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Joseph Margulies

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## WHY THE HUBBUB ABOUT HABEAS?: A POST-MORTEM ON A FAILED POLICY

Joseph Margulies<sup>†</sup>

### *3. What are the lessons from detaining non-U.S. citizens, labeled enemy combatants, at Gitmo?*

Recently, I had occasion to speak at an event sponsored by the Chicago Humanities Festival, an annual celebration of the arts and letters with public lectures and performances at sites around the city. The theme was, "Thinking Big." The organizers asked me to talk about habeas corpus, which they apparently believed was a topic that lent itself to Big Thoughts. I agreed, but fully expected that whatever thoughts I had—big or small—would be shared with just a few. It was, after all, habeas. So I thought the organizers were out of their minds when they scheduled the event at a 700-seat auditorium on the campus of Northwestern University Law School, where I teach.

Naturally, consistent with my long success in public prognostications, the hall was filled to overflowing. I never expected that Internet thing would catch on either.

The turnout forces us to ask why habeas has become a matter of such public concern. I take it as a given it is not the Great Writ of Liberty in itself that attracts so much attention. As much as I would like to believe otherwise, I find it improbable that the American public has suddenly developed an intense and abiding interest in King John at Runnymede. Obviously, the curiosity comes from the more recent and unaccustomed prominence of habeas in our great national debate. And since the most visible and controversial use of habeas these past seven years has been in challenges to the Bush administration's post-9/11 detention policy, and in particular to its imprisonment of foreign nationals at

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<sup>†</sup> Clinical Associate Professor, Northwestern University School of Law. Thanks to Muneer Ahmad for helpful suggestions on an earlier draft of this essay, and to Brian Carter-Stiglitz for his research assistance.

Guantanamo, the showing on a splendid Chicago Saturday makes us ask what it is about the policy that generates so much *sturm und drang*?

I have never been much impressed with the usual explanations. It can't be the numbers. As I write this in early 2009, approximately 250 men remain at Guantanamo—a substantial population, but significantly fewer than, for instance, death row in Texas. In fact, in the modern era alone, Texas *has executed* almost twice as many people as Guantanamo now holds.<sup>1</sup> In total, the prison has housed about 780 men and boys (the numbers are vague because the Department of Defense only releases estimates), which is somewhat larger than death row in California. The death penalty is a contentious issue in Illinois, where as many people have been exonerated as executed, but it is hard to imagine an overflow crowd at a lecture about current issues in capital punishment.

Nor can it be the conditions, which I have written about before.<sup>2</sup> Though deplorable, even the most oppressive unit at Guantanamo is modeled after super-maximum security facilities in the United States. Thousands of prisoners, most of whom are American citizens, spend years under comparable conditions, and I doubt very seriously that a public lecture on prison conditions in this country would attract much discussion, though it undeniably should.

Nor can we attribute the outpouring to the fact that the prisoners at Guantanamo, unlike prisoners on death row or in maximum security facilities in the United States, have not been charged, tried, or convicted of any wrongdoing. On any given day, tens of thousands of aliens are held without criminal charge in jails and detention centers all across the land,<sup>3</sup> often for months

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1. The modern era in capital punishment began in 1976 when the Supreme Court upheld the constitutionality of three capital statutes written in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972). See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Information on executions comes from the Death Penalty Information Center, <http://deathpenaltyinfo.org/state/> (last visited Mar. 31, 2009). For the names and numbers of prisoners who are or who have been at Guantanamo, see The Guantánamo Docket, <http://projects.nytimes.com/guantanamo> (last visited Mar. 31, 2009).

2. See JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (Simon & Schuster 2006).

3. See 2008 OFF. IMMIGR. STAT. ANN. REP. 1, 4, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_06.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf) ("ICE detained a total of 256,842 aliens during 2006. The average daily

unending, and sometimes for years.<sup>4</sup> This practice, routine in immigration cases, has never particularly distressed the American public.

Another possible explanation for America's focus on Guantanamo may be the interrogation techniques that for a time flourished at the prison. Certainly they were outrageous, and have provoked a well-earned criticism.<sup>5</sup> Yet the abuses at Guantanamo, though scandalous, never reached the levels we saw at the Abu Ghraib Prison in Iraq or Bagram Air Base in Afghanistan. Perhaps more to the point, whatever Guantanamo interrogators may have done is a matter that ended long ago, since the Department of Defense is no longer interrogating prisoners at the facility. But interest in the prison did not abate when the interrogations stopped; on the contrary, it seemed to grow only more intense. And finally, the public seems studiously indifferent to the fact that far worse abuses have taken place for years at police stations across the country.<sup>6</sup>

And yet for some reason, interest in the Bush administration's detention policy, and in Guantanamo as its most visible embodiment, is curiously high, and not merely among civic-minded

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detention population was approximately 21,450.”).

