

**Detained Immigrants, Excludable Rights:
The Strange Devolution of
U.S. Immigration Authority, 1882-2012**

by

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Introduction

On July 30, 1981, President Ronald Reagan released a statement demanding that the United States “establish control over immigration.”¹ The previous year had posed a seemingly impossible challenge for U.S. immigration policymakers. In the midst of Cold War tensions, an ongoing diplomatic hostage crisis, and domestic recession, over 130,000 Cuban and Haitian citizens had flooded onto American shores. Seeking asylum and bringing a multitude of legal, pragmatic, and political issues with them, the Caribbean immigrants presented a profound test for U.S. immigration policy. The United States took months to generate a new policy for the asylum seekers, and border officials appeared entirely overwhelmed by the influx. Both domestic and foreign leaders grew critical of the government’s slow response to the crisis, and many declared the United States to be out of control of its growing “immigrant problem.”² President Reagan sought a way to show the world that the United States could control its borders and dissuade further illegal immigration. The following day he issued an executive order to Congress, quietly reinstating a rule of mandatory detention—a controversial policy that would imprison excludable immigrants before trial in order to streamline deportations and discourage future illegal entry.

President Reagan’s decision seemed to represent a radical departure from existing immigration law, which had almost entirely phased out immigration detention over the previous 30 years. Following the atrocities of World War II, both citizens and policymakers of the 1950’s grew wary of the ethical and human rights implications of indefinitely detaining immigrants without legal hearings. As the United States tried to maintain its identity as an international

¹ Ronald Reagan, "Statement on United States Immigration and Refugee Policy ," July 30, 1981. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=44128>.

² Thomas R. Maddux, “Ronald Reagan and the Task Force on Immigration,” *Pacific Historical Review* 74.2 (May 2005): 197.

beacon of freedom and liberty, compared to the fascist regimes proliferating around the globe, immigration detention proved too difficult for policymakers to justify. Thus, immigration detention fell out of practice until 1981, when Reagan initiated the policy shift through an executive order. The order saw no debate in Congress, no published rules on detention practices, and no formal standards given to the federal immigration bureaucracy.³ Subsequently, the public remained largely unaware of the sweeping policy change. In reinstating detention, Reagan used the discretionary authority that had come to characterize the immigration bureaucracy throughout its history. Despite having no formal judicial authority, the Immigration and Naturalization Service (INS) now had the power to arrest immigrants and indefinitely detain them in county jails, federal detention centers, and eventually, privately-owned detention facilities.

President Reagan's actions represented, at once, an abrupt shift in U.S. immigration policy but also one that built on earlier precedents of using executive authority to create immigration policy. While 1981 served as a crucial turning point for immigrant incarceration, it also represented the continuation of a theme that had been prevalent since the late 19th century—the use of executive authority to delegate extraordinary, extralegal power to the immigration bureaucracy. This event embodied the doctrine of *plenary power*, a unique, discretionary authority that enabled the immigration bureaucracy to operate outside constitutional and judicial bounds. While the executive branch made the decision to reinstate detention, it immediately transferred all power over detention operations to the INS. The INS received no directions about who or how to detain. The executive branch created no formal rules for immigration authorities regarding detention procedures. Immigration officers instead relied on personal judgment as to which entering immigrants seemed excludable and which did not. Immigration officers could

³ *Louis v. Nelson*, 544 F. Supp. 973, 982 - Dist. Court, SD Florida (1892).

thus arbitrarily detain anyone who they deemed to have an invalid case for asylum, which in most cases, meant incoming Haitians. Reagan's actions established one of the fundamental uncertainties in immigration policy—who precisely controlled plenary power and who was empowered by it? Under the plenary power doctrine, Reagan could bring back immigration detention with no congressional or judicial interference, and subsequently delegate all responsibility for the ambiguous, undefined practice to the immigration bureaucracy. While early conceptions of plenary power perceived the doctrine as a means of privileging the executive branch, in practice, plenary power privileged a much larger network of mid-level bureaucrats who administered the executive order.

Immigration detention law has expanded dramatically in the 30 years since President Reagan first issued the detention order. Under current law, Immigration and Customs Enforcement (ICE) can detain all non-citizens in removal proceedings. However, it *must* detain all noncitizens who are removable on criminal or national security grounds, asylum seekers who have not yet demonstrated a credible fear of persecution in their homelands, and arriving aliens who appear inadmissible for other than document-related reasons.⁴ With more and more entrants facing detention, the federal government has struggled to expand its physical resources to match its new ideological and political stance. In 2009, ICE had a budget of \$5.9 billion, with \$1.7 billion dedicated specifically to immigration custody and detention.⁵ While in 1994, an average of 6,875 detainees resided in INS custody on a given day, by 2009 the immigration detention system had expanded to fund 33,400 detention beds.⁶ U.S. detention centers now represent a

⁴ U.S. Library of Congress. Congressional Research Service Immigration-Related Detention: Current Legislative Issues by Alison Siskin. (Washington: Government Printing Office, 2004)
Accessed through CRS Web, available at <http://fpc.state.gov/documents/organization/33169.pdf>

⁵ Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*. Washington, DC: Migration Policy Institute, 2009: 54.

⁶ *Ibid.*

major component of homeland security and a key from of border enforcement. Yet the process exhibits almost no transparency, is largely kept out of the public consciousness and remains notoriously secretive in giving access to outsiders.

Furthermore, the responsibility for immigration detention does not fall exclusively to the federal government. In the years since 9/11 the government has increasingly relied on private companies to operate detention centers, creating a system in which corporations reap huge profits from the ever-expanding federal detention budget. Immigration detention presents a political and legal liability to the state as controversy and constitutional uncertainty have long shrouded the practice. By making this task the responsibility of the private sector, the immigration bureaucracy has further complicated the question of who controls and monitors plenary authority. Immigration detention is rapidly redefining how we conceptualize the rights of outsiders, the role of the state, and the intersection of policy and profits.

My project aims not simply to look at how immigration detention has functioned over the past 30 years, but to analyze how U.S. immigration bureaucrats have long derived the power to create a uniquely punitive system of processing. The concept of plenary power stands central to my entire thesis. Plenary power, which underlies all immigration law in the United States, consists of three characteristics. First, the authority to control immigration belongs to the federal government and not to the states. Federal authorities consider immigration to have foreign policy implications, thus making it the responsibility of the national government. Plenary power is bolstered by the executive branch's concept of sovereignty, through which a President claims complete control over the nation's borders and its exclusions. Second, the executive and legislative branches hold primary responsibility in overseeing immigration policy decisions. The executive and legislative branches frequently act on unchecked discretionary authority while

making life-changing decisions of exclusion and entry. Finally, the U.S. judicial system takes an extremely limited role in interfering with the executive branch's immigration decisions. As I show throughout my thesis, the courts frequently refused to overturn exclusion or deportation decisions made by the executive branch, even when they acknowledged that the executive branch had made decisions without sufficient evidence or due process. In short, plenary power exemplifies how the executive branch's unchecked control over immigration policy has shaped the peculiar character of immigration enforcement by border authorities.

