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**Immigration Detention in
America: A History of its
Expansion and a Study of its
Significance**

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COMPAS does not have a centre view and does not aim to present one. The views expressed in this document are only those of its independent author

Abstract

This working paper investigates the legislative origins of the US immigration detention system. This critical history is an attempt to broaden the discussion of the place and propriety of immigration detention in the American political landscape. The paper explains who has historically been subject to immigration detention, where and for how long the practice takes place, and what has led to its rapid enlargement in recent decades. Using historical frames, this paper identifies and traces three key characteristics in the legislative development of the US immigration detention system: firstly, the increasingly restrictive nature of the system; secondly, the fact that the system is more similar to an ad hoc bricolage of policies and contradictory justifications than a coherent assemblage of policies; and, finally, the criminalization of immigrants and resident non-citizens. What emerges from this narrative is a history of the expansion of the immigration detention system by the executive branch in response to periods of increasing politicization of immigration, particularly concerning the category of resident non-citizens. The paper argues that, in the absence of clear policy objectives, public oversight, and public accountability, government has developed the US immigration detention system without coherence and often hastily in reaction to events in the political sphere.

Key Words

Immigration detention; legislative history; United States of America; resident non-citizens; criminalization; immigration policy

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Introduction

Instituted through the power of Congress and the executive branch of government, immigration detention in the US is an administrative instrument that affects tens of thousands of non-citizens each year. Whilst supporters claim that it is a fitting tool of punishment and potential deterrent for undocumented immigrants, the rise of immigration detention¹ has been met with almost uniform opposition from political liberals and legal advocacy groups.

Stepping back from this heated debate, my concern in this working paper is to identify key historical frames in the legislative development of immigration detention, and to explore how these conceptual frames have changed over time. I draw out three overlapping characteristics from the history of immigration detention in the US: firstly, that US immigration detention policy has become more restrictive over time; secondly, that this system is comprised of a complex bricolage of *ad hoc* policies governed by three, unequally empowered branches of government, and that this situation results in both uncertainty about immigration detention's aims and damage to thousands of individuals' lives; and, finally, that the place of immigration detention at the nexus of foreign and domestic policies means that it has been inconsistently instrumentalized in response to a range of interests. I also summarise shifts in the more technical aspects of how and where immigration detention takes place in the US

My historical study proceeds as follows: I first outline the early history of immigration detention from the writing of the Constitution in 1787 until the First World War, including the use of Ellis Island as an immigration detention facility. I then turn to discuss incidents that were pivotal in the development of immigration detention legislation. I am interested both in the sequence of events that led to these pivotal moments as well as in their eventual legislative and juridical outcomes. Although they are necessarily imperfectly divided, the post-First World War incidents to be examined are: the internment in concentration camps of over 120,000 Japanese-American citizens and non-citizens during the Second World War; the Mariel boatlift and detention of Haitian and Cuban migrants; the populist reactions against undocumented migrants in the early 1990s, including Proposition 187 in California; the provisions and consequences of two seminal 1996 immigration acts; and the legislative fall-out from the terrorist attacks of 11 September 2001. Altogether, then, the findings of this working paper imply that the US policy of immigration detention is ill conceived, and, moreover, that this lack of cohesion has produced a harmful, expensive, and inefficient system that has persisted for many years without due public oversight.

¹ The term "immigration detention" has been purposefully selected for two primary reasons: the first is to indicate the difference between criminal and civil detention, of which immigrants are subject to the latter; and the second is to point to the fact that detention is inflicted on people entering a country and thus it is a coercive instrument of receiving states.

A brief history of immigration detention in the US

Historians are divided in opinion over the degree to which immigration was regulated during the country's early period². The writing of the US Constitution did not specifically address the issue of immigration - although it did provide Congress with some authority over the movement of non-citizens, including powers of detention³. The Constitution also guaranteed the protection of physical liberty by *habeas corpus*⁴, and this writ has application to the detention and removal of non-citizens⁵.

The first legislated authorization for detaining non-citizens was the Alien⁶ Enemies Act of 1789, passed during the Alien and Sedition Crisis⁷. Although not invoked during the Crisis, this law remained (and still remains) on the statute books⁸. The Alien Enemies Act authorized the US President during a declared war to detain, expel, or otherwise restrict the freedom of any citizen fourteens years or older of the country with which the US is at war. It served as the basis for executive orders leading to the internment of thousands of non-citizens in the 20th century, including the mass incarceration of German, Italian, and Japanese aliens during the Second World War. The US Supreme Court upheld the 1789 Act in a 1948 case brought by a German national who instituted *habeas corpus* proceedings to secure his release from detention under the order⁹ (Cole, 2002, p. 989).

During the Civil War (1861 – 1865), emergency detention was forced upon a large group of

² From one perspective, Benjamin J. Klebaner (1958) and Daniel Tichenor (2002, pp. 1 - 2) produce accounts of antebellum immigration policy as *laissez-faire* with the “open door” beginning to close through the exclusion of Chinese migrants in the final decades of the 19th century and the imposition of annual quotas for Europeans in the 1920s. From another perspective, Gerald Neuman (1993; 1997, "Part One") and Aristide Zolberg (2006) argue that, from colonial times onward, American policymakers actively devised legislation that effectively shaped the country's population and hence its overall makeup.

³ Article I, Section 9, Clause 1 of the Constitution (The Migration and Importation Clause) concerns limiting migration and importation of “such persons as any of the States now existing shall think properly to admit”. Article I, Section 8, Clause 11 (The War Power Act) gives Congress the power to declare war; permits the federal government to stop the entry of every alien; and further permits the President to apprehend, restrain, secure and remove alien enemies (Jasper, 2008, p. 1).

⁴ *Habeas corpus* refers to a legal action that can be addressed to a prison official, demanding that a prisoner be brought before a court of law to determine if he or she is serving a lawful sentence or should instead be removed from custody. The writ of *habeas corpus* is frequently used by detainees who are seeking relief from unlawful imprisonment, and is generally regarded as an important instrument for the safeguarding of individual freedom against arbitrary state action. It was commonly used in immigration matters to challenge unlawful decisions resulting in deportation (Kurzman, 2008).

⁵ For a discussion of the constitutionality of the writ and its application to executive detention, see Gerald Neuman (1998), Part II.

⁶ The term “alien” is an American legal term referring to any person not a citizen or national of the country in question. It does not include foreign nationals who have subsequently become citizens of the country in question. Cf. Section 101(a)(3) of the US Immigration and Nationality Act, 8 USC. § 1101(a)(3). It will here be used interchangeably with “non-citizen”.

⁷ Alien Enemies Act of 1798, ch. 66, 1 Stat. 577-8 (1798). For more on the Alien and Sedition Acts of 1789, see J.A. Smith (1966).

⁸ 50 USC.S. §§ 21-24 (Law. Co-op. 2002).

⁹ *Ludecke v. Watkins*, 335 US 160, 171-72 (1948).

citizens and aliens, but only during actual conflict¹⁰. Beginning in 1903 with that year's Immigration Act, however, Congress authorized summary arrest and detention orders for the purpose of deporting politically undesirable aliens during times of peace as well as war. The categories of resident non-citizens vulnerable to detention and deportation were expanded with virtually every succeeding immigration law passed in the 19th and early 20th centuries (Goldstein, 1978 - 1979, p. 543).