4. The Special Rapporteur, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Human Rights of Migrants, Mission to the United States of America*, ¶ 30, delivered to the Human Rights Counsel and the General Assembly, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008), available at [http://www.aclu.org/pdfs/immigrants/sr\\_bustamante\\_report.pdf](http://www.aclu.org/pdfs/immigrants/sr_bustamante_report.pdf) (“ICE reported an average stay of 38 days for all migrant detainees in 2003. Asylum-seekers granted refugee status spend an average of 10 months in detention, with the longest period in one case being three and a half years.”).

5. See, e.g., SENATE ARMED SERVICES COMM. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, EXECUTIVE SUMMARY (2008), available at [http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS\\_For%20Release\\_12%20December%202008.pdf](http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf); MARGULIES, *supra* note 2, at 85–88.

6. See *Patterson v. Burge*, 328 F. Supp. 2d 878 (N.D. Ill. 2004); Gretchen Ruethling, *National Briefing, Midwest: Illinois: Police Torture Accusations*, N.Y. TIMES, Aug. 30, 2005, at A15; HUMAN RIGHTS PROGRAM, HUMAN RIGHTS AT HOME: THE CHICAGO POLICE TORTURE ARCHIVE, SUMMARY OF EVIDENCE OF *MONELL* POLICY AND PRACTICE OF TORTURE AND COVER-UP, AND OF THE DEFENDANTS MARTIN'S, SHINE'S, NEEDHAM'S, AND HILLARD'S INVOLVEMENT, <http://humanrights.uchicago.edu/chicagotorture/SummaryofEvidence.pdf>; see also *People v. Orange*, 749 N.E.2d 932 (Ill. 2001); *People v. Patterson*, 735 N.E.2d 616 (Ill. 2000); *People v. Anderson*, 874 N.E.2d 277 (Ill. App. Ct. 2007).

Chicagoans. The bookshelves groan under the growing weight of titles that criticize every aspect of the policy, and Jane Mayer's recent book, *The Dark Side*, a *New York Times* bestseller, was shortlisted for the National Book Award.<sup>7</sup> Academics and pundits have been nearly unanimous in their denunciations, attacking detention without legal process, the suspension of habeas corpus, and the use of coercive or "enhanced" interrogation techniques.<sup>8</sup> Non-governmental organizations have rained down a relentless criticism. Libertarian and conservative think tanks like CATO and the Rutherford Institute, bi-partisan organizations like the Constitution Project, a veritable army of liberal policy centers, and a broad coalition of religious and military groups have consistently inveighed against the policy.<sup>9</sup> Professional associations like the

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7. Deborah P. Jacobs, *Down a Dark Road*, THE BOSTON GLOBE, Dec. 9, 2008, at G3.

8. See, e.g., Mario L. Barnes & F. Greg Bowman, *The Uses and Abuses of Executive Power: Entering Unprecedented Terrain; Charting A Method to Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365 (2008); David Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2543-44 (2007); Brian J. Foley, *Criminal Law: Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009 (2007); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (2007); Derek Gregory, *The Black Flag: Guantanamo Bay and the Space of Exception*, 88 GEOGRAFISKA ANNALER SERIES B: HUM. GEOGRAPHY 405 (2006); Stephen Soldz, *Healers or Interrogators: Psychology and the United States Torture Regime*, 18 PSYCHOANALYTIC DIALOGUES 592 (2008); Jennifer Van Bergen & Douglas Valentine, "Torture and the War on Terror": *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449 (2006); Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 154-55 (2004); Daniel R. Williams, *After the Gold Rush—Part II: Hamdi, The Jury Trial, and Our Degraded Public Sphere*, 113 PENN ST. L. REV. 55 (2008); Richard J. Wilson, *Defending the Detainees at Guantanamo Bay*, 12 HUM. RTS. BRIEF 1 (2005); Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, OCT. 10, 2003, at A1; Edward T. Pound, *A House of Horrors, Revealed*, U.S. NEWS & WORLD REP., Sept. 6, 2004, at 45; Gabor Rona, "War" *Doesn't Justify Guantanamo*, FIN. TIMES, Mar. 1, 2004, at 17, [http://search.ft.com/ftArticle?queryText=gabor+rona&y=15&x=33&id=040229002897&ct=0&encklick\\_check=1](http://search.ft.com/ftArticle?queryText=gabor+rona&y=15&x=33&id=040229002897&ct=0&encklick_check=1); Evan Thomas et al., *The Debate Over Torture: Right After 9/11, Cheney Said, "We Have to Work . . . the Dark Side If You Will,"* NEWSWEEK, Nov. 21, 2005, at 30; Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER, Dec. 4, 2006, at 46; Marty Lederman, *The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, Executive Authority, DOJ and OLC*, BALKINIZATION, <http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html> (July 8, 2007, 08:30 EST).