My thesis analyzes how plenary power, as a form of discretionary authority, enabled U.S. immigration authorities to initiate, expand, and privatize detention over the past 130 years. I trace how the three characteristics of plenary power developed over time and became riddled with political and constitutional contradictions. The characteristics of plenary power faced, and continue to face, opposition from each branch of government. For example, although the federal government established its authority to control immigration in the late 19th century, in 2010, Arizona's law SB 1070, called this authority into question. Plenary power is routinely challenged, transferred, and redefined; yet it remains the enduring doctrine governing how immigration law operates.

While in theory plenary power privileges the executive branch, in practice, plenary power has devolved to privilege immigration bureaucrats, allowing the bureaucracy to occupy a uniquely autonomous role in U.S. government. Much of this autonomy comes because other branches of government are simply reluctant to get involved. The actions of the immigration bureaucracy evoke a sovereign's authority, and therefore make its precedents very difficult to challenge. While everyone wants to use the disproportionate authority that plenary power brings, almost no one wants to oversee or monitor the use of this power. Most policymakers and judicial

officials choose not to get involved with the complex, contested issues of federal control, ill-defined immigrant rights, and administrative power that characterize immigration policymaking. The plenary power that allows the judiciary to take a backseat to executive and bureaucratic discretion is unique in that it can be assigned and reassigned at the discretion of the very same immigration authorities who exercise it. In the 19th century, public employees with no legal training served on “Boards of Special Inquiry” and made irrevocable decisions about who to exclude, decisions that the courts refused to challenge. Today, private companies and local police forces make decisions about who will be detained, deported, and denied constitutional rights. This decentralization reinforces the question raised by President Reagan’s 1981 policy shift—who, if anyone, has authority over plenary power?

Plenary power may seem like a simple ideology of pragmatism, allowing the immigration bureaucracy to efficiently create policy and make admissions decisions with minimal interference. But in practice, plenary power poses an astounding number of problems for all three branches of the federal government. As I illustrate, the plenary power derived from sovereignty enables immigration authorities to make decisions insulated from the constitutional rights and balances, judicial oversight, and administrative procedures that distinguish U.S. policymaking. In the absence of judicial interference, immigration bureaucrats routinely use plenary power to assume the role of the judiciary: determining exclusions and creating ad hoc policies. Immigration bureaucrats have therefore come to rely on administrative power rather than due process and judicial norms. Since immigrants are often on the margins of society, excluded from constitutional protection, the immigration bureaucracy can execute this power with even greater ease. The federal government perceives immigrants as having privileges, but not rights, allowing

the immigration bureaucrats tremendous discretion in arbitrarily assigning or revoking these freedoms.

Challenges to plenary power have proved almost uniformly ineffective in generating long-term reform. Throughout my thesis, I show how nearly all judicial challenges to plenary authority possess minimal effect in changing the practices of the immigration bureaucracy. I argue that while the concept of sovereignty strengthens plenary power, outbreaks of public fear toward immigrants and the government's need to create a façade of control extend the exertion of that power. The federal government has often forged restrictive immigration policy in the wake of national emergencies, be it a war, a terrorist act, or a refugee crisis. In the wake of disaster, restrictive immigration policy becomes framed as a matter of national security. This trend can be seen as early as Ellis Island, when suspected Communists faced indefinite detention, or as recently as post-9/11, when the U.S. decided it did not have to reveal evidence used in the deportation proceedings of immigrants with alleged terrorist connections. Even when judicial challenges do arise, the immigration bureaucracy can absolve itself by claiming that it acted in the interest of national security. The ongoing securitization of immigration policy exerts a particular impact on immigration detention, bolstering the government's primary means of holding and deporting immigrants. Because much of the public views immigrants as illegal actors, whether by dint of past criminal history or undocumented entry, immigration detention becomes a means of punishment and dissuasion. If detention becomes seen as a punishment for immigrant-criminals rather than as an administrative process, Americans may become less vigilant about the human rights abuses and profit-seeking motives of those who possess plenary power.

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My project has required me to draw on scholarship produced by historians, political scientists, and legal scholars. I have also gone beyond the academy to examine work by journalists and public intellectuals. This wide range of authors has helped me develop the concepts of plenary power and sovereign authority that inform my thesis. They have allowed me to give thematic coherence to the historical narrative that I have pieced together by looking at court documents and testimonies, newspaper articles, and government reports. My thesis then enters into dialogue with scholarship, especially in debates about how to conceptualize contemporary detention and privatization.

It is difficult to compile historiography for the specific topic of immigration detention because almost no historical research on the topic exists. To date no comprehensive history of immigration detention practices has been published. While detention may be mentioned in a book on Ellis Island and mentioned again in a book on the Mariel boatlift, there is currently no research that looks critically at how the government moved from detention in the late 19th century to detention in the 21st century.

Although no scholar has produced a book on immigration detention, substantive work on the topic has come from journalists and legal scholars. Current research on immigration detention tends to fall into one of two categories: contemporary investigations of human rights abuses in detention centers, such as journalist Mark Dow's 2004 book, *American Gulag: Inside U.S. Immigration Prisons* or publications in law reviews addressing legal issues within detention.⁷ While both of these sources offer insight into the current state of the U.S. detention system, both have a similar shortcoming. Exposé-style books tend to present immigration

⁷ Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Los Angeles: University of California Press, 2004), 97.

detention as existing in a vacuum, and pay little attention to how the system originated or how it remains resilient, despite repeated legal and constitutional challenges. While books such as Dow's *American Gulag* give first-hand accounts of suffering and injustice in detention centers, they do not address the real root of the problem—the immigration bureaucracy's ability to operate outside constitutional and judicial bounds due to a unique, discretionary authority reinforced by executive orders over the past 130 years. This type of research supports the assumption that detention is a new problem, an assumption I argue is categorically untrue. Law reviews generally do a better job acknowledging the history of detention as they address the legal precedents for the practice. Scholarly work by lawyers has been enormously useful in directing me to key cases that explain and illustrate the judiciary's reluctance to interfere with immigration policy. However, legal scholarship often lacks the broader analysis that a historian can offer. Immigration detention is not simply a story of legality, but a story of how politics, communities, and current events came together at distinct moments in time.

Since the scholarship on immigration detention proves limited, I have built upon the work of scholars who examine themes of discretionary authority and accountability in immigration policy. My thesis extends the scholarship of the historian Lucy E. Salyer and political scientist Robert Koulish. Salyer's 1995 book on Progressive Era immigration policy, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*, and political scientist Robert Koulish's 2009 book on sovereignty and contemporary immigration law, *Immigration and American Democracy: Subverting the Rule of Law* both note a common theme: how the federal government created a system that gives immigrants almost no legal recourse for the decisions made by the immigration authorities. The ill-defined rights of immigrants and lack of judicial review gave rise to an agency with ever-expanding, unchecked power. The foundations

of plenary power appear in Salyer's examination of the Chinese Exclusion Act, passed in 1882, which stated that the nation possessed complete power over its borders. Koulish argues that the authority seen in the Progressive Era represents an extension of sovereignty, "a quasi-legal status that places decision-makers above and outside the law."⁸ My work further develops these observations, applying them to the temporal gaps between the two works. How did we move from the system of erratic detention and nativist policies seen in the early 20th century, to the massive, increasingly privatized immigration bureaucracy we know today? In what ways did the events and legal cases Salyer presents create the foundation for plenary power and detention in the 21st century? How can the broad concept of plenary power be applied directly to immigration detention history?

