be successful for achieving redress for aliens subjected to human rights abuses, this might not be the case. The argument disfavoring reliance on the ATS is that it “does not independently waive U.S. sovereign immunity.” Since the ATS is “jurisdictional and only creates a mechanism for enforcing international law, it does not, in itself, create a private cause of action.”<sup>161</sup> This argument is counterintuitive though, especially given that the primary purpose of the ATS is to “challenge state action that has allegedly violated international human rights.”<sup>162</sup> Courts should not recognize a government’s assertion of sovereign immunity in situations where grave human rights abuses have been reported. Sovereign immunity “is limited in international law by obligations called *erga omnes*, which are owed to the international community rather than to any particular state.”<sup>163</sup>

The Supreme Court echoed these sentiments, albeit indirectly, in *Rasul v. Bush*, holding that “courts of the United States have traditionally been open to nonresident aliens”<sup>164</sup> and that the ATS “explicitly confers the privilege of suing for an actionable tort.”<sup>165</sup> Thus, the Court remanded the case to the U.S. District Court for the District of Columbia to consider the merits of the petitioners’ ATS claims regarding their indefinite detention, implying that the District Court’s initial refusal to hear these claims because they were barred by sovereign immunity was incorrect.<sup>166</sup>

An additional development in the field of ATS litigation that will ease the problem of overcoming federal sovereign immunity is the rise of ATS litigation involving corporations and private government contractors. This is significant because a large number of immigration detention centers are privately run. In *Jama v. INS*, various foreign nationals and refugees filed a complaint against Esmor Correctional Services (now Correctional Services Corporation), a private detention center under contract with the U.S. Immigration and Naturalization Service (“INS”).<sup>167</sup> Plaintiffs brought suit against the INS, INS officials in their individual capacities, Esmor Correctional Servic-

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161 Ellison, *supra* note 70, at 24.

162 Irena Nikolic, Comment, *The Viability of Guantánamo Bay Detainees’ Alien Tort Statute Claims Seeking Damages for Violations of the International Law Against Arbitrary Detention*, 37 SETON HALL L. REV. 893, 921 (2007).

163 *Id.* at 925 (citing Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. OF INT’L L. 237, 271 (1999)).

164 542 U.S. 466, 484 (2004).

165 *Id.* at 485.

166 *Id.*

167 *Jama v. INS*, 343 F. Supp. 2d 338, 345 (D.N.J. 2004).

es as a corporation, and Esmor guards in their individual capacities, and the court held that while the INS was protected by foreign sovereign immunity,<sup>168</sup> the INS officials, Esmor the corporation, and the Esmor guards were not entitled to the protections of sovereign immunity.<sup>169</sup>

The court explicitly held that “Esmor was clearly a contractor with the United States” and could not “be held to be employees of the government insulated from liability” because “Esmor and its employees in fact ran the Facility” without much effective control asserted by the INS.<sup>170</sup> From here it becomes clear that detained noncitizens could potentially bring effective claims for relief against corrections officers and the correctional corporations they work for as sovereign immunity does not seem to extend to them. In *Jama*, Esmor tried to assert immunity by claiming a government contractor defense, but the court struck that down as well, holding that “[i]n the case of the INS . . . there is no federal statute expressly authorizing it to contract with private companies to provide detention facilities for aliens.”<sup>171</sup>

The federal contractor defense originated in *Boyle v. United Technologies Corp.*,<sup>172</sup> where “the Court found that state tort law significantly conflicted with and had to give way to ‘uniquely federal interests’” and that “[d]isplacement will occur only where . . . a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law’ or [where] the application of state law would ‘frustrate specific objectives’ of federal legislation.”<sup>173</sup> In situations where courts are balancing the government contractor defense against the ATS, the protection of the “uniquely federal interest” in a U.S. statute seemingly outweighs a government contractor’s sovereign immunity defense, especially since most human rights abuses alleged by ATS plaintiffs will presumably violate official U.S. policies as well.<sup>174</sup>

Lastly, a rather novel argument that Guantanamo detainees have started to use to circumvent the government’s sovereign immunity defense that might prove useful to noncitizens detained in immigration facilities within the United States is reference to the Administra-

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168 *Id.* at 349 (citing the court’s prior opinion in the same case, *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998)).

169 *Id.* (citing the court’s prior opinion in the same case, *Jama*, 22 F. Supp. 2d at 365).

170 *Id.* at 357.

171 *Id.* at 356.

172 487 U.S. 500, 504 (1988).

173 Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1485 (2009) (citing *Boyle*, 487 U.S. at 504, 507).

174 Lam, *supra* note 173, at 1486–87.

tive Procedure Act (“APA”).<sup>175</sup> Detainees have asserted, in response to the claim that the ATS does not itself waive sovereign immunity, that the APA does by providing for judicial review for “any person suffering legal wrong because of agency action . . . [and] seeking relief other than money damages.”<sup>176</sup> Petitioners in *In re Guantanamo Detainee Cases*<sup>177</sup> did in fact argue that violations of the ATS constituted such “legal wrongs” and sought injunctive relief and acknowledgment that “the conditions of their confinement violate[d] customary international law and international treaties prohibiting prolonged . . . detention.”<sup>178</sup>

The APA might prove to be a viable solution at getting around the sovereign immunity defense because it provides a presumption that agency action is reviewable absent express statutory preclusion or explicit and exclusive delegation to the discretion of the agency by law.<sup>179</sup> It also mandates review of an agency where there is “no other adequate remedy in a court.”<sup>180</sup> Consequently, if noncitizens are able to establish that ICE is an agency within the meaning of the APA, they can then argue that ICE’s actions with respect to their confinement is subject to judicial review because they have no other remedy in court. This method would potentially allow noncitizens detained in immigration detention centers to present their claims based on violations of international human rights law in United States federal courts.