The first office for federal immigration control was established in 1864, but it was relatively purposeless until the Immigration Act of 1882 declared immigration regulation to be the responsibility of federal government¹¹. The 1882 Act also barred from entry to the US convicts, prostitutes, paupers, "mental defectives", and any other non-citizen likely to become a public charge¹². Immigration control was now clearly under the purview of the federal authorities, and the Alien Enemies Act of 1789 ensured that immigration detention would remain an integral, though largely hidden, part of the remit.

The early links between anti-Asian xenophobia and immigration detention

In the late 1800s, it had become commonplace to blame Chinese immigrants for an array of social ills, including taking jobs from citizens and refusing to assimilate¹³. The need for inexpensive labor to fuel the California Gold Rush combined with the Taiping Rebellion in China had resulted in an influx of Chinese immigrants in the mid-1800s. When the need for labour waned, so too did the tolerance for immigrants (Daniels, 1988, Chapter One).

The Chinese Exclusion Act was passed in 1882, and the legal challenges that followed it were to set important benchmarks in the development of the US immigration detention system. In *Chae Chan Ping v. United States* of 1889 ("The Chinese Exclusion Case")¹⁴, the Court formulated the *plenary power doctrine* based on the pre-eminence of US state sovereignty (Makki, 2001 - 2002, p. 482). In 1893, the *Fong Yue Ting v. United States*¹⁵ decision confirmed Congress's absolute discretion in deciding whom to admit and whom to bar from the US. The Court also concluded that deportation is only ever an administrative process for returning undesirable non-citizens to their countries of origin (Hernández, 2008, p. 48). In 1896, this trend continued with the Court's decision in *Wong Wing v United States*¹⁶ that

¹⁰ For a discussion of the use of detention powers during the US Civil War, especially the legality of detaining citizens and non-citizens, see Vladeck (2004), pp. 162 – 167.

¹¹ Until 1903, immigration regulation had been the jurisdiction of local state governments (Hutchinson, 1981, p. 584).

¹² 1882 Immigration Act (An act to regulate immigration), Sess. I Chap. 376; Stat. 214, 47th Congress.

¹³ See, e.g., US Library of Congress (2003, 28 March). "The Chinese in California 1850 -1925" collection of primary source materials - including newspaper clippings, magazine covers, pamphlets, and other images - captures the pervasiveness of the anti-Chinese zeitgeist, especially along the Pacific Coast.

¹⁴ *Chae Chan Ping v. United States*, 130 US 581 (1889).

¹⁵ *Fong Yue Ting v. United States*, 149 US 698 (1893)

¹⁶ *Wong Wing v. United States*, 163 US 228, 235 (1896).

immigration detention is valid as long as it is used as a means to "give effect to the provisions for the exclusion or expulsion of aliens". The detention of Chinese non-citizens was therefore not punishment in the eyes of the Supreme Court but a bureaucratic function of border control (Dow, 2007, p. 536; Kanstroom, 2000, p. 1903; Weisselberg, 1994-1995, p. 991).

In 1910, a facility analogous to Ellis Island was opened on Angel Island in San Francisco Bay¹⁷. Whilst most immigrants passed quickly through Ellis Island, people detained at Angel Island were typically held for weeks and months, "examined and reexamined, humiliated time and again" (Daniels, 1988, p. 93). Angel Island was abandoned in 1940 after the Sino-Soviet war slowed immigration rates, and focus turned to the mass internment of virtually anyone with Japanese ancestry in camps on the mainland

The hidden history of Ellis Island

Starting in 1892 and lasting for sixty years, the US government instituted a policy of mandatory immigration detention for all non-citizens seeking to enter the territory. A facility on Ellis Island in New York Harbor was the first federally operated immigration detention centre, and the most frequently used during this time¹⁸. Known amongst immigrants as the "Island of Tears", approximately 12 million non-citizens were detained at Ellis Island over its lifespan. The Ellis Island facility was most likely inaugurated as a response to the record-level influx of immigrants at the turn of the century. The period of mandatory detention for non-citizens at Ellis Island roughly corresponded to the 1880 to 1924 mass immigration influx. The decline of Ellis Island as a major entry point for new immigrants began in the 1920s with the passage of that decade's restrictive entry laws (US National Park Service, 2008).

The majority of Ellis Island detainees were held only briefly in order to undergo medical checks, an inconvenience that was typical of a culture frightened by the possibility of foreign diseases. An exceptional minority were held for lengthier periods of time, usually on suspicion of subversion, criminal behaviour, or liability to become charges on the state (Abrams, 1984, p. 108; US National Park Service, 2008). During the anti-communist paranoia following the First World War, thousands of suspected communist sympathizers without American citizenship were incarcerated at Ellis Island for months or years, including the infamous cases of Ellen Knauff and Ignatz Mezei; these cases in particular served to reinforce the *plenary power doctrine*¹⁹. These varieties of immigration detention – medical, criminal

¹⁷ Cf. Helton 1991, p. 254.

¹⁸ After a decrease in the 1890s, the American economy and immigration to the US rebounded strongly at the turn of the century. Responding perhaps to an unusually low national unemployment rate, immigration flows reached record levels and the foreign-born population of the US numbered fifteen percent, an all-time high (Hollifield, Hunt, & Tichenor, 2008, p. 72).

¹⁹ The detentions of Knauff and Mezei led to the Supreme Court decisions that, if the US executive believed that a detained non-citizen posed a threat to national security then it could incarcerate that person without needing to provide evidence of a threat to the public. Resting on the power of sovereignty, the court recognized the

suspicion and political – raise interesting questions about the changing meanings and purposes of the practice. It seems that even at an early stage of the development of immigration detention and in an especially visible location, government was unclear about whom it was appropriate to target with detention, for how long, and with what justification.

Immigration to the US remained lower than officials expected during the economic hard times of the 1930s (Hollifield et al., 2008, p. 77). Perhaps for this reason, Ellis Island began to function principally as a location to enact the final stages of deportation orders, and it fell slowly into disuse. By the 1940s, only a few hundred immigrants per year were detained there, and it finally closed in 1954 (Helton, 1991, p. 254). The main building was subsequently restored by government and re-opened as a museum on 10 September 1990.

Ellis Island now ranks among the top tourist destinations in the country, and is billed as one of “the most recognized symbols of freedom and democracy” in the world (US National Park Service, 2006). Whilst it is clearly ironic that the first US immigration detention facility is now considered to be a symbol of freedom and liberty, perhaps the greater significance of this situation lies in its ability to shed light on the contentious place of immigration detention in the country. Indeed, the fact that the history of Ellis Island has been repainted in sepia tones underlines how the support that some Americans profess for harsh immigration control measures can lead to more extreme practices like immigration detention. It also points to the hidden nature of this history and the overall elision of detention that has allowed it to be seen as a modern tool instigated in response to modern threats.

Detention of resident non-citizens during the First and Second World Wars

Following American entry into the First World War in 1917, the Justice Department drew on the authority of the 1798 Enemy Aliens Act to prosecute 2,100 Americans for anti-war speeches and

executive’s right to operate its immigration detention system outside of judiciary control. In *Knauff v. Shaughnessy*, 338 US 537 (1950), the court emphasized that “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not from legislative power alone but is inherent in the executive power to control the foreign affairs of the nation.” In *Shaughnessy v. Mezei*, 345 US 206 (1953), the court upheld the indefinite detention of Mezei and emphasized the importance of US sovereignty: “Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control” (Johnson, 1996 - 1997, p. 852). *Mezei* was condemned in newspaper editorials across the country, including the Washington Post and New York Times, and Congress reacted to the public’s indignation by introducing two bills on Mezei’s behalf. Attorney General Herbert Brownell stemmed mounting public outcry by granting Mezei parole into the US (Walker, 2006, p. 129). Nonetheless, and despite the Court’s sanctioning of a far more interventionist judicial role under the banner of due process, the *Knauff-Mezei* doctrine still has not been officially dislodged (Martin, 1982 - 1983, pp. 166 - 170).