My thesis also enters into debates about issues of sovereignty and visibility in immigration policy. In *Walled States, Waning Sovereignty*, political scientist Wendy Brown argues that immigration enforcement, and border walls specifically, "function theatrically, projecting power and efficaciousness."⁹ Brown contends that the visibility of walls and the performance of walling reflects a desire for protection, containment, and sovereignty from the "outsider." Therefore, these walls serve as a psychological comfort to the American people.¹⁰ Similarly, Koulish argues that ICE serves as a "high-level public relations firm," that creates a sense of security through branding, all while outsourcing the actual responsibilities of border control to private companies.¹¹ My work on immigration detention leads me to argue that both Koulish and Brown overstate the desire for visibility within the immigration bureaucracy.

⁸ Robert Koulish, *Immigration and American Democracy: Subverting the Rule of Law* (New York: Routledge, 2010), 81.

⁹ Wendy Brown. *Walled States, Waning Sovereignty* (New York: Zone Books, 2010), 25.

¹⁰ Ibid.

¹¹ Robert Koulish, "Blackwater and the Privatization of Immigration Control." *St. Thomas Law Review* 20.3, 2008: 4.

Immigration detention complicates the notion of immigration policy as theatre. ICE rarely mentions immigration detention unless an issue arises that forces the practice into the public consciousness. “Theatre” is precisely the opposite of what ICE seeks. If detention centers end up in the media or in the national dialogue, it generally means something went wrong, and that centers are at risk of losing the autonomy they so highly value. From 2009-2010, the *New York Times* published 97 articles on immigration detention and virtually every article dealt with issues surrounding detainee deaths; detention is an issue that only becomes “theatre” when questions of injustice arise.

Nonetheless, Brown’s assertion of immigration policy as “security theatre” cannot be entirely rejected. The struggle between visibility and lack of visibility (or theatre and lack of theatre) represents one of the fundamental instabilities of plenary power. For example, one could read Reagan’s quiet use of plenary power as illustrating either side of the visibility dilemma. On the one hand, Reagan needed to use detention as theatre in order to placate the critics who accused the U.S. of being weak on illegal immigration. However, the almost silent way Reagan created the policy seemed to indicate that the immigration bureaucracy did not actually want to create a visible means of enforcement for the public. By issuing an executive order, Reagan quelled Congress’ demands for immigration control, while avoiding confrontation with the public and the media.

Brown’s assertion that border walls serve as “security theatre” ultimately poses compelling questions for visibility in detention. There appears to be a comfort factor with walls that does not exist with detention centers. Border walls are perceived as “just” walls, extended surfaces that we can fully examine, whereas a detention center is enclosed and serves a variety of roles with which we are less familiar. The minimized visibility and privatization of immigration

detention seem to reflect an acknowledgment of the questionable ethics at hand—if the government felt comfortable with what occurs within detention centers, would they not be used as a theatrical tool for quelling public anxiety? Invisibility suggests that detaining immigrants in pseudo-prisons is fundamentally unsettling to the American people and presents a legal liability to the state. Therefore privatization becomes a way to insulate the state from responsibility, both in the courts and the media. The ways plenary power perpetuates a lack of accountability serve as a theme throughout my paper.

My treatment of privatization engages with the work of public intellectual and writer Naomi Klein. In *The Shock Doctrine*, Klein argues that neo-conservative politicians have conspiratorially seized moments of societal “shock” to implement free market principles and deregulation with minimal public protest. Often, this means dramatically recasting the role of the state through privatization. In Klein’s interpretation of 21st century U.S. privatization, President George W. Bush and Defense Secretary Donald Rumsfeld had long sought to privatize homeland security. They used 9/11 as a moment of public fear and confusion, exploiting “the shock that gripped the nation to push through (their) radical vision of a hollow government in which everything from war fighting to disaster response was a for-profit venture.”¹²

While Klein addresses homeland security broadly, she does not directly touch on the unique place of privatized detention within the growing trend. I show how the privatization of immigration detention has some relevance to the opportunistic policymaking Klein describes, but also reveals a larger historical trend of plenary power and decentralized authority. The power to privatize U.S. immigration detention did not come solely from a post-9/11 ideology shift, but also from an ongoing desire by immigration bureaucrats to place their practices further outside media and public

¹² Naomi Klein, *The Shock Doctrine* (New York: Picador, 2007), 377.

consciousness. By analyzing the history of the immigration bureaucracy, prior to the privatization shift, we can see how the executive branch routinely reorganized and reassigned plenary power. While allowing private prison companies to control immigration had radical consequences for detainees, the move itself proves not as unprecedented a departure as Klein suggests. Klein also poses privatization as an exclusively economic solution for governments. However, I argue that the privatization of detention does not serve primarily as a way of reducing economic risks, but a way of reducing political and legal risks. With each controversial event that occurs in U.S. detention centers, the government faces legitimacy costs, as both the public and media call detention practices into question. By privatizing detention, the government separates itself from these risks.

My thesis reveals that despite the many shifts in leadership, bureaucratic structure, and policy, the doctrine of plenary power both influenced and drove the history of U.S. immigration detention. The three chapters of my thesis each focus on a separate location and catalyzing event for immigration detention, tracing the practice from the Chinese Exclusion cases to the contemporary moment. Chapter One will analyze the early years of the immigration bureaucracy and the foundations of plenary power. It looks first at the Chinese Exclusion cases, where I discern how the pattern of judicial non-interference began as a deferral to the sovereignty of the nation-state. The chapter then focuses on Ellis Island. Although generally remembered as the port of entry for thousands of new citizens, Ellis Island also bears a somber history as a detention center for thousands of excludable immigrants who would never reach American soil. An analysis of the various administrations of Ellis Island reveals how the late 19th century and early 20th century created foundations for the discretionary authority of immigration officers. Ellis Island also provided some of the earliest dialogue around the intersection of private companies and immigrants, raising questions about the state's obligation to protect non-citizens.

Chapter Two examines the Mariel boatlift as a national refugee crisis that sparked the rebirth of detention. In a political moment when the United States desperately needed to assert its authority and control, the executive branch looked to plenary power to generate dramatic new immigration policies that would transform how the nation approached immigrants. Chapter Two offers a case study of Krome Service Processing Center, one of the nation's first federal detention centers, as an illustration of how the need to create "control" became linked with the need to limit congressional and judicial oversight.