9. See, e.g., James Bovard, *Breaking Bush's Resistance: A Pending Court Case Could Expose the Administration's Torture Regime*, AM. CONSERVATIVE, July 30, 2007, at 25, available at <http://www.amconmag.com/article/2007/jul/30/00025>; AM. CIVIL

ABA and the American Psychological Association have taken official positions against one or more aspects of the policy. And, of course, it should come as no surprise that condemnation abroad has been well nigh universal.<sup>10</sup>

Nor is this interest confined to popular culture. At a gathering at the University of Georgia in March 2008, five former Secretaries of State—Henry Kissinger, James Baker, Warren Christopher, Madeleine Albright, and Colin Powell—agreed that the next President should move quickly to close the prison. Baker, who served under the first President Bush, said Guantanamo “gives us a very, very bad name, not just internationally.” “I have a great deal

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LIBERTIES UNION, COALITION LETTER SUPPORTING END TO TORTURE AND CHANGES IN INTERROGATION AND DETENTION POLICY (2009), [http://www.aclu.org/images/torture/asset\\_upload\\_file718\\_38484.pdf](http://www.aclu.org/images/torture/asset_upload_file718_38484.pdf); AMNESTY INT’L, FRAMEWORK: END ILLEGAL U.S. DETENTIONS (2007), <http://www.amnesty.org/en/library/asset/AMR51/167/2007/en/69dcf709-aa4b-11dc-a783-95b6ae9ecbe6/amr511672007eng.pdf>; GENE HEALY & TIMOTHY LYNCH, CATO INSTITUTE, POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH (2006), [http://www.cato.org/pubs/wtpapers/powersurge\\_healy\\_lynch.pdf](http://www.cato.org/pubs/wtpapers/powersurge_healy_lynch.pdf); Robert E. Hunter & William H. Taft, IV, *U.S. Should Restore Rights to Detainees*, THE CONSTITUTION PROJECT, July 10, 2007, [http://www.constitutionproject.org/pdf/Hunter-Taft\\_Commentary\\_Rights\\_For\\_Detainees1.pdf](http://www.constitutionproject.org/pdf/Hunter-Taft_Commentary_Rights_For_Detainees1.pdf); Press Release, Nat’l Lawyers Guild, National Lawyers Guild Calls for Closure of Concentration Camp at Guantanamo Bay, Cuba, <http://nlg.org/news/statements/guantanamo.htm> (last visited Mar. 31, 2009); PEOPLE FOR THE AM. WAY FOUND., UNDERMINING THE BILL OF RIGHTS: THE BUSH ADMINISTRATION DETENTION POLICY (2004), <http://67.192.238.59/multimedia/pdf/Reports/underminingthebillofrights.pdf>; September Eleventh Families for Peaceful Tomorrows, Peaceful Tomorrows Campaign to Close Guantanamo, <http://www.peacefultomorrow.org/article.php?id=916>; Unitarian Universalist Association of Congregations, Civil Liberties: 2004 Statement of Conscience, <http://www.uua.org/socialjustice/socialjustice/statements/13422.shtml>; Tim Wheeler, *Growing Movement Assails Bush Torture Policy*, PEOPLE’S WKLY. WORLD, May 20, 2006, <http://www.pww.org/article/articleview/9149/>; John W. Whitehead, *The Constitution Is the Issue*, THE RUTHERFORD INST., Sept. 12, 2008, [http://www.rutherford.org/articles\\_db/commentary.asp?record\\_id=552](http://www.rutherford.org/articles_db/commentary.asp?record_id=552).