Both court decisions imply that as long as the executive acts within the broad boundaries set by Congress, the judiciary will generally defer to executive decisions in immigration detention matters. The concepts of full federal authority and judicial deference exemplified in these cases are commonly called the *plenary power doctrine* (Weisselberg, 1994 - 1995, pp. 938 - 984).

publications, some of whom were incarcerated at Ellis Island despite their US citizenship²⁰. The department detained an even larger number of alien enemies as a result of President Woodrow Wilson's 6 April 1917 proclamation²¹ invoking the 1798 Act. Official constraints on movement were placed on approximately 600,000 German-Americans, another 6,300 were summarily arrested, and 2,300 were interned in camps for the duration of the war (Goldstein, 1978 - 1979, p. 550).

The wartime Immigration Act of 1917 was a much longer and more restrictive act than its predecessors. Whilst the Act increased the executive's discretion to decide the fate of deportable aliens, it did not indicate for how long aliens could be detained. To fill this gap, the courts imposed a so-called reasonable time limit of four months on immigration detention²². Although never codified, this invocation of a reasonable time limit was respected until the 1990s with the passage of a series of restrictive immigration control measures.

After taking office in 1933, the Franklin D. Roosevelt administration formed the Immigration and Naturalization Service (INS) agency in the Department of Labor. INS was charged with the discrepant tasks of enforcing immigration control laws *and* providing services to immigrants. In 1940, at the brink of US involvement in World War II and at the tail end of the Great Depression, immigration once again became a focus for security concerns and the I.N.S. was transferred to the Department of Justice²³.

In the aftermath of the Pearl Harbor bombing on 7 December 1941, anti-Asian xenophobia and fear of aliens was revived amongst and by the press, the military, and politicians. Some Pacific Coast residents began insisting "as a matter of revenge, or safety, or both, persons of 'the Japanese race' should be locked up, regardless of age, or sex, or nativity" (Daniels, 1988, p. 199). In the days and weeks that followed, President Franklin Roosevelt ordered the arrests of thousands of people of Japanese, German, and Italian descent living along the Pacific Coast, including resident non-citizens *and* US citizens. The arrests were sanctioned under the auspices of the 1798 Alien Enemies Act. On 7 and 8 December 1941, Roosevelt signed Presidential Proclamations 2525, 2526, and 2527 that declared all Japanese, German, and Italian non-citizens aged fourteen and over were now "alien enemies", and were henceforth required

²⁰ An interesting implication of this form of detention is that if government took offence to a citizen's political views, that citizen's status could potentially be downgraded to pseudo-alien. Thanks to Melanie Griffiths for drawing my attention to the importance of spelling out this point.

²¹ Proclamation 1364 (1917), available online at <http://millercenter.org/scripps/archive/speeches/detail/3798>

²² See, e.g., *Spector v. Landon*, 209 F. 2d 481, 482 (9th Cir. 1954); *Saksagansky v. Weedon*, 53 F. 2d 13, 16 (9th Cir. 1931); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403 – 04 (2nd Cir. 1922) (cited in Larson Beyer 2000, 181; Gardner, 2003 - 2004, pp. 180 - 181).

²³ President Franklin Roosevelt explained that these were "not... normal days" and that it was necessary to make this security change for "national safety reasons". In later background papers, the President said that Congress should reconsider where to house the INS "after these days of emergencies have passed" (Briggs, 1996, p. 48). Interestingly, a promised commission to review these discrepant responsibilities was never convened, and it was not until another emergency – the 11 September 2001 attacks – that INS was relocated.

to register and carry certificates of identification²⁴.

On 19 February 1942, at the height of the Second World War, President Roosevelt authorized Executive Order 9066²⁵. The Order resulted in the mass internment²⁶ of approximately 120,000 Japanese-Americans, seemingly more than the initial registration of alien enemies and two-thirds of whom were native-born American citizens²⁷ (Goldstein, 1978-1979, p. 555). The key to the legality of this Executive Order once again lay with the 1798 Alien Enemies Act.

The internment continued from March 1942 until March 1946, and was implemented at ten relocation camps situated in isolated areas of California, Arizona, Colorado, Idaho, Wyoming, and Arkansas²⁸. In 1943 and 1944 decisions, the Supreme Court upheld the legitimacy of the internment when it rejected the constitutional challenges brought by four American citizens who had received criminal charges after disobeying Executive Order 9066²⁹. It was not until 1988 and the passage of the Civil Liberties Act that the former internees received compensation and a formal apology from the US president³⁰.

These episodes of internment are important indicators that the history of immigration detention runs deeper than post-11 September 2001 immigration crackdowns. They also demonstrate that the US executive uses population control measures to respond to political and social concerns surrounding the public's perception of the immigrant population, as well as its tendency to issue fiats and special orders without prior public consultation and in a relatively timely manner. The fact that the Supreme Court did not intervene on behalf of the guileless resident non-citizens and US citizens to protest their internments speaks to the confusion over who is granted protection by the US Constitution, and what role the

²⁴ Approximately 600,000 people of Italian descent, 300,000 of German descent, and 100,000 of Japanese descent were registered as alien enemies (Hoover, 1943 - 1944). The internment of the German- and Italian-Americans was selective, however, and only a tiny fraction of the million-plus people eligible for internment was seized (Daniels, 2003, p. 53).

²⁵ See Roosevelt, F. D. (1942). Executive Order No. 9066: Authorizing the Secretary of War to Prescribe Military Areas. Retrieved 15 November, 2009, from <http://bss.sfsu.edu/internment/executiorder9066.html>

²⁶ Against a general consensus, historian Roger Daniels argues forcefully (2002, 2003) that the Japanese-Americans were not interned but incarcerated in concentration camps.

²⁷ On the issue of detaining American citizens, Lt. General John L. DeWitt, the driving force behind the internment orders, testified in 1943 before the House Naval Affairs Committee, that "[a] Jap's a Jap. It makes no difference whether he is an American citizen or not (Muller, 2001-2002, p. 990)."

²⁸ For detailed histories of the internment, see Eugene V. Rostow (1944-1945) and Peter Irons (1983). Greg Robinson (2001) provides analysis of President Roosevelt's motivations for signing Executive Order 9066.

²⁹ For discussion of these cases, including the well-known *Korematsu v United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), see Serrano and Minami (2003). It was not until 1983 that *Korematsu's* conviction was overturned by the courts; cf. *Korematsu v. United States*, 584 F. Supp. 1406, 1416 – 18 (N.D. Cal. 1984).

³⁰ Daniels points out that only survivors alive at the time of the passage of the Civil Liberties Act – or their heirs – were to receive the tax-free payment of 20,000 USD. / 12,100 G.B.P. No appropriation bill was passed at that time, and it was more than two years before the payments began, with the oldest survivors being paid first. The process continued into 1999, more than a decade after the Civil Liberties Act became law. Over those years more than \$1.6 billion was paid to 82,210 survivors or their heirs (Daniels, 2004-2005, pp. 167 - 168).

Supreme Court is expected to play in the face of the *plenary power doctrine*.