Finally, Chapter Three examines the exponential expansion of immigration detention following Reagan's War on Drugs and the terrorist attacks of 9/11. This chapter traces how immigration detention became linked to securitization. I argue that while the language of security came to define immigration policy in the 1990's and 2000's, immigration detention became a tool to propel both political and corporate interests rather than the interests of public safety. The allocation of discretionary authority to the private sector did not represent a waning of plenary power in the immigration bureaucracy, but a way for the bureaucracy to distance itself from the political and legal risks controversial detention practices posed.

I chose to focus on these three specific frames of immigration detention history for two reasons: first, they all serve as key moments of transition for formal immigration law, and second, because they all reflect distinct moments of tension over who will control plenary power. The Chinese Exclusion cases (Chapter One) show a conflict between the judiciary and the executive branch, the Mariel boatlift (Chapter Two) shows a conflict between the executive branch and the INS, and the post 9/11 detention regime (Chapter Three) shows a conflict between the public and private sectors. A comparative narrative of detention over time proves advantageous in illustrating the remarkable endurance of plenary power. While the politics surrounding immigration change substantially over the period of analysis, the theme of plenary power remains crucial in driving

policy change. The extended timeframe highlights precisely how ingrained both the authority to detain and the controversy surrounding detention have been. As human rights groups and newspaper editorials wrestle with seemingly undemocratic, un-American detention practices today, they wrestle with an issue that Americans struggled with through the Cold War, both World Wars, and even prior.



Haitian protesters gather across the street from the United States Immigration and Naturalization Service building in Miami. The protest took place in 2002, after 214 Haitian boat people arrived in Miami and were immediately placed in immigration detention. The Creole sign in the front reads roughly, “We need to free Haitians.”¹³

Finally, let me offer a personal reflection that exemplifies how I first encountered the topic of immigration detention. I grew up in South Florida, in a community composed primarily of Latin American and Caribbean immigrants. The stories of Cuban and Haitian immigrants became a vivid part of my upbringing. I met my first Mariel refugee in the first grade, and lessons involving Cuba, communism, and Castro served as a regular part of our elementary school curriculum. The narratives of immigration have defined and redefined the culture of South Florida. We heard tales of struggle and triumph, admission and exclusion daily, and we saw these stories play out in legal cases, street protests, and community organizing.

¹³ AP Photo, “Democrat Confronts Bush: Set Haitians Free,” (Oct. 31, 2002), *St. Petersburg Times* news photograph [accessed at http://www.sptimes.com/2002/10/31/State/Democrat_confronts_Bu.shtml, April 21, 2012].

Because of its unique community composition, South Florida breeds a distinct consciousness of the inequalities in the U.S. immigration system. The disparate treatment of Cuban and Haitian immigrants by the immigration bureaucracy has always been a subtle, profoundly discomfoting aspect of life. Perhaps nowhere is this unequal policy more visible than in the practice of U.S. immigration detention. When rafts of Haitians came ashore, the government labeled them illegal immigrants, but when rafts of Cubans came ashore, the government labeled them refugees. The state offered Cubans a path to citizenship, while it offered Haitians an indefinite stay in an immigration detention center, preceding their deportation back to Haiti. Images of Haitians protesting the detention of their countrymen, such as the picture above, are ubiquitous and raise many larger questions about how this strange form of incarceration came to be. Is this practice constitutional? Is it American? Is it just?

The story of Cubans and Haitians in my hometown presents an interesting place to begin an examination of plenary power because the inequalities between the two immigrant communities appear so vividly. Growing up, I had no concept of the term “plenary power,” but I knew that how the government treated entering Haitians and Cubans seemed fundamentally unfair. Even if plenary power was not visible, its consequences certainly were. By examining the history of immigration detention and plenary power, we can see how the policies that dictate the disparate treatment of Haitians and Cubans today result from the same discretionary, plenary authority that allows the immigration bureaucracy to shape the fabric of the nation with limited interference from Congress or the judiciary. Unjust immigration policies did not arise recently or arbitrarily, but derive from a principle of plenary power that both policymakers and the judiciary have reinforced over the past 130 years. The origins and the endurance of this power must be made visible before they can be challenged or changed.

Chapter One: The Discretionary Power of the Early Immigration Bureaucracy 1882-1954

In the months between April and September 1980, 124,779 Cubans washed ashore the beaches of South Florida. Seeking refugee status and fleeing a Communist homeland, President Jimmy Carter announced that the U.S. would welcome the new arrivals “with open arms and an open heart.”¹⁴ But nine years later, 2,500 of the Cuban refugees remained detained at 23 federal prisons throughout the U.S.¹⁵ The government labeled these immigrants as excludable based on past criminal history; the detainees included some serious criminals, but consisted primarily of people prosecuted for petty crimes, such as shoplifting or drunkenness. Most had already served their time in Cuba. Almost none received exclusion hearings or trials in the United States. Cuba refused to take these individuals back, and the United States refused to admit them. After nine years of detention, one thing seemed clear—the United States immigration bureaucracy possessed nearly unchecked administrative authority in excluding and detaining immigrants. These highly publicized incarcerations left advocates, citizens, and detainees with one question: how exactly did this agency, the Immigration and Naturalization Service (INS), gain such a privileged position within the U.S. government?

While the 1980 Mariel boatlift served as a turning point for widespread detention, the concept of holding immigrants without trial has much deeper roots. In this chapter, I explore the legal and historical precedents for the modern immigration bureaucracy and its operation outside the parameters of a traditional government agency. Since the turn of the 19th century, three elements have defined the policies and practices of the U.S. immigration bureaucracy: (1) a high level of administrative discretion given to immigration officers, (2) limited due process rights,

¹⁴ Paul L. Montgomery, “For Cuban Refugees, Promise of U.S. Fades,” *New York Times*, April 19, 1981.

¹⁵ Miles Corwin, “Cuban 'Detainees' From Mariel Boat Lift : 2,500 Prisoners of U.S. Face No Charges,” *Los Angeles Times*, August 27, 1989.

distancing immigrants from constitutional norms, and (3) an extraordinary lack of judicial oversight.

This chapter traces these three strands throughout 20th century U.S. immigration policy, leading up to the Mariel boatlift. These elements established the precedents allowing for a privatized, non-transparent, and increasingly punitive system of immigration detention to arise in the United States. Immigration detention continues a historical trend that insulates aliens from due process rights and constitutional norms. The “orphaning” of the U.S. immigration bureaucracy from established government parameters and oversight led to the disproportionate administrative power the agency held both historically and in the contemporary moment. This distance also allowed the government to redefine how a federal agency operates. As early as Ellis Island, the immigration bureaucracy depended on private contractors to provide services, often leading to large profits and conflicts of interest. This trend of “orphaning” has an extensive history, particularly visible in court cases, which will compose the majority of the sources for this chapter

An examination of early immigration history is necessary to understand the unusual position Immigration and Customs Enforcement (ICE) occupies in the 21st century. The competence and methods of the immigration agency have been criticized and routinely called into question. Human rights groups generate exposés on detention centers on an almost monthly basis. The constitutionality of ICE’s practices faces frequent challenges in court. Newspapers publish multi-part series on detainee deaths and administrative cover-ups. Yet, it is this agency that the courts decided to opt out of overseeing—this flawed, controversial agency became “the

odd repository for judicial trust.”¹⁶ How did this relationship arise, and why have the routine challenges to this judicial passivity failed to reform the immigration bureaucracy?