10. See, e.g., Thomas Friedman, *Just Shut It Down*, N.Y. TIMES, May 27, 2005, at A23; Luke Harding, *CIA’s Secret Jails Open Up New Transatlantic Rift: Hundreds of Flights Landed in Germany over 2 Years: Seizure of Innocent People Likely to Embarrass Rice*, THE GUARDIAN, Dec. 5, 2005, at 14; *Euro MPs Urge Guantanamo Closure*, BBC NEWS, June 13, 2006, <http://news.bbc.co.uk/2/hi/americas/5074216.stm>; *Close Guantanamo Camp, Hain Says*, BBC NEWS, Feb. 17, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4722408.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4722408.stm); *Merkel: Guantanamo Mustn’t Exist in Long Term*, SPIEGEL ONLINE, Jan. 9, 2006, <http://www.spiegel.de/international/0,1518,394180,00.html>.

of difficulty," he added, "understanding how we can hold someone, pick someone up, . . . and hold them without ever giving them an opportunity to appear before a magistrate." Powell hoped the new President would close Guantanamo "immediately."<sup>11</sup>

The various branches of the federal government have not been absent from this national conversation. Congress, though it joined the fracas late (as is its wont), has of late been unsparing in its criticism.<sup>12</sup> The Supreme Court, which in our legalistic society both reflects and shapes national sentiment, has addressed matters at Guantanamo on three occasions, each time ruling against the Bush administration.<sup>13</sup> In the closing months of the former administration, the most important senior officials in the Bush White House announced that Guantanamo should be closed, including Secretary of State Rice and Secretary of Defense Gates. Even President Bush said he wanted to shutter the island prison.<sup>14</sup>

Befitting this level of interest, Guantanamo and the detention policy became a heated campaign issue. Both Senators McCain and Obama promised they would close the camp. Prior to his inauguration, the President-Elect repeated this commitment, and on his second day in office, President Obama made good on his campaign pledge and ordered Guantanamo shut within a year. Noting the "significant concerns" raised by the facility, "both within the United States and internationally," Obama determined it "would further the national security and foreign policy interests of

11. David E. Sanger, *Restoring a Constitutional Balance*, N.Y. TIMES, July 14, 2006, at A15.

12. See, e.g., 155 CONG. REC. S779 (daily ed. Jan. 22, 2009) (statement of Sen. Dodd); 153 CONG. REC. H7080-05 (daily ed. June 26, 2007) (statement of Rep. Moran); 153 CONG. REC. E979-05 (daily ed. May 8, 2007) (speech of Rep. Harman); 152 CONG. REC. S7290-04 (daily ed. July 11, 2006) (statement of Sen. Durbin); 152 CONG. REC. S6047 (daily ed. June 19, 2006) (statement of Sen. Bingaman); Renee Schoof, *Congress Letter to Bush: Close Guantanamo*, MCCLATCHY, June 29, 2007, <http://mcclatchydc.com/100/story/17486.html>; Posting of Sen. Diane Feinstein to the Hill, <http://thehill.com/letters/setting-acceptable-conditions-for-military-detentions-trials-2007-06-28.html> (June 28, 2007, 06:55 EST).

13. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

14. Vice President Cheney, it should be noted, apparently thought otherwise and continues to believe the base should remain open. See *CBS Evening News: Gitmo Controversy Pitted Bush vs. Cheney* (CBS television broadcast Feb. 5, 2009), available at <http://www.cbsnews.com/stories/2009/02/05/eveningnews/main4778641.shtml>.

the United States and the interests of justice” to close the base.<sup>15</sup>

So we have a paradox: A prison breathlessly denounced as “the gulag of our times,” and “the most infamous prison in the world,” a facility that has attracted unprecedented national and international attention, apparently consists of parts that, in any other context, would be waived off as practically prosaic. What accounts for this?

We should approach the question with some urgency, and not simply because the baton has finally been passed to a new administration. During the recently completed campaign, some segments of the population struck an ominous tone. Well-intended patriots reminded us once again of what it means to be truly American. Nothing new here. Throughout our history, a not insignificant number of people have professed to know what it takes to be a good American, who among us may rightly claim that condition, and what to do with those who cannot.<sup>16</sup>

These sentiments surface in troublous times. Not long after 9/11, a *TIME/CNN* poll found that nearly one-third of respondents favored allowing the Government “to hold Arabs who are U.S. citizens in camps until it can be determined whether they have links to terrorist organizations.” In a *Newsweek* poll taken about the same time, a slightly higher percentage thought it was a perfectly sound idea to “put Arabs and Arab-Americans in this country under special surveillance,” even though the question was specifically worded to remind respondents of the internment of Japanese and Japanese-Americans during the Second World War. And an ABC News/*Washington Post* poll taken a month after 9/11 found that nearly half the respondents supported giving the police the discretionary power to stop anyone “who appears to be Arab or

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15. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). President Obama also ordered the CIA to close and not reopen its black sites and to conform its interrogations to the Army Field Manual. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009); see also *Australia Says It May Accept Guantanamo Bay Detainees*, N.Y. TIMES, Dec. 27, 2008, at A7; James Risen, *The Executive Power Awaiting the Next President*, N.Y. TIMES, June 22, 2008, at 4.