The Mariel boatlift

In 1952, Congress passed the Immigration and Nationality Act (INA)³¹, which remains the basis of current US immigration law. The INA regulated the conditions under which non-citizens may enter the US by setting forth a list of grounds of deportability, and a list of exclusive grounds of inadmissibility (formerly known as "excludability"). The Act stipulated that once a non-citizen is ordered to be removed from the US and that removal order becomes final, the non-citizen must be deported within ninety days of that date. If the INS could not execute the removal order, however, the 1952 INA gave the Attorney General special permission to detain the non-citizen for more than ninety days under the post-removal detention statute³². While it follows that the Attorney General was thus authorized to detain a deportable non-citizen for more than ninety days, the statute's permissive language made no indication of the maximum time period the Attorney General was authorized to detain deportable non-citizens (Makki, 2001 - 2002, p. 483).

In 1965 Congress passed major amendments³³ to the 1952 INA. The amendments assigned new duties to the Attorney General and immigration officials, especially those concerned with the determination of a non-citizen's status and eligibility for permanent parole (Hutchinson, 1981, p. 551). It also codified instructions regarding the detention of non-citizens. Chapter 4, Section 235(b) stated that anyone not "clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer". Section 235 (c) authorized the Attorney General to deport certain non-citizens "at his discretion" and "without any inquiry or further inquiry by a special inquiry officer". The 1965 INA entitled specific categories of detained non-citizens to seek relief from custody through bail or parole, although the availability of access to those provisions has varied over time³⁴. Due to the semantic overlap between "inspection" and "detention", Section 235 has effectively endorsed the use of mandatory immigration detention in the US

The immigration detention system had remained minimal and mostly out of public sight throughout the post-war period; however, a large-scale migration of Cubans and Haitians led to its

³¹ Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in 8 USC.).

³² The post-removal detention statute is codified at 8 USC.A. §1231 (a) (6).

³³ Immigration and Nationality Act (*An act to amend the Immigration and Nationality Act, and for other purposes*), H.R. 2580; Pub. L.89 - 236; 79 Stat.911, 89th Congress.

³⁴ By regulation, parole is now available only to non-citizens who are neither a flight risk nor a danger to the community, and who fall into one of a handful of narrow categories: (1) persons with serious medical conditions; (2) pregnant women; (3) juveniles; (4) witnesses in legal or legislative proceedings; and (5) persons whose continued detention is not in the public interest (Kerwin and Lin, 2009, p. 25).

expansion and return to popular attention in the early 1980s. Under the impression that they had been invited to immigrate to the US by President Jimmy Carter's "open heart and open arms" speech³⁵, approximately 125,000 Cubans came to the US in a period lasting roughly from spring 1979 until autumn 1980. Known then as the "Freedom Flotilla" and now as the Mariel Boatlift, this group came to Florida via shrimp boats, dinghies, wooden boats, and motorboats.³⁶ An additional 25,000 Haitians and one million Salvadoran, Guatemalan, and Nicaraguan immigrants also entered the US during this decade, all fleeing political upheaval and violence (Ojito, 2005; Zolberg, 2006, pp. 350 - 351).

The INS soon became overwhelmed by the number of applicants seeking entry, especially given the requirements to evaluate each migrant's suitability status (Mastin, 2000, p. 143). The fact that most of the Cubans lacked proper entry documents made them excludable under the provisions of the 1952 INA.³⁷ When Cuban President Fidel Castro refused to repatriate the majority of the group, he not only ignited a panic among the American public that the migrants were criminals, ideologically left, racially different and diseased (Hernández, 2008, p. 51), but he also put the INS in a difficult position in regards to resettlement options.

What could the US do with such a large group of excludable non-citizens who had already arrived on its shores? The Attorney General, acting through the INS, responded by setting up detention camps in Florida, Arkansas, Pennsylvania, and the Atlanta Penitentiary in Georgia (Kemple 1988–1989, p. 1736). In August 1981, the Attorney General used his discretionary power to parole roughly 123,000 of the Mariel Cubans (although he did not change their excludable status and thus they were not formally admitted into the US)³⁸. This left 3,500 Mariel Cubans in indefinite immigration detention as of 1990³⁹.

³⁵ See Basch (1982-1983) for further analysis on the events leading up to the Mariel boatlift and the policy options that were available at the time. See the oft-cited Kemple (1988-1989) for a legal analysis of the situation.

³⁶ The Mariel Boatlift was not the first large-scale influx of asylum seeking and other Cuban immigrants. In fact, there have been four separate influxes of Cuban immigrants to the United States. The first was actually a group of mostly educated, wealthy, and professional men and women who left Cuba in the aftermath of the 1959 revolution. Officials considered this group to be easily assimilable, and allocated millions of dollars in resettlement funds through the 1961 Cuban Refugee Program. See Mitchell (1962) and Zucker (1983).

³⁷ See 8 USC. § 1182(a)(20) (1982).

³⁸ Whilst the parolees have been living among the general population for the last three decades, a legal doctrine known as the "entry fiction" enables government to regard parolees as never having entered the US for purposes of immigration law. Such immigration detention parolees are thus not resident "within" the United States. This territorial distinction is significant because non-citizens outside the US have virtually no constitutional due process rights. Thus, despite their prolonged and actual physical presence in the US, the paroled Mariel Cubans are considered to have the same due process rights as non-citizens seeking initial entry. As such, the Mariel Cubans have no recourse to the Fifth Amendment guarantee against deprivation of liberty without due process and are vulnerable to detention at virtually any time. The entry fiction creates this distinction between actual physical presence and judicially recognized physical presence. See A. A. Miller (2006) and Wexler (2003-2004) for analysis on inadmissible non-citizens and the entry fiction in the US

³⁹ Of this group, some 300 to 400 Mariel Cubans who had allegedly committed "crimes of moral turpitude" in Cuba had been continuously detained in the US from 1980 through 1990 (Kemple, 1988-1989, p. 1736).

The combined impact of the peaking Mariel boatlift and the increased flow of Haitians⁴⁰ during the spring of 1980 created panic across the country (Loescher and Scanlan, 1984, p. 341). In 1982, President Ronald Reagan sought to resolve this situation by ordering the mandatory detention of all arriving Haitian migrants. Then-Attorney General, William French Smith, said of the decision: “Detention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place” (Dow, 2004, p. 7).

The administration instructed the US Coast Guard to interdict any migrants found at sea and to remove them to the US naval base in Guantánamo Bay, Cuba, where they were pre-screened for asylum⁴¹. This means that, despite later becoming host to terrorist suspects after September 11th, 2001, Guantánamo Bay never ceased functioning as an offshore immigration detention facility for migrants interdicted at sea by the US. The Haitian immigrants were also incarcerated in detention for longer periods than the Cubans. Interest groups and minority leaders, including the Congressional Black Caucus, accused government of a racially-informed double standard (Chisholm, 1982).

The INS began expanding its immigration detention facilities in response to the influx. For example, Krome Avenue Detention Center, or Krome Service Processing Center, was built in 1979 on a 15-acre former Nike missile site twenty miles from downtown Miami, on the edges of the Florida Everglades. After the announcement of mandatory detention for Haitian migrants, the INS took over the operation of Krome and renovated the existing buildings (US Congressional Task Force on Immigration Reform, 1995). Krome is still in use as an immigration detention facility, although its operations are shrouded in controversy⁴². Another notable expansion during this time was the bed capacity of Port

⁴⁰ For more information on what precipitated the outflow of Haitian migrants, and the overlapping responses of US foreign and domestic policy, see Loescher and Scanlan (1984), J.C. Miller (1984) and Hughes and Crane (1993).