This chapter examines how a particular configuration of power among branches of the federal government, known as plenary power, bred instability in immigration policy. At the same time, challenges to plenary power both succeeded and failed in generating additional oversight. Furthermore, I analyze the historical origins of the extralegal authority immigration bureaucrats now hold. How bureaucratic leaders chose to assign rights to non-citizens, manage the visibility of their industry, and respond to public criticism reveals much about the philosophy and power of the agency and how it has functioned throughout history.

Establishing the Doctrine of Plenary Power through 19th Century Court Cases

During the 19th century, the institutional parameters for controlling immigration proved hazy at best. The U.S. Constitution contains only one reference to immigration—the Naturalization Clause, which gives Congress the power to “establish a uniform Rule of Naturalization.”¹⁷ Naturalization differed from immigration as it intended to determine the path to citizenship for those who had already immigrated to the U.S. The Constitution possessed no explicit references to the process of deciding entry. It took the federal government until the late 1800’s to establish its authority in immigration because the issue of slavery complicated the debate over alien entry. In the years following the Civil War, many states passed legislation forbidding the entry of free Blacks, both from within the Union and from abroad.¹⁸ This policy could not remain if the federal government forbade states from independently controlling their

¹⁶ Peter H. Schuck, “The Transformation of Immigration Law,” *Columbia Law Review* 84, no. 1, (1984): 17.

¹⁷ U.S. Constitution, art. 1, sec. 8

¹⁸ Charles D. Weisselberg, “The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei.” *University of Pennsylvania Law Review* 143, no. 4 (1995): 941.

borders, as states would thus no longer have the ability to exclude “undesirable” migrants. In an attempt to avoid conflict with states over a valued power, Congress refrained from passing immigration legislation altogether.

It was not until the passage of the Chinese Exclusion Act in 1882 that Congress finally asserted the federal government’s authority over immigration control. During the mid-19th century, the United States enthusiastically recruited Chinese workers to work on railroad construction. But as the projects neared completion and the economy began to slump, Congress sought to restrict further Chinese immigration. The 1882 Chinese Exclusion Act placed a ten-year moratorium on Chinese labor immigration but had no effect on immigrants already in the United States. After the passage of the Act, a string of legal cases throughout the late 19th century established both the authority of the federal government in controlling immigration and more specifically, the authority of the executive and legislative branches in independently shaping immigration policy.

The most frequently cited example of the plenary power doctrine is the case of *Chae Chan Ping v. United States*. Chae Chan Ping, a Chinese citizen, came to the United States seven years before the 1882 Act.¹⁹ The legislation thus should not have affected him. But in 1887, Chae Chan Ping traveled to China, after first obtaining a certificate of identity that would allow him to reenter the United States.²⁰ However, while Chae Chan Ping was abroad, the United States passed a new law that voided the certificates and forbade Chinese laborers from leaving and then reentering the U.S. Chae Chan Ping challenged the new act as a violation of his Fifth Amendment due process rights, but the Supreme Court responded that the judiciary could not

¹⁹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

²⁰ 130 U.S. 581, 582 (1889).

interfere with the immigration policies passed by the legislative and executive branches. The Court declared that “the powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce...and admit subjects of other nations to citizenship, are all sovereign powers, restricted...only by the Constitution itself and considerations of public policy and justice.”²¹

This case established several important principles for subsequent immigration bureaucrats’ authority. First, the ruling cemented the federal government’s implied sovereign power to control entry and exit of aliens. The ruling suggested that immigration should be categorized as a matter of foreign affairs and that for this reason the federal, rather than state, government held responsibility.²² The so-called “need for the government to control relations with other nations” established border control as an inherently non-judicial function.²³ Second, the ruling showed that Congress could retroactively apply new policies to immigrants, thereby leaving immigrants vulnerable to reactive shifts in policy. Chae Chan Ping exited the country under one policy and followed all the proper steps for reentry. However, the U.S. held him to the standards of a reformed policy, enacted just days before his attempted return. The court ruled that any privileges extended to aliens remained held at the will of the government, revocable at any time. Finally, and perhaps most significantly, the ruling ensured that the courts would not interfere with, nor review appeals regarding, Congress’ immigration laws. The Supreme Court stated “[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security...its determination is

²¹ 130 U.S. 581, 604 (1889).

²² The ruling states, “While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.”

²³ Charles D. Weisselberg, “Detention and Treatment of Aliens Three Years after September 11,” *University of California Davis Law Review* 38 (2005): 818.

conclusive upon the judiciary.”²⁴ All three of these precedents proved integral in defining plenary power and shaping the nation’s detention policies in the coming century.

Subsequent 19th century legal cases reinforced the plenary power doctrine. In the 1892 case of *Nishimura Ekiu v. United States*, a Japanese immigrant challenged an immigration officer’s decision to detain her and deny entry. Authorities based Nishimura Ekiu’s exclusion on her “likelihood to become a public charge.”²⁵ Nishimura argued that she had the right to a court hearing and a review of the evidence used against her in making the exclusion decision. Justice Gray came to a decision similar to that of *Chae Chan Ping*, stating, “It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them.”²⁶ Plenary authority served as an attempt to silence immigrants’ demands and challenges. “Sovereignty” became a catch-all term for the executive branch’s power to make discretionary policies that proved almost impossible for immigrants to oppose.

Justice Gray further argued that the courts may not review an immigration inspector’s decision regarding an alien’s imprisonment and exclusion, unless Congress expressly granted such permission.²⁷ The court stated that while aliens possessed the right to a writ of habeas corpus, that the final determination “may be in trusted by Congress to executive officers...in which a statute gives a discretionary power to an officer, to be exercised by him upon his own

²⁴ 130 U.S. 581, 606 (1889).

²⁵ The Immigration Act of 1882 found immigrants who were unable to take care of themselves without becoming a public charge unsuitable for American citizenship and therefore denied their entry. This applied to immigrants with physical or mental ailments, unmarried pregnant women, immigrants who arrived with very little money, female immigrants with dependent children, and others.

Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

²⁶ 142 U.S. 651, 659 (1892).

²⁷ Schuck, 14.

opinion of certain factors.”²⁸ The immigration officer is therefore “made the sole and exclusive judge” and cannot be overruled, reexamined, or questioned by any other tribunal.²⁹ The law explicitly stated that even if the validity of evidence is in question, the judicial branch will not intervene. This ruling set an early precedent for the astounding, disproportionate discretionary power given to immigration officers, and eventually, to immigration detention officers. It also assured immigration officers that they would not have to defend their actions, as the courts had no intention of challenging the bureau’s rulings. While aliens technically held rights to due process of law, the courts rapidly redefined what constituted “due process.” As the case of *Nishimura Ekiu v. United States* solidified, “due process” for an alien could consist of a review and decision by a single, non-judicial immigration officer. Paradoxically, the Supreme Court made the decision to remove its own authority, and instead championed the administrative powers of immigration bureaucrats.