16. For discussions of earlier experiences with Americanism, see, e.g., DAVID H. BENNETT, *THE PARTY OF FEAR: THE AMERICAN FAR RIGHT FROM NATIVISM TO THE MILITIA MOVEMENT* (1995); ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1967); JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1987); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (2002); ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920* (1964); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998); GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).



Muslim.”<sup>17</sup>

Polling data like this should come as no surprise. In late July and early August 1950, roughly a month after Truman dispatched the first troops to Korea and only five years after the Japanese internment camps emptied, a Gallup poll asked what “should be done about members of the Communist Party in the United States” in the event of war with Russia. Forty percent said they should be interned or imprisoned and nearly 30% said they should be exiled or sent to Russia. Thirteen percent said they should be shot or hanged. Only 1% said they should be left alone because everyone is entitled to freedom of thought.<sup>18</sup> At moments like this, nationalism becomes the Jekyll to patriotism’s Hyde.

And it is worth recalling that widespread enthusiasm for a muscular response to 9/11 was not confined to support for internment or invigorated police powers. In an interview with Tim Russert on *Meet the Press* five days after the attacks, Vice President Cheney famously predicted that the war might lead the Government “to the dark side” in its dealings with prisoners.<sup>19</sup> Six weeks later, Harvard Law Professor Alan Dershowitz published a controversial piece in the *Los Angeles Times* advocating the use of “torture warrant[s]” against suspected terrorists. He later suggested that in the so-called “ticking time bomb” scenario, interrogators should be allowed to insert a sterilized needle under a prisoner’s fingernails.<sup>20</sup>

During the same period, “Arab, Muslim, and South Asian communities in the United States experienced a wave of violence far greater in magnitude than they had ever experienced before.”<sup>21</sup> In eight weeks, these sections of society reported over 1000 separate bias incidents, including as many as nineteen murders. Mosques, temples, and gurdwaras were fire bombed, innocent men

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17. This and other polling data regarding the reaction to 9/11 appears in Deborah Schildkraut, *The More Things Change . . . American Identity and Mass and Elite Responses to 9/11*, 23 POL. PSYCHOL. 511, 525–26 (2002).

18. The data is collected in JOHN KENNETH WHITE, STILL SEEING RED: HOW THE COLD WAR SHAPES THE NEW AMERICAN POLITICS 69 (1998). The percentages are modestly inflated because some respondents gave more than one answer.

19. *Meet the Press with Tim Russert*, (NBC television broadcast Sept. 16, 2001).

20. Alan M. Dershowitz, *Is There a Torturous Road to Justice*, L.A. TIMES, Nov. 8, 2001, at B19; *CNN Access: Dershowitz: Torture Could Be Justified* (CNN television broadcast Mar. 3, 2003).

21. Muneer I. Ahmed, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265–66 (2004).

and women were assaulted, homes were vandalized, and property destroyed. Then there were the “innumerable instances of verbal harassment and intimidation.”<sup>22</sup>

History does not allow us the luxury of ignoring these incidents. In February 1919, a jury in Hammond, Indiana, acquitted the killer of an alien who proclaimed, “To Hell with the United States.” The jury deliberated two minutes. In May of the same year, a man refused to stand for the National Anthem at an event in Washington, D.C. At the end of the song, an enraged sailor shot him in the back. The assembled crowd cheered lustily. In early 1920, a salesman in Waterbury, Connecticut was sentenced to six months in jail for telling one of his customers that he thought Lenin was “one of the brainiest” political leaders in the world.<sup>23</sup> Every period of immense social strain has contributed its cautionary examples for our study and enlightenment. From this spring has flowed great suffering.

Yes, this is an old story, older than the Republic. It is part of a timeless pattern of American thought. Agents of a hostile government or foreign ideology have combined to form a new and unprecedented threat to our democratic institutions and national security. At any moment in American history, a small but vocal fraction of the public is gripped by this mindset, trapped in the misguided but firmly held belief that the Nation is at risk of imminent demise. For these people, America is under siege. Her institutions are threatened, her way of life imperiled. Unless Americans awake to the wolf at the door, the end is near. The Illuminati in the eighteenth century; the Masons, Mormons, and Catholics in the nineteenth; the Jews, Anarchists, Japanese, and Communists in the twentieth; Arabs and Muslims in the twenty-first—the demon changes but the essential process of demonization does not.<sup>24</sup>

For much of U.S. history, the relatively small numbers of adherents to this apocalyptic worldview have insured their limited

22. *Id.* at 1266.

23. Stanley Cohen, *A Study in Nativism: The American Red Scare of 1919–20*, 79 *POL. SCI. Q.* 52, 52 (1964); see also MURRAY, *supra* note 16.