⁴¹ On 24 May 1992, citing a surge of arriving Haitians, the new President George H.W. Bush issued a new executive order, “Interdiction of Illegal Aliens”, that ordered the US Coast Guard to intercept all Haitians in boats, and immediately repatriate them. The Haitian Refugee Center in Miami sued the Bush administration for violation of the 1980 Refugee Act and international treaties regarding refugees. After a federal court issued an injunction against repatriation and the government established the Guantánamo Bay detention centre, screenings interviews conducted there were also challenged because they did not provide for lawyers. In the two-year period 1991 – 1992, the US Coast Guard interdicted over 40,000 Haitians, sending roughly 34,000 people to Guantánamo Bay (McBride, 1999, p. 294; Zolberg, 2006, p. 384).

The administration of President William Clinton suspended this policy in June 1994; however, it was restarted only weeks later under the guise of permanent removal to “safe havens”. (Safe havens are a containment policy for temporary and emergency resettlement of refugees fleeing intense conflict. The policy is thought to have emerged in the 1990s. See generally Tiso (1994), Part III.) The resettlement of Haitians to safe havens was ongoing as of 2005, when only 9 of the 1,850 interdicted Haitians received a credible fear hearing and, of those, one man received refugee status and permission to reside in the US (Wasem, 2007, pp. 3 - 4).

⁴² Community groups and lawyers claim that Krome now holds 1,000 detainees, twice the legal limit for the facilities (Detention Watch Network, 2009). It has been plagued by allegations of misconduct by the guards and inadequate facilities for the detainees (Women’s Commission for Refugee Women and Children, 2000). It has also been the site of numerous protests, including a 48-day hunger strike in early 1999 by parents of men incarcerated inside the facility (Costello, 2001, p. 504).

Isabel immigration prison in South Texas from 425 to 10,000, mostly through construction of massive tents to house the immigration detainees. In addition, there was an increase in the number and sizes of contracted facilities along the US-Mexico border, and a reopening of a federal facility that had been used to intern Japanese-Americans during the Second World War (Kahn, 1996, pp. 13 - 20).

The general consensus of the courts⁴³ was that immigration detention remained the prerogative of executive government. The INA is an expression of the US government's plenary powers to establish federal immigration laws regardless of judicial consent (Makki, 2001-2002, p. 483). The same *plenary power doctrine* that had been referenced by the Supreme Court to justify the executive's actions in regards to *The Chinese Exclusion Case*, *Knauff*, and *Mezei* was being called upon again. Furthermore, due to the semantic overlap between "inspection" and "detention", Section 235 has effectively endorsed the use of mandatory immigration detention in the US. It is clear that the checks and balances that the courts were supposed to maintain in relation to government failed in the face of executive power.

Backlash

The Mariel boatlift and Haitian immigration influx prompted Congress to renew the perennial debate over immigration reform. The 1980 -1981 debate was set against the background of the biggest economic downturn since the Second World War (Fuchs, 1990, p. 116). For five years there was little progress on passing a new immigration regulation bill until the compromise Immigration Reform and Control Act of 1986 (IRCA)⁴⁴.

Perhaps as a reflection of the conflicting demands being addressed in Congress, IRCA was remarkable not only for issuing an amnesty for long-term undocumented residents, but also for its "get-tough" approach to future immigrants. It called for a widespread escalation of border inspection stations as well as internal immigration regulation controls (US Congress, 1986). In order to realize IRCA, the INS opened 109 new immigration control offices, with an additional 980 sites and some 200 voluntary agencies and affiliated community organizations (Zolberg, 2006, p. 371). IRCA has been described by one of its drafters as an "attempt to close the back door to illegal immigration, and then ... to open the front door more widely" (Fuchs, 1990, p. 111).

The Anti-Drug Abuse Act of 1988⁴⁵ added the concept of "aggravated felony" to the INA,

⁴³ These cases include *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1389, 1390 (10th Cir. 1981), and *Sanchez v. Kindt*, 732 F. Supp. 1419, 1424, 1427 (S.D. Ind. 1990).

⁴⁴ "Immigration Reform and Control Act of 1986 - 8 USC 1101: An Act to amend the Immigration and Nationality Act to revise and reform the immigration laws, and for other purposes". For more on the evolution of IRCA, see Fuchs (1990). Calavita (1989) interprets the Act as a pluralist compromise that represents an unsatisfactory compromise of conflicting demands in the US political economy.

⁴⁵ Anti-Drug Abuse Act of 1988, Pub. L. No. 100 – 690, 102 Stat. 4181 (1988), 8 USC. § 1101 (a) (43) (1994).

defining it narrowly to include murder, drug trafficking, and firearms trafficking. Often struck down in individual immigration hearings as unconstitutional⁴⁶, the 1988 Act *mandated* detention for any aggravated felon non-citizen awaiting his or her deportation hearing. This was the first time that aggravated felonies constituted a separate basis for detention and deportability under the INA (Legomsky, 1998-1999, p. 533). Further, unlike the grounds for removal for crimes involving moral turpitude, convictions for aggravated felonies need not be committed within five years from admission. Such convictions could affect a resident non-citizen throughout his or her lifetime, and without regard to the potential or actual sentence (Newcomb, 1998, p. 698).

By the early 1990s, a palpable backlash against resident non-citizens had begun in the US. In 1994, voters in California were presented with Proposition 187⁴⁷, the purpose of which was to prevent “illegal aliens” from receiving public benefits in the State of California. Although opposed by political liberals, minority rights activists, and other advocacy groups, Proposition 187 was eventually passed in an environment of economic hardship and soaring unemployment. In July 1999 Governor Gray Davis announced an agreement that effectively nullified Proposition 187 and brought the discussion of extending social welfare benefits to resident non-citizens to a temporary close (Cooper, 2003-2004, p. 365).

Following the tragic bombing of the Alfred P. Murrah Federal Building in Oklahoma City⁴⁸, most of the American public believed that Middle Eastern terrorists were responsible for the attack. Although the true identity of the native-born terrorist emerged almost immediately⁴⁹, the public perception that foreigners were to blame continued (Cook, 2003, p. 303). In an apparent effort to address these concerns, Congress approved and President Clinton signed The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁵⁰ one year after the bombing and with little legislative debate (Dlin, 1998, p. 55; Reuben, 1996). Whilst its stated purpose was to prevent terrorism on American soil, a review of the legislation demonstrates that AEDPA contained minimal provisions that could have prevented the Oklahoma City bombing, the main impetus for the passage of the Act. AEDPA also provided alleged

⁴⁶ Most courts held this mandatory detention provision unconstitutional on the grounds that procedural due process requires a hearing on the issue of whether the individual is likely to abscond or otherwise threaten the community (Legomsky, 1998 - 1999, p. 533).

⁴⁷ Proposition 187, 1994 Cal. Legis. Serv. Prop. 187 (West) (nullified by injunction).

⁴⁸ The 19 April 1995 was the deadliest incident of domestic terrorism in US history until the attacks on 11 September 2001. A bomb targeted government employees in the Alfred P. Murrah Federal Building in the central business district of Oklahoma City, the state capital and 29th most populous US city. The explosion claimed 168 lives (including 19 children), injured 674 people (including 57 children), and orphaned an additional 30 children (Lewis, Tenzer, & Harrison, 1999, p. 617).

⁴⁹ On 21 April 1991, the culprit Timothy McVeigh – a former soldier with ties to the far-right – was escorted past the press after having just been charged with the bombing (Gray, 1995).