The two legal cases described above introduced a particular interpretation of sovereignty that became core to the formation of immigration policy in the United States. The cases defined sovereignty as the autonomy of the nation-state in controlling its borders and promoting national security. Sovereignty refers to a “supreme authority over territory” in which citizens are separated from non-citizens and outsiders may not interfere with a state’s governance.³⁰ This interpretation of American sovereignty derived from the Declaration of Independence, in which the colonies asserted themselves as sovereign entities, separate from British rule. These roots made immigration policy an anomaly in the American tradition of constitutional governance. Immigration control represents one of few policies that drew its power from the sovereignty that

²⁸ 142 U.S. 651, 660 (1892).

²⁹ 142 U.S. 651, 660 (1892).

³⁰ Robert Koulisch, *Immigration and American Democracy: Subverting the Rule of Law* (New York: Routledge, 2010), 8.

preceded the Constitution rather than from the Constitution itself.³¹ Ultimately, “sovereignty” as used in immigration policy helped place immigration detention outside the normal parameters of policymaking oversight. However, complications arose as the executive branch increasingly delegated its right to sovereign rule to immigration authorities.

When the Supreme Court claimed the ability to exclude Chae Chan Ping as a “sovereign power” it stated that this authority proved fundamental to the autonomy of the state. However, the amorphousness of the term “sovereignty” made the doctrine difficult to challenge or oppose. Unlike rulings based on the Constitution, immigration rulings drawing on sovereignty cannot be challenged based on an alternative interpretation. How does one challenge whether a ruling or policy indeed furthers a sovereign power? No formal document asserts what constitutes sovereignty, nor is there an official authority on the term. As one of the few bureaucracies that derives its power from this fluid, abstract concept, it seems logical that immigration policy would possess substantial discretionary powers. In coming sections, I continue to explore how the designation of border control as a sovereign power allowed the federal government nearly unchecked power in determining exclusions, superseding judicial oversight, and operating outside constitutional bounds.

Fong Yue Ting and the Rights of Deportation

The 1893 case of Fong Yue Ting marked a new era for immigration legal history as it dealt with deportation rather than exclusion. The issue of deportation in turn initiated a dispute about the nature of the control that the federal government exerted over immigrants. Did the federal government control immigrants because they had broken a law, and were thus criminals?

³¹ Ibid.

Or did it control such immigrants as simply a necessary, administrative process that supported sovereignty? Responses to these questions shaped the policy of detaining immigrants across the 20th century.

In 1893, the government ordered the deportation of Fong Yue Ting, a Chinese immigrant who had refused to register for a certificate of residence. The Geary Act, passed in 1892, demanded that all Chinese residents carry a resident permit at all times with failure to do so punishable by deportation or a year of hard labor. In 1893, the government ordered Fong Yue Ting's removal for his failure to comply with the new policy. While *Chae Chan Ping v. U.S.* and *Nishimura Ekiu v. U.S.* asserted the power of the nation-state to *exclude* aliens, Fong Yue Ting's attorneys argued that the power to *deport* a legal resident alien stood as far removed from the exclusion precedent "as the North Pole is from the South."³²

The attorneys representing Fong Yue Ting directly opposed the notion of sovereignty as an enforceable law. They argued that "there is no such thing as an inherent power of sovereignty resting in Congress" because sovereignty lies with the people.³³ The Supreme Court disagreed. It again established the right to exclude or to expel aliens as an inalienable right of nations and further clarified, "The order of deportation is *not a punishment for crime* [italics mine]...It is but a method of enforcing the return to (an alien's) own country."³⁴ Under this precedent, the government did not hold immigrant detainees for punitive purposes. Thus, detainees did not receive the same legal protection initiated if charged with a criminal action.³⁵ Three years later, the Supreme Court would elaborate on this position, stating, "...detention or temporary

³² Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill, NC: The University of North Carolina Press, 1995), 48.

³³ Salyer, 49.

³⁴ 149 U.S. 698, 730 (1892).

³⁵ Suzanne Oboler, ed., *Behind Bars: Latino/as and Prison in the United States* (New York: Palgrave MacMillan, 2009), 51.

confinement as part of the means necessary to give effect to the provisions for the exclusion of aliens would be valid...it is not imprisonment in a legal sense.”³⁶

The case of *Fong Yue Ting* created one of the most fundamental paradoxes of immigration detention—detainees held in American prisons under extremely limited rights and freedoms, were not technically criminals. In theory, this may seem like a benign attempt to avoid criminalizing immigrants. But in practice, it meant immigrant detainees found themselves denied the most fundamental rights in the legal process. For example, immigrant detainees did not possess a right to legal counsel, as a criminal convict would. The vast majority of detainees entered the “due process of law” with no representation. Additionally, previous determination did not bind the immigration bureaucracy, as it would a U.S. court. If a court acquitted an immigrant on criminal charges, this did not prevent the Bureau from arresting and deporting an alien on the same charge.³⁷ As the *Fong Yue Ting* ruling stated, “Because the order of deportation...is not punishment for crime...the provisions of the Constitution and securing the right of trial by jury and prohibiting unreasonable searches and seizures, and cruel and unusual punishment, have no application.”³⁸

Even at the time of the ruling, some members of the opposition claimed the deportation process violated the Fourth and Sixth Amendments. The ruling generated substantial controversy among the Supreme Court justices. Justice David Brewer represented the dissenting opinion, calling the process “cruel and severe” as it imposed punishment without a trial.³⁹ He argued that any description of deportation as an administrative procedure was simply a governmental euphemism. Justice Brewer contended, “Deportation is a punishment. It involves first, an arrest,

³⁶ *Wong Wing v. United States*. 163 U.S. 228 (1896).

³⁷ Salyer, 193.

³⁸ 142 U.S. 651, 730 (1892).

³⁹ 142 U.S. 651, 739 (1892).

a deprivation of liberty, and second a removal from home, from family, from business, from property...but punishment implies a trial.”⁴⁰ The Court’s eventual overruling of Brewer’s claims set a key precedent for the modern immigration bureaucracy. 20th century courts frequently cited *Fong Yue Ting* in ruling that detention and deportation did not constitute “cruel and unusual punishment.”⁴¹

At the turn of the century, the *Fong Yue Ting* ruling meant that the immigration bureaucracy need not adhere to the Bill of Rights that governed criminal proceedings. Bureaucrats could issue warrants without merit, set bail arbitrarily, and detain immigrants indefinitely.⁴² As one federal judge summarized, “If the Commissioners (of immigration) wish to order an alien drawn, quartered, and chucked overboard they could do so without interference.”⁴³ With this precedent established, the federal immigration bureaucracy entered the 20th century more powerful than ever.