24. For a discussion of earlier episodes, see, e.g., *CONSPIRACY: THE FEAR OF SUBVERSION IN AMERICAN HISTORY* (Richard O. Curry & Thomas M. Brown eds., 1972); *THE FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT* (David Brion Davis ed., 1971); Richard Hofstadter, *The Paranoid Style in American Politics*, *HARPER'S MAG.*, Nov. 1964, at 77. See also *supra* note 16 and accompanying text.

influence, both on public debate and national policy, and their voices—overwrought and intolerant—are usually heard only by those most inclined to listen. But during periods of social or economic upheaval, when it seems the world has shifted beneath our feet and our settled hopes for the future have been dashed, as when war clouds our visage or when long-held values have suddenly been cast in doubt, these voices gain a wider audience.<sup>25</sup>

This phenomenon—a complex social and psychological process that I can only hint at here—captures one recurring conversation in American culture. And there are moments when it is the dominant conversation. There is no point in pronouncing it “un-American.” It is a fact of our history, a pattern of American thought. The particulars change, of course. It is impossible to imagine a return of the Know Nothing Party of the 1840s, with its virulent anti-Catholicism, and I would like to believe that Father Charles Coughlin’s prewar anti-Semitic harangues could no longer command a weekly radio audience of three million. But the people at Governor Palin’s rallies who chanted, “John McCain! Not Hussein!,” the racists who insisted darkly that former Senator Obama was Muslim (as though that mattered), and the poor, misguided woman at the McCain rally in Lakeville, Minnesota, who said she could not trust Obama because he was “an Arab”—they are the heirs of this cultural legacy, simply the most current speakers in a long-running American conversation.<sup>26</sup>

But if it is important to acknowledge the power and endurance of this impulse, it is equally important to note how remote and distant it is from the dominant and pervasive image most Americans hold of themselves and their country. The intolerance

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25. I do not mean to suggest an excessive rigidity to this process. The size and relative diversity of the American population, combined with a long and legally protected tradition of airing public grievances, guarantees a great richness of views on nearly any topic of social significance. Any attempt at categorization risks imposing an artificial order that elides differences and obscures nuance. Yet American thought is not simply a muddle, and there are undeniably periods when one set of views will come to predominate, sometimes overwhelmingly so.

26. See, e.g., Elisabeth Bumiller, *McCain Draws Line on Attacks as Crowds Cry “Fight Back,”* N.Y. TIMES, Oct. 11, 2008, at A12 (“Crowds in Wisconsin and Pennsylvania have repeatedly booed Mr. Obama and yelled ‘off with his head,’ . . . .”); Jonathan Martin & Amie Parnes, *McCain: Obama Not an Arab, Crowd Boos,* POLITICO, Oct. 10, 2008, <http://www.politico.com/news/stories/1008/14479.html>; Posting of Julie Bosman to The Caucus, <http://thecaucus.blogs.nytimes.com/2008/11/01/hussein-chant-at-palin-rally/> (Nov. 1, 2008, 10:30 EST).

and ugliness embedded in this sentiment is fundamentally at odds with another, antithetical tradition of American thought, a tradition that has rightly been called the American Creed.<sup>27</sup>

The term—popularized two generations ago by Gunnar Myrdal in his classic and influential study of the “Negro Problem” in America—refers to the cluster of shared principles and ideals that shape and give content to American society. These values, among which Myrdal identifies “the essential dignity of the individual human being, . . . the fundamental equality of all men, and . . . certain inalienable rights to freedom, justice, and a fair opportunity,” derive from our Enlightenment history and Judeo-Christian heritage.<sup>28</sup> They permeate our founding documents—the Declaration of Independence, the Constitution, the Bill of Rights—and are distilled in the clichés memorized by every child and recited by every adult: “with liberty and justice for all”; “a government of laws, not of men”; “all men are created equal”; “the right to life, liberty, and the pursuit of happiness.”

Americans may not fully appreciate how pervasive the Creed is in American society. The man who has spent all his days in the desert no longer feels its heat. Since before the Founding, the Creed has been taught in the schools and preached from the pulpit. Editorial pages pronounce endlessly whether national events demonstrate an appropriate fidelity to the Creed and its principles: Do they advance the inexorable march of equality? Do they contribute to the inalienable rights of man? Do they comply with the Rule of Law? Are they faithful to our sacred texts?