#### CONCLUSION

The Supreme Court’s landmark decision in *Sosa* spurred a veritable revolution in the use of ATS litigation to address new and novel human rights abuses. With both the ATS and a little imaginative lawyering, detained immigrants protesting conditions of confinement based on the customary international norm against cruel, inhuman, and degrading treatment have a high probability of being heard and compensated. At this point, conditions in immigration detention centers are deplorable and perhaps reminding the courts that nonci-

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175 Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2006).

176 *See id.* at § 702; *see also* *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207–08 (D.C. Cir. 1985) (acknowledging that the APA may waive sovereign immunity under the ATS).

177 355 F. Supp. 2d 443 (D.D.C. 2005).

178 Petitioners’ Memorandum in Opposition to Respondents’ Motion to Dismiss at 45, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (No. 04-CV-1166).

179 *See* *Von Clemm v. Banuelos*, 365 F. Supp. 477, 481 (D. Mass. 1973), *aff’d* 498 F.2d 163 (1st Cir. 1974).

180 5 U.S.C. § 704 (2006) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

tizen detainees are human beings deserving of respect, dignity, and fair treatment will help further their cause and achieve immigration detention reform. This is especially true today as there exists individuals and groups who would like to further inhibit the natural and inviolable rights due to all human beings, legal or not.<sup>181</sup>

In September 2008, ICE formulated forty-one new performance-based detention standards, which were to take full effect in all detention facilities in January 2010.<sup>182</sup> The standards are broken down into categories such as “safety,” “security,” “order,” and “care.”<sup>183</sup> They include provisions that are aimed to address some of the biggest problems in detention centers, like access to medical care.<sup>184</sup> However, while implementing these measures is a step in the right direction, the standards are still only guidelines and are not legally enforceable. Additionally, while there exists pending legislation to rectify the sad state of immigration detention centers,<sup>185</sup> until this legislation is ac-

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181 See Keep Our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011), available at <http://judiciary.house.gov/news/pdfs/Keep%20Our%20Communities%20Safe.pdf>; see also *Oppose H.R. 1932: Prolonged and Indefinite Detention*, ACLU, [http://www.aclu.org/files/assets/hr\\_1932\\_issue\\_brief\\_final.pdf](http://www.aclu.org/files/assets/hr_1932_issue_brief_final.pdf) (last updated Aug. 2, 2011); Chris Rickerd, *Expanded Immigration Detention: Locking Up Those Yearning to Breathe Free*, HUFFINGTON POST, Nov. 1, 2011, [http://www.huffingtonpost.com/end-ice-abuse/expanded-immigration-dete\\_b\\_1067254.html](http://www.huffingtonpost.com/end-ice-abuse/expanded-immigration-dete_b_1067254.html), for a description of the proposed legislation, introduced by Rep. Lamar Smith (R-Texas). The bill would authorize the prolonged, indefinite detention of immigrants by allowing DHS to detain individuals without a bond hearing before an immigration judge while they wait for a final resolution in their cases (which can often take years) and allowing the indefinite detention, potentially for life, of those who have been ordered removed but cannot be deported. *Id.* This proposed bill would directly impinge upon the due process rights of immigrants and directly contravene what the Supreme Court held in *Zadvydas v. Davis*.

182 Press Release, U.S. Immigration & Customs Enforcement, ICE Announces New Performance-Based National Detention Standards for All ICE Detention Facilities (Sep. 12, 2008), <http://www.ice.gov/news/releases/0809/080912washington.htm>.

183 *2008 Operations Manual ICE Performance Based National Detention Standards (PBNDs)*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/detention-standards/2008/> (last visited Oct. 23, 2011).

184 See *id.*; see also *ICE/DRO Detention Standard: Medical Care*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, [http://www.ice.gov/doclib/dro/detention-standards/pdf/medical\\_care.pdf](http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf) (last visited Oct. 23, 2011) (“This Detention Standard ensures that detainees have access to emergent, urgent, or non-emergent medical, dental, and mental health care that are within the scope of services provided by the DIHS, so that their health care needs are met in a timely and efficient manner.”).

185 Maryam N. Mohamed, *Legislation to Regulate Immigration Detention System Introduced: Bills Will Protect U.S. Citizens from Unlawful Detention and Ensure Due Process Rights to Detainees*, 24 GEO. IMMIGR. L.J. 107, 107 (2009) (“The Strong STANDARDS (Strong Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System) Act sets minimum detention standards and requires the Secretary of Homeland Security to ensure that laws concerning the treatment of detainees are properly enforced.” (citing Strong STANDARDS Act, S. 1550, 111th Cong. (2009))).

tually passed, detained noncitizens must have some other means of vindicating their rights.

What noncitizens need now is an effective and legally enforceable means to assert their internationally recognized right to be free from cruel, inhuman, and degrading treatment. This Comment has demonstrated how litigation under the ATS has the ability to achieve for noncitizens detained in deplorable conditions a recognition of their rights and remuneration for any harms suffered. The state of immigration detention in this country needs to change, and using the ATS to hold the United States government accountable for its actions is a first step in the right direction.