Boards of Special Inquiry & the Extension of Plenary Power

With the *Fong Yue Ting* ruling, deportation took its place as a formal responsibility of the federal government and the U.S. immigration bureaucracy ushered in a new era. In this section, I examine the extraordinary discretionary powers that enabled the so-called “bureaucratic tyranny” of the Bureau of Immigration at the turn of the century.⁴⁴ In particular, I analyze how the immigration bureaucracy extended plenary power to an increasingly large network of discretionary decision-makers. The Boards of Inquiry, non-judicial bodies who made the final

⁴⁰ 142 U.S. 651, 740-741 (1892).

⁴¹ *Burr v. INS*, 350 F.2d 97; *Bassett v. INS* 581 F.2d 1385.

⁴² Salyer, 136.

⁴³ Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* (New York: New York University Press, 1975), 23-24.

⁴⁴ Salyer.

rulings on cases of deportation and detention, came to illustrate how low-ranking bureaucratic agents now held the sovereign powers to dictate admission or exclusion.

Much of the logic pervading the early Bureau of Immigration can be seen by examining the Reports of the Industrial Commission on Immigration of the 57th Congress, published in 1901. President William McKinley created the Industrial Commission in 1898 to investigate the impact of immigration on labor markets and make recommendations to the President and Congress. The Reports reveal a deep discomfort among policymakers towards both the growing administrative power of the Bureau and the lack of judicial oversight. The Reports also expose an uncertainty with how to manage the agency itself. While the Commission recognized the issues created by the bureaucrats' extralegal authority, they ultimately held little control over the Bureau or its Commissioner's actions. The problem of how to regulate an agency with nearly unchecked sovereign power would prove a persistent issue for the federal government throughout the ensuing century.

The federal government created the Bureau of Immigration in 1895, as the agency that would oversee all deportations and detentions in the United States. Prior to the Bureau's creation, immigration tasks fell under the Office of the Superintendent of Immigration, a similar but smaller agency. Both the Bureau of Immigration and its prior incarnation found classification under the Department of the Treasury, where it would stay until 1903, when the Department of Commerce and Labor gained control.⁴⁵ The Commission Reports show that the re-organization of the Bureau of Immigration gave the agency more employees, a broader reach, and greater influence. While the 19th century court cases proved the immigration bureaucracy could operate

⁴⁵ Darrell Hevenor Smith & H. Guy Herring, *The Bureau of Immigration: Its History, Activities, and Organization* (Baltimore, MD: The Johns Hopkins Press, 1924), 74.

without judicial interference, the Bureau of Immigration became the first governmental agency to truly seize this opportunity for discretionary decision-making. Perhaps nowhere was this authority more clear than in the expansion of federal detention.

In the Bureau of Immigration's early years, most detention cases involved contracted labor. At the turn of the century, some companies encouraged foreign residents to come to the United States under the promise of employment. Companies recognized that the immigrants would work for low wages, and therefore aided them in their immigration. The government classified "contracted laborers" as any immigrants induced, assisted, or solicited to migrate to the United States under the pre-arranged promise of employment.⁴⁶ Policymakers realized that the importation of cheap labor represented a threat to American jobs and that the process of contracting exploited migrants. As the 20th century began, immigrants identified as contract laborers entered detention and faced deportation to their country of origin.⁴⁷ After contracted laborers, immigrants labeled "liable to become a public charge" comprised the second highest number of detained entrants. Officials also detained suspected anarchists, panderers, polygamists, and prostitutes.⁴⁸ Detentions generally took place on the ships the immigrants had arrived on or in crowded dormitories within the processing facility. Transportation companies paid for the voyage home for excluded immigrants. Deportations typically took place within one or two weeks.⁴⁹

The Industrial Commission Reports identified executive discretion as a particular concern for Congress under the new Bureau of Immigration. The strict laws regarding contract laborers

⁴⁶ Ibid.

⁴⁷ U.S. Congress, House of Representatives, *Reports of the Industrial Commission on Immigration and Education*, Vol. XV 57th Cong., 1st sess., 1901, Government Printing Office, 658.

⁴⁸ Pitkin, 73.

⁴⁹ Ibid.

meant increased numbers of aliens faced deportation, and under the precedent of *Nishimura Ekiu*, none held the right to a judicial appeal. The executive discretion carried such weight that courts refused to interfere even when they realized the Bureau acted inappropriately. In a September 1899 case involving the deportation of a legal resident to Japan, a California court stated:

It appears very clearly from these facts that Ota is not an alien immigrant, and the commissioner of immigration...erred in ordering him to be returned to Japan as such. But...the decision of the secretary of the treasury to the contrary cannot be reversed or set aside by the court in this proceeding. Under this statute, when the executive officers of the government...have decided that an alien is not entitled to enter the United States, the courts are without jurisdiction to review the determination upon questions either of law or of fact.⁵⁰

While the courts often reviewed the decisions made by the Bureau of Immigration, they repeatedly made the decision not to get involved. The Bureau of Immigration had been created as the agency that knew what was best for immigrants and for the nation-state. Therefore, the judiciary determined that their interference would symbolize both a distrust of the agency and an overstepping of sovereignty. This solidified the unique plenary power of the new agency.

The growing number of deportations alongside the lack of judicial interference raised another question: who made the deportation decisions? When appeals did occur, the Department of Commerce and Labor reversed the decisions made by the Boards of Special Inquiry in nearly 50% of all cases; critics believed this fact cemented the incompetence of these boards.⁵¹ Who comprised the Boards of Special Inquiry became a hotly contested issue in the Industrial Commission Reports. The Boards of Special Inquiry began in 1893, as a way to review “those

⁵⁰ *In re OTA*. 96 F. 488 (2d Cir. 1899).

⁵¹ Salyer, 156.

who are not clearly and beyond doubt entitled to admission.”⁵² By the turn of the century, immigration inspectors detained about 13 to 16% of immigrants for special inquiry. However, many of the board members possessed questionable credentials; the Industrial Commission reported that the officers “at present are scarcely qualified for the satisfactory performance of their duties.”⁵³ The Bureau of Immigration generally selected subordinate officers with no judicial or legal qualifications for service on the Boards. Many of the Board members worked as interpreters or registry clerks prior to their appointment and many had been immigrants themselves.⁵⁴ The Industrial Commission summarized the gravity of the administrative power, writing: “They are sometimes without very much legal or judicial qualifications, but they are placed in the position where they are, for the time being, judges.”⁵⁵

The Boards of Special Inquiry served as another example of how the immigration bureaucracy managed to evade the restrictions placed on other governmental agencies. While employees of other agencies took a civil-service examination to qualify for their positions, inspectors in the Bureau of Immigration did not. Then-Commissioner Thomas Fitchie claimed in 1901 that the positions relied on “common sense and honesty,” rather than the “book learning or linguistic knowledge” tested for in civil-service examinations. Critics questioned if this gave the Commissioner too much discretion in hiring officers who fit his ideology (“party workers”), rather than hiring the most competent men.⁵⁶ Commissioner Fitchie dismissed their concerns, saying that while he remained “as radical a partisan...as any man living” that this “would not

⁵² U.S. Congress, House 1901, XVII.