The Creed defines the limits of popular culture and sets the bounds of socially acceptable behavior. It raises some among us to prominence and relegates others to shame. We celebrate Dr. King for the courage of his dream, and deride Governor Wallace for the wickedness of his defiance. Statesmen of every political stripe pay homage to the Creed. All political speech is couched in its terms and every inaugural address invokes it, sometimes in ringing tones:

Let the word go forth from this time and place, to  
friend and foe alike, that the torch has passed to a

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27. For a defense of the Creed against charges of nationalism in the post-9/11 context, see Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 878–79 (2004).

28. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 3–29 (1944).

new generation of Americans, born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage, and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world. Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty.<sup>29</sup>

Necessarily, anything cast in such lofty abstractions as “freedom,” “equality,” “liberty,” and “justice” will be endlessly protean. As a consequence, we should not be surprised that the Creed means very different things for different people. In fact, it is capable of justifying diametrically opposite positions. Both the fundamentalist Christian and the gay rights activist will ground their appeals in their vision of the Creed. By one light, homosexuality is a threat to the family and a departure from a long and unbroken set of Judeo-Christian values, passed down without interruption since the memory of man runneth naught. By another, discrimination against homosexuals offends our fundamental commitment to equality and involves the State in a person’s most intimate private choices. Both speakers claim the Creed as their polestar. The important point is not that the Creed produces irreconcilable outcomes, but that no outcome can be imagined except one which is faithful to the Creed. The Creed thus defines the terms of acceptable debate.

In the same way, the Creed can be used to justify apparently repressive policies. As a rule, Americans have perceived no contradiction between professing a dogmatic and unshakeable faith in the Creed, with its broad commitment to tolerance and dissent, and engaging in repressive and intolerant behavior. A two-step process allows these apparently irreconcilable tendencies to exist side by side. First, the demonization that takes place is never random. It is invariably cast as a threat to the continued existence of the Creed itself. The enemy imperils the very ideals and

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29. John F. Kennedy, President of the United States, Inaugural Address (Jan. 20, 1961).

institutions which make America unique in the world—her Constitution, her commitment to the Rule of Law, her democratic forms, her exceptional status as a beacon of equality, liberty, and hope. If this is true, then the second step follows automatically: the continued existence of the Creed demands a repressive response. Although some people may not recognize our occasional intolerance for what it is, the more common sentiment has been to recognize but accept the intolerance as simply a necessary step to purge society of the greater risk, like the application of leeches. We must be intolerant today so that we may continue to be tolerant tomorrow, and for all time.

In short, it is nearly impossible to overstate the importance of the Creed in American culture. It is our civic religion, our national ethos. It is, as Myrdal observed two generations ago, “the cement in the structure of this great and disparate nation.”<sup>30</sup>

Nothing summons forth the majestic symbols of the Creed like war. After 9/11, the President cast terror as a fundamental challenge to the Creed. At a Fourth of July celebration in 2002 at Ripley, West Virginia, for instance, President Bush told the cheering crowd that:

Unlike any other country, America came into the world with a message for mankind that all are created equal, and all are meant to be free. There is no American race. There’s only an American creed: We believe in the dignity and rights of every person; we believe in equal justice, limited government, and in the rule of law; we believe in personal responsibility and tolerance toward others. This creed of freedom and equality has lifted the lives of millions of Americans, of citizens by birth and citizens by choice. This creed draws our friends to us. It sets our enemies against us and always inspires the best that is within us.<sup>31</sup>

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30. MYRDAL, *supra* note 28, at 3. For an account of the pervasiveness of the Creed and its near universal acceptance within all sectors of American society, see, e.g., ANATOL LIEVEN, *AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM* 48–58 (2005).

31. Remarks at a “Saluting Our Veterans” Celebration in Ripley, West Virginia, 2 PUB. PAPERS 1174 (July 4, 2002). The President repeated these essential themes, often in nearly identical language, throughout his administration. On his last Fourth of July weekend in office, for instance, he told a national radio audience that “[t]here is no American race, there’s only an American creed. We

These remarks expanded on themes developed a month earlier in a speech to the graduates at the U.S. Military Academy at West Point. The American flag, Bush said, stands

not only for our power but for freedom. Our Nation's cause has always been larger than our Nation's defense. We fight, as we always fight, for a just peace, a peace that favors human liberty. . . .

The twentieth century ended with a single surviving model of human progress, based on nonnegotiable demands of human dignity, the rule of law, limits on the power of the state, respect for women, and private property and free speech and equal justice and religious tolerance.<sup>32</sup>

And these remarks elaborated on his speech to Congress on September 20, 2001, with the rubble of the Twin Towers still smoldering: "We're in a fight for our principles, and our first responsibility is to live by them."<sup>33</sup>

But the administration that lives by the Creed dies by the Creed, and when it conceived, designed, and implemented its post-9/11 detention policy, the Bush administration committed the unpardonable sin. Apparently convinced by their own apocalyptic rhetoric, the architects of the policy genuinely believed that everything had changed on 9/11 and that the American public would permit a permanent and radical recalibration of the Creed—namely, that human beings could lawfully be treated as chattel.