⁵⁰ Pub. L. No. 104 – 132, 110 Stat. 1214.

terrorists with more protection than it afforded most immigrants⁵¹ (Dlin, 1998, p. 61).

Many of AEDPA's provisions were soon superseded by the “massive changes” of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁵² (Wolchok, 1997, p. 12). Implemented in September 1996, IIRIRA changed the vocabulary of US immigration law by streamlining deportation and exclusion proceedings into “removal” proceedings. IIRIRA also added Section 287(g)⁵³ to the INA, which authorized the INS and then its successor agency, Immigration and Customs Enforcement (ICE), to enter into agreements with state and local law enforcement agencies that would permit them to perform immigration enforcement functions, of which immigration detention was to be the centerpiece (US Immigration and Customs Enforcement, 2007). ICE has since contracted with approximately 350 state and county criminal jails across the country to take non-citizens into detention⁵⁴.

For the purposes of tracing a history of immigration detention in the US, however, the most significant of the Act's provisions was the amendment to the INA that effectively specified levels of immigration detention priority and classes of non-citizens subjected to mandatory detention. Section 236 (c) instructed the Attorney General to take into custody most criminal non-citizens and precluded him from releasing them pending the conclusion of removal proceedings. Included in this list of criminal non-citizens were those who had been convicted of an aggravated felony (as described earlier) (Loughran, 2003 - 2004, p. 685). Section 602 authorized relief through bond strictly on a case-by-case basis for urgent humanitarian reasons or significant public benefit (Siskin, 2004, p. 3). In October 1998, a former INS commissioner issued a memorandum⁵⁵ clarifying IIRIRA, and establishing categories of non-citizens in order of prioritization for detention⁵⁶. A ninety-day time limit was given by way of instruction to the INS for physical removal after the entry of a final administrative order (Loughran, 2003-2004, p. 686).

Arguably, the most influential of a spate of post-IIRIRA court cases were *Zadvydas v. Davis*⁵⁷ (June 2001) and *Demore v. Kim*⁵⁸ (April 2003). In *Zadvydas v. Davis*, the Court upheld that a non-citizen's detention is permissible only for a “reasonably foreseeable” period in order to carry out deportation;

⁵¹ Brian K. Bates, an immigration lawyer, said in 1996: “Suspected terrorists under the act have the right to appointed counsel, the right to [bail] proceedings, the right to a court hearing and the right to judicial review in removal proceedings while the same law takes away all of those rights for long-term permanent residents who have had even a minor criminal violation, with no possibility for relief from deportation” (Reuben, 1996, p. 34).

⁵² Pub. L. No. 104 – 208, 110 Stat. 3009.

⁵³ Section 287 (g) Title 8, USC. Section 1357 (g).

⁵⁴ See Richard Stana (2009); for criticism of Section 287(g), see the Immigration Policy Center (2009), the US GAO report (2009) and the ACLU policy review (Weissman, Headen, & Parker, 2009).

⁵⁵ See Pearson (1998).

⁵⁶ According to the guidelines, detainees are assigned to one of four detention categories: (1) required; (2) high priority; (3) medium priority; and (4) lower priority. Non-citizens in required detention must be detained, while those people in the other categories may be detained depending on detention space and the facts of the case (Siskin, 2004, footnote 18).

⁵⁷ *Zadvydas v. Davis*, 533 US 678 (2001).

⁵⁸ *Demore v. Kim* 538 US 510 (2003).

however, the Court nonetheless recognized the federal's government's right to set categorical detention rules⁵⁹. A second Supreme Court case ruled against Hyung Joo Kim's claim that his months-long immigration detention violated his liberty and due process rights. The Court accepted government's rationale for mandatory detention as a means to compensate for its own inefficiency and lack of resources⁶⁰. It also rejected information suggesting that immigration detention is unnecessary in all cases of criminal non-citizens⁶¹ (Doucleff, 2003, p. 650). Thus, the Supreme Court recognized not only the power of Congress and the executive to employ broad categorical judgments about the treatment of non-citizens pending removal, but also that Congress's categorical decision to detain these groups of non-citizens without individualized bail hearings was reasonable (Loughran, 2003 – 2004, p. 696).

Undoubtedly, the retroactivity of the 1996 legislation's mandatory detention provisions combined with the expanded categories of deportable offences were responsible for the massive expansion of the immigration detention system in the late-1990s. A brief sketch of the escalating INS population in the years following the 1996 legislation illustrates this point: in 1994 the INS held roughly 5,500 detainees in custody; this number rose to 16,000 in 1997, representing a tripling over a period of four years; during the 2000 fiscal year, the INS detained almost 190,000 non-citizens; and, by 2001, the INS was detaining on average 19,500 non-citizens on any given day (T. Miller, 2002, p. 214).

In 2000, following numerous complaints and lawsuits, the INS issued the National Detention Standards (NDS) to provide humane conditions of confinement for immigration detainees. These thirty-eight standards resulted from negotiations between INS, the Department of Justice, and various advocacy groups. Although it has never promulgated the NDS as binding⁶², ICE continues to apply these standards and create additional ones to govern its immigration detention system (US immigration and Customs Enforcement, 2008).

Collectively, this pre-September 11th 2001 legislation marked a "paradigm shift in immigration policy from an individual-based focus to a categorical approach" (Loughran, 2003–2004, p. 681). This shift may have been fed by a popular perception – amongst conservatives *and* liberals - that regarded

⁵⁹ For further analysis of the *Zadvydas* decision, see Joshua W. Gardner (2003-2004) and Abira Ashfaq (2008).

⁶⁰ The Court's decision was not unanimous. In his dissenting opinion, Justice David Souter emphasized that the "INS has never argued that detaining Kim is necessary to guarantee his appearance for removal proceedings or to protect anyone from danger in the meantime." In fact, the INS released him on \$5,000 bond after the district court first held the statute unconstitutional. "The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process," Justice Souter (*American Civil Liberties Union*, 2003a).

⁶¹ For further legal materials on *Demore v. Kim*, see *American Civil Liberties Union* (2003b), and for further analysis see Jennifer Korte Doucleff (2003) and Alexis D. Hedman (2005)

⁶² For further discussion on the issues of promulgating the NDS, see Steven Neely (2008).

immigrants arriving in the US less as discrete agents and more as a faceless crowd⁶³. The Oklahoma bombing amplified these xenophobic and anti-immigration tendencies that were already present in American society. Congress's apparent impatience with the pace of deportation of criminal non-citizens⁶⁴ compounded this elision between those who belonged and those who could be summarily detained and deported. The retroactivity clause was implemented in the same atmosphere of distrust and suspicion that produced Proposition 187. Further, Section 287(g)'s devolution of the powers of arrest and detention of non-citizens from the INS to local officers denoted the federal government's abdication of responsibility for the welfare of all persons within its territorial jurisdiction. Although he signed AEDPA into law, President Clinton remarked that the legislation made "major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism", the alleged reason for tightening the measures (Cook, 2003, p. 305). It was the responsibility of the courts to provide checks and balances on this legislation but their hands-off approach did not allow for intervention against the rise of mandatory, indefinite detention in the US. In conclusion, we can see why there is almost unanimous agreement among analysts that the 1996 legislation facilitated the transformation of the US immigration detention system into a more efficient, less discretionary, and increasingly rigid apparatus (Kanstroom, 2007, p. 11; Seattle University School of Law International Human Rights Clinic, 2008, p. 3).