⁵³ U.S. Congress, House 1901, 661.

⁵⁴ The immigrant status of many Board of Special Inquiry members also raised concerns for their objectivity; the Industrial Commission report (pg. 661) states: “It can not be expected that such men, themselves immigrant, shall understand the principles and objects which are desired by the American people in adopting exclusive legislation. As a matter of fact this class of inspectors are liberal in admitting people of their own race but captious in admitting other races.”

⁵⁵ U.S. Congress, House 1901, 75.

⁵⁶ U.S. Congress, House 1901, 74

interfere with (his) keeping a competent man.”⁵⁷ The tremendous administrative discretion that pervaded the immigration bureaucracy’s exclusion decisions extended even to the hiring process.

The Industrial Commission also called the proceedings of the Boards of Special Inquiry into question, claiming that their rulings had become highly arbitrary and had moved even further away from judicial norms. The Immigration Act of 1907 stated that exclusion decisions could “be rendered solely upon the evidence adduced before the Board of Special Inquiry.”⁵⁸ However, many cases showed that the Board decided to exclude based on the applicant’s occupation. If the immigrant sought work in what the Boards labeled “congested industries,” they assumed the immigrant would not find work, and would therefore become a public charge. The Boards made this assumption with no formal evidence, thereby contradicting the 1907 ruling. One reformer called this “utterly inconsistent,” noting the impossibility of truly measuring congestion, given the “ever-varying and complex conditions involved.”⁵⁹ Reformers remained unconvinced that the untrained, underpaid Boards of Special Inquiry could make such judgments.

Administrative shifts brought formal criticisms of the Board’s methods and practices. When Commissioner William Williams took office in 1902, he filed charges of abuse against former Commissioner Fitchie. He argued that the Boards of Special Inquiry under Commissioner Fitchie utilized the “power of blackmail” to arbitrarily detain wealthier immigrants and then demand boarding fees.⁶⁰ The U.S. Immigration Commission in 1911 recommended that “in justice to the immigrant, and to the country as well, the character of these boards should be

⁵⁷ Ibid.

⁵⁸ Congress, House, New York Congressman William Stiles Bennet speaking to the House of Representatives, 60th Cong., 1st sess., *Congressional Record* 41, pt. 5 (2 March 1907), 4529.

⁵⁹ Max Kohler, *Immigration and Aliens in the United States* (New York: Bloch Publishing, 1936), 57.

⁶⁰ “Immigration Abuses Finally Charged: Commissioner Williams Reflects Upon Predecessor in His Report,” *New York Times*, Oct. 1, 1902.

improved.”⁶¹ While there was near consensus that the Boards of Inquiry needed reform, the lack of judicial interference meant the immigration bureaucracy faced no legal imperative to change its ways. The plenary power assigned to even the lowest level officers would become an enduring characteristic of the immigration bureaucracy.

Ellis Island: Foundations of Detention & Privatization 1900-1924

The Bureau of Immigration expanded significantly as it entered the 20th century. This expansion appears most vividly at Ellis Island, the hub of U.S. immigration activity. The Bureau’s rapid growth meant a decentralization of power and heightened administrative authority given to immigration officers. Upon its creation in 1895, only four people worked for the Bureau: the superintendent of immigration, a chief clerk, and two assistant clerks.⁶² By 1906, the D.C. office had 25 employees, and border immigration stations had also expanded. Ellis Island alone employed 523 people in 1911. Employment with the Bureau continually rose until 1917 when the outbreak of war meant fewer incoming immigrants and fewer potential employees. In a 1924 letter to Congress, the Secretary of Labor admitted that during World War I many of the Ellis Island staff members lacked qualifications, stating: “the immigration force was badly disorganized...a great many inexperienced persons were called to the service in place of trained men who had gone into other occupations during the war.”⁶³

While historians often think of privatization as a modern phenomenon in U.S. detention, the federal government did not operate Ellis Island on its own. Ellis Island relied heavily on private contractors to manage its detention of immigrants. Before World War I, the Bureau of

⁶¹ United States Immigration Commission. *Brief Statement of the Conclusions and Recommendations of the Immigration Commission, with Views of the Minority*. (Washington, D.C.: Government Printing Office, 1910), 24.

⁶² Salyer, 144.

⁶³ Congress, Senate, Secretary of Labor James J. Davis of Massachusetts speaking to the United States Senate, 66th Cong., 1st sess., *Congressional Record* 61, pt. 8 (22 November 1921), 8107.

Immigration detained immigrants only for brief periods, generally under a week, while determining their fitness for admission or awaiting their deportation. Private contractors provided services including food concessions, transportation, and money exchanges, as well as the construction of new buildings and holding centers. Reports of exploitation proliferated. The food provided to detainees became a point of particular concern, sparking extensive national media coverage. When William Williams' took over as Commissioner for a second term in 1909, he promised to reform the system of contracting, and launch a "painstaking investigation" into detainment conditions.⁶⁴ Williams encountered appalling conditions, reporting "I witnessed with my own eyes the fact that immigrants were often fed without knives, forks, or spoons, and I saw them extract boiled beef from their bowls of soup with their fingers . . . (the meat was tainted) and the floors were covered with grease, bones, and other remnants of food for days at a time."⁶⁵

Commissioner Williams hired a new contractor, but problems persisted. In a 1911 *New York Times* article, a political asylum seeker previously detained in Siberia compared Ellis Island unfavorably to his imprisonment in Russia. The asylum seeker, Karl Lewis, described Ellis Island as overcrowded and unsanitary with verbally abusive officials and insufficient rations.⁶⁶ Lewis told the *New York Times*, "The filth and the stench in the room in which human beings are kept here for no crime are horrible."⁶⁷ The early use of private contracts incurred substantial criticism from community leaders, as well as immigrants. Dr. William H. Allen wrote in the 1914 *American Review of Reviews*, "...our national Government farmed out to the private contractors the privilege of making money out of food supplies to the poor immigrant during his

⁶⁴ Department of Commerce and Labor, *1910 Report of the Secretary of Commerce and Labor and Reports of Bureaus*, (Washington D.C.: Government Printing Office, 1911), 290.

⁶⁵ *Ibid.*

⁶⁶ "Siberian Prisoner Flees Here and Gets a Shock," *New York Times*, Jan. 29, 1911.

⁶⁷ *Ibid.*

short stay at Ellis Island.”⁶⁸ A 1913 investigation recommended to President Wilson that the practice of private contracting be discontinued and that all services on Ellis Island be operated by federal employees, with federal oversight.⁶⁹ Opponents did not offer evidence that the government could operate these services more efficiently, but instead based their disapproval on moral and ideological terms. Many policymakers believed that allowing private companies to