However malleable the Creed may be, it cannot abide the suggestion that a man in his home has no greater rights than a beast in the field; that he has no rights which derive naturally and automatically from his condition as a human being, and that, like

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believe in the dignity and rights of every person. We believe in equal justice, limited government and the rule of law, personal responsibility and tolerance towards others. This creed of freedom and equality has lifted the lives of millions of Americans, of citizens by birth and citizens by choice." *President Bush's July 6 Radio Address to the Nation*, U.S. NEWSWIRE, July 6, 2008.

32. Commencement Address at the United States Military Academy in West Point, New York, 38 WKLY. COMP. PRES. DOC. 944 (June 1, 2002).

33. George W. Bush, President of the United States, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html).

an animal, his only protection in life is the doubtful assurance that those who mistreat him will be punished.

Yet that was the Bush administration's position, and all we have seen these past seven years emanated from this first noxious premise: the artful dodging and systematic dismantling of legal prohibitions against cruelty; the widespread deployment of "enhanced interrogation techniques" developed from reductive myths about "the Arab mind"; the linguistic legerdemain that led to Orwellian absurdities like, "Guantanamo is Cuba," "waterboarding is humane," and "we do not torture." The entire vile edifice emerged from the medieval conceit that an American may, by executive order alone, strip a man of his humanity.

In fact, the very malleability of the Creed helped explain the breadth and intensity of the reaction against the policy. Everyone could see within the policy a threat to the social institutions and values they held most dear. Physicians and mental health providers recoiled when they discovered that psychologists were called in to design interrogations specially calibrated to produce psychic trauma. Law enforcement and security experts were horrified that the administration deliberately employed counter-productive techniques that would inflame moderate Muslims and Arabs and harden the radicals without improving the flow of reliable intelligence.

The military shook its head in disgust as the administration crippled the culture of restraint in the treatment of prisoners that had been carefully instilled after Vietnam. The legal community was appalled at the systematic assault on the Rule of Law. Human rights and religious groups were aghast that a western democracy grounded in Judeo-Christian moral traditions would actually give official endorsement to techniques like waterboarding. Congress railed against the Imperial Presidency. Editorial pages pounded on all these themes. But doubtless the majority of people simply balked at the policy writ large, seeing in it a grotesque perversion of their image of America. In the best tradition of pluralist politics, these and other disparate elements fused to produce a powerful electoral force.

Naturally, Americans did not reject the detention policy instantly, nor did they respond en masse. The process by which American society slowly turns its back on nationalist excess is itself a fascinating tale, but one that will have to wait for another essay. Here it is enough to observe that the shock of 9/11 dissipates



unevenly within the population, and that some people continue to feel its impact longer and more acutely than others. At the same time, the policy was so foreign to the Creed, so literally unprecedented, that it took time both for its implications to be widely understood, and for its effects to be widely seen. Certain dramatic events greatly accelerated the process—the Abu Ghraib scandal, the disclosure of the infamous “torture memo,” and the Supreme Court decisions striking down key legal justifications for the policy. Adding to these events was the slow, steady accumulation of evidence that the ends had not justified the means, and that a substantial fraction of the prisoners were innocent.

At the same time, the shift in the public perception of Guantanamo was greatly intensified by the fact that the prison, for most people, exists only in their imagination. From the beginning, the base has been shrouded in secrecy. Even today, the release of information has been partial and contested. But what we imagine to be real is always etched more deeply in our psyche than what we ascertain to be true. As a result, when people imagined Guantanamo as allied with the Creed, their mind’s eye saw a place filled with people whose demonization was demanded for our survival. But once people came to view the prison as contrary to the Creed, they imagined it as filled with innocent people, all of whom have been horribly abused. As that narrative was repeated, it developed a self-sustaining quality, a truth that exists because we believe it to be true, not because we can verify it.<sup>34</sup>

But independent of this, and perhaps even more important, was a gradual reawakening among the American people that humanity is not ours to deny or bestow. It is not a condition the executive may withdraw. No matter how deeply buried within the folds of an aggrieved national soul, there is a humanity that will always emerge—the humanity of the American people. The crowd that gathered Saturday afternoon for a discussion about habeas understood what President Bush forgot: a policy that allows us to renounce the humanity in others can be pursued only at the cost of our own.

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34. I am grateful to Muneer Ahmed for this insight about the imagined quality of Guantanamo.