Post September 11th 2001 legislative changes

Eight days after the terrorist attacks of September 11th 2001, President George W. Bush's administration sent to Congress a draft anti-terrorism bill that became the USA PATRIOT Act (US Congress, 2001). It sought to concentrate indisputable authority for indefinite preventive detention of non-citizens in the office of the Attorney General. Section 411 of the Act added extra categories of terrorism-related offences for which a non-citizen could be detained. Interestingly, although the USA PATRIOT Act specifically provided for mandatory detention without bond of non-citizens suspected of terrorism, the INS relied on Section 236 (c) to conduct post-September 11th detention sweeps⁶⁵ (Taylor, 2004, p. 154).

⁶³ This criticism that Western popular culture tends to portray immigrants as a massive "sea of humanity" is not new. See, for example, Liisa H. Malkki (1992, 1996) and Prem Kumar Rajaram (2002).

⁶⁴ Neuman draws our attention to Section 440 (a), a miscellaneous immigration provision tacked onto AEDPA, as evidence that policymakers wanted to quicken the pace at which criminal non-citizens should be deported: "any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in [certain listed deportation provisions] shall not be subject to review by any court" (Neuman, 1998, p. 965).

⁶⁵ According to a report by the Office of the Inspector General of the US Department of Justice, the majority of the 762 detained non-citizens classified as September 11 detainees were arrested by terrorism task forces pursuing investigative leads and were held on valid immigration charges. The age of the detainees varied, although most, 479 (or 63 percent), were between 26 and 40 years old. However, many of the detainees were much older. The September 11 detainees were citizens of more than 20 countries. The largest number, 254 or 33 percent, came

On September 17th 2001, the Department of Justice issued a new regulation extending the federal regulation requiring the INS to make a charging determination on any non-citizen being held in its custody from within 24 hours of arresting to 48 hours after the arrest; the regulation also contained an exception to this 48-hour rule which provides that, under undefined emergency circumstances, the charging decision could be postponed for an unspecified period of time (Office of the Inspector General, 2003, p. 28)

The Homeland Security Act of 2002 dismantled the INS and transferred 185,000 federal employees and 22 federal agencies into the new Department of Homeland Security (DHS). ICE is one of three bureaux in the DHS, the other two being Citizenship and Immigration Services, and Customs and Border Protection. As of late 2009, ICE operates 24 field offices and 186 subfield offices nationwide (Schriro, 2009, p. 14). Along with reconstituting the responsibility for immigration control, the language of the 2002 Act seemingly vested the Attorney General with authority to arrest, detain, and release non-citizens (Siskin, 2004, p. 2).

Less than a year after the enactment of this legislation, in June 2003, ICE finalized a ten-year strategic enforcement plan, Operation Endgame. In an effort that focussed once again on ensuring that non-citizens attend their deportation hearings, Operation Endgame called for streamlined information sharing across every level of government (US Department of Homeland Security, 2003, p. ii). Almost all information on Operation Endgame has been removed from the public sphere⁶⁶. It is far from clear how these policies would have been enforced on a national level, or how the steps of the plan would have coalesced together or with existing legislation.

The incoming administration of US President Barack Obama responded to criticism of the immigration detention system with a new strategic program for reform. *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* aimed to identify criminal non-citizens through biometric and criminal records information sharing; create a hierarchy of prioritized non-citizens to be detained and deported; and expand ICE capacity to reduce the time spent by non-citizens in immigration detention (US Department of Homeland Security, 2009). It was similar to the 287(g) programs in many ways. As of November 2009, *Secure Communities* was available in 81 jurisdictions in nine states. ICE plans to have a *Secure Communities* presence in every state by 2011, and plans to implement *Secure Communities*

from Pakistan, more than double the number of any other country. The second largest number (111) came from Egypt. Nine detainees were from Iran and six from Afghanistan. In addition, 29 detainees were citizens of Israel, the United Kingdom, and France. A large majority of detainees were arrested in New York (491 of 762, or 64 percent), followed by New Jersey with 70 detainee arrests. The timing of detainee arrests shows that 658 detainees (86 percent) were arrested in the first 3 months after the terrorist attack, with 85 people arrested during the week after the September 11 attacks (Office of the Inspector General, 2003, pp. 20 - 23).

⁶⁶ The ACLU has made copies of the original ICE *Operation Endgame* forms available on its website: please see <http://www.aclum.org/pdf/endgame.pdf>; the document can also be accessed via the New York Immigration Coalition's website at <http://www.thenyic.org/>

in each of the 3,100 state and local jails across the country by 2013 (Waslin, 2009, p. 3).

In the year of writing, ICE estimates that it will detain 440,000 migrants and Congress has authorized the construction of up to 40,000 additional immigration detention bed spaces over the coming years. Through the use of Section 287(g), approximately 67 percent of immigration detainees in the US are held in privately-operated detention facilities (Amnesty International, 2009, "Key Findings"). Confusion amongst frontline immigration officers about the categories of immigration regulations available to non-citizens has led at times to mistaken cases of immigration detention⁶⁷. Adding to this confusion is the expansion of the definition of aggravated felony to encompass fifty different categories of crimes (T. Miller, 2002, p. 220). There is also major cause for concern amongst advocacy groups that immigration detainees do not have adequate access to legal counsel. The US Department of Justice reports that 84% of immigration detainees do not have legal representation during their removal hearings, compared with 58% of non-detained immigrants⁶⁸. Other forms of mistreatment, such as health care neglect⁶⁹ and detainee abuse⁷⁰, continue to plague the immigration detention system. At the far extreme, at least 86 immigration detainees have died in ICE custody since March 2003, including a mentally disabled man who suffered from seizures, and a German-American man who died of an untreated cardiac infection (Ferrell, Kelso, Tate, & Nista, 2009; Florida Immigrant Advocacy Center, 2009, pp. 13 - 22). There is also evidence that American citizens and lawful permanent residents have been held for significant periods of time in immigration detention⁷¹. A series of newspaper articles

⁶⁷ For instance, Meng Li, a Chinese businesswoman, was strip-searched and held in jail in Alaska for twenty-six days as an immigration detainee. Despite her having been allotted a business visa, INS officers at the Anchorage airport charged Li with trying to enter the US with fraudulent documents after they mistook her for an asylum seeker (Stock, 2004, p. 392)

⁶⁸ Amnesty International (2009, "Key Findings") reports that 84 percent of immigration detainees are unable to secure adequate legal assistance.

⁶⁹ Human Rights Watch has been documenting cases of health care neglect since 1998. The group recently released a report that documents dozens of cases in which ICE medical staff failed to respond in a timely manner to women detainees' health problems (Human Rights Watch, 2009a). The Florida Immigrant Advocacy Center (2009) has also documented widespread health care neglect by DHS and its contracted private prisons agencies.

⁷⁰ Allegations of sexual abuse have been lodged against officers at Krome Service Processing Center in Florida (Mishra, 2001; Women's Commission for Refugee Women and Children, 2000). Other types of physical and psychological abuse in immigration detention include verbal abuse, spraying with pepper spray, theft of personal property, unwarranted solitary confinement, lack of beds, forced labour, and strip searches in full view of officers of the opposite sex (McCaslin, 2000-2001, p. 201).

⁷¹ Mark Lyttle, a bipolar, dyslexic man born in North Carolina, was detained by ICE and wrongfully deported to Mexico in 2009. Pedro Guzman, a developmentally disabled man born in California, was detained by ICE and wrongfully deported to Mexico in 2007. Hawa Said, the daughter of American citizens who immigrated when she was one year old, was detained in 1999, whilst pregnant. Jodey Gravett, a decorated Vietnam veteran and adopted son of American parents, was detained by INS in 1998. (Collins, 2009; US Congress Subcommittee on Immigration and Claims, 2002; US Immigration and Customs Enforcement & Mead, 2008).

published in the Washington Post⁷² and the New York Times⁷³ in 2008 and 2009 brought this situation to greater public attention and sparked debate about the appropriateness of this system and its place in the US

ICE Assistant Secretary John Morton characterized the US immigration detention system as “sprawling” and in need of “more direct federal oversight and management”(Morton, 2009). A top ICE official released a review on October 6th 2009 that described the immigration detention system as costly, ungovernable, and designed for criminals, not immigrants (Schriro, 2009). In March 2010, the ICE inspector general published a report critical of the 287(g) program, warning that “ICE had not established a comprehensive process for assessing, modifying, and terminating current agreements” (US Department of Homeland Security, 2010, p. 14). During his first official speech on the topic of immigration reform on July 7th 2010, President Obama explicitly made mention of improving the immigration detention system (Obama, 2010); however, as of August 2010, neither he nor any other member of the current administration have publicized how or when any reform will happen.

Conclusion: Three characteristics of immigration detention in the US

In this working paper, I have attempted to sketch a history of the expansion of immigration detention in the US. I have argued that immigration detention impedes upon the basic rights of tens of thousands of non-citizens each year. Alarming, this situation has evolved relatively inconspicuously and without too much attention from the general news-reading public. We might ask, what overarching conclusions about the nature and uses of immigration detention may be revealed by this history? I argue that we can identify three, overlapping characteristics of the US immigration detention system.

The first characteristic is that immigration detention legislation has become more restrictive with time. Indeed, not a single provision implemented in the legislation has curtailed a restriction once it had been implemented. Periods of immigration detention have grown longer, conditions have become more deleterious, and accountability in detention is scarce. Detainees have less access to legal counsel and fewer rights to health care and other social welfare provisions. The retroactivity clause in the 1996 legislation also means that these heightened restrictions can be applied to people who have long since repaid their debts to society and integrated into US life. The obviously illiberal act of targeting certain

⁷² In May 2008, the Washington Post published a four-part investigative series detailing the poor medical care provided to immigration detainees in the US. This was followed up by a report on immigration detainee deaths while in ICE custody. See Priest and Goldstein (2008) and Ferrell, et al. (2009).

⁷³ The reporter Nina Bernstein has been continuously publishing scathing reports of abuses inside ICE facilities on the front pages of the New York Times and online since at least 2006; see, for example, Bernstein (Bernstein, 2006, 2007, 2008, 2009a, 2009b). The newspaper has also published editorials calling for reform of the immigration detention system, including one reminding federal government of its obligations called “That Promise of Detention Reform” (Editorial, 2009).

people for detention has shifted from earmarking enemy aliens and communists to Mexican border trespassers and foreign criminals, yet the politics of targeting unwanted non-citizens with detention remains the same.

The second characteristic is the lack of coherence in US immigration detention policy. As Kitty Calavita notes, policy and practice often resembles an ad hoc patchwork fashioned out of mutually contradictory pieces that represent responses to conflicting pressures in the political economy (Calavita, 1989, p. 40). This bricolage is made more complex by the fact that all three branches of US government – Congress, the executive in the form of the Department of Justice and the INS, and the judiciary – actively participate in crafting, implementing, and reviewing immigration detention policy. Added to this are the interests and objectives of the private firms that are being contracted through 287(g) to operate immigration detention centres.

This multilayered, multifaceted system is confusing to navigate and difficult to penetrate on two levels. On a practical level, many detainees and their families find themselves at a disadvantage when navigating the system. Non-citizens may be detained for reasons varying from extreme charges of terrorism to minute infringements of visa requirements. Some detainees become literally lost in the system. It was only in July 2010 that ICE implemented the first-ever electronic detainee locator system to allow people to find their loved ones (Tumlin, 2010). It is also quite onerous to convince a pro bono lawyer to travel to a county jail or facility as remote as, for example, the 1,000-bed Oakdale, Louisiana, facility that is located 75 miles away from the nearest major city (Kerwin, 2001, p. 5). Some immigration detainees literally go missing under ICE care⁷⁴.

The multi-faceted system is confusing on a more abstract level, as well. It seems to exhibit an unequal power balance amongst the three branches of government that govern it. This division of responsibility and oversight results in the degradation of non-citizens' political rights. The problem lies with the judiciary's acceding the absolute sovereign right to the executive to decide how to regulate immigration. The Supreme Court's continuing deference to the *plenary power doctrine* shields congressional action from judicial oversight, and allows it to move "significantly further in stifling the free expression of non-citizens than of citizens" (Johnson, 1996-1997, p. 840). Further, 19th-century Supreme Court rulings – including *Chae Chan Ping*, *Fong Yue Ting*, and *Wong Wing* – that detention and deportation are not considered punishment remain crucial to legitimizing US government's practice. David Manuel

⁷⁴ For example, an Egyptian dentist named Tarek Mohamed Fayad was detained in southern California on September 13th 2001, for allegedly violating his student visa. It took his privately contracted lawyer over 2 months to locate him despite the protestations of the Bureau of Prisons that Fayad was not in custody (Chishti, et al., 2003, p. 8). Mentally ill non-citizens are at particular risk for prolonged, unnecessary immigration detention (Bernstein 2009c).

Hernández and Teresa Miller have argued convincingly in separate research that this legal view has led to a double-bind whereby immigration detainees are not privy to the protections of the criminal justice system but are nevertheless regarded as criminals by the American public (Hernández, 2008; T. Miller, 2002).

The final characteristic relates to the criminalization of immigration detainees and points to the multiple uses of immigration detention in the US. Immigration detention is at the nexus of foreign and domestic policies, and it has been instrumentalized at various times as a response to both. Whereas the detentions of Chinese labor migrants and aggravated felons were responses to perceived internal problems, the internment of Japanese-Americans in the Second World War and the mass incarceration of the Mariel Cubans and Haitians in the 1980s adhered to foreign policy objectives. Other cases, such as the detention of Knauff and Mezei on Ellis Island overlap with both local and global interests. The mandatory, indefinite detention of any non-citizen suspected of terrorism that began with the 1996 legislation and was exacerbated after 11 September 2001, highlights the middle ground between foreign and domestic policy that is occupied by immigration detention. Clearly, foreign policy is deeply intertwined with domestic interests and *vice versa*. Immigration detention provides a rather unique variation on this theme, however, because it showcases the way in which a policy measure that is intended as an administrative fiat safeguarding the territorial population can be manipulated to deter potential future migrants, dissuade refugees and asylum seekers from coming, and buttress an image of a strong state, all of which are both foreign and domestic issues. This is only possible if non-citizens who violate immigration laws are segregated from the local population and made to appear criminal.

These three characteristics help us to make sense of immigration detention, and begin to understand its place in the history of US immigration control policy. The central conclusion of this working paper is unambiguous. I propose that the US immigration detention system exhibits characteristics that point to its confused and confusing remit. There has been inconsistency throughout its development, and there have been few attempts to streamline it into a managed, goal-directed system. The fact that immigration detention is usually considered one step towards either deportation or naturalization has obfuscated the real trauma that the system has inflicted on the lives of hundreds of thousands of people. There needs to be more concern with the practical and theoretical significance of implementing immigration detention in the US and other liberal, democratic states.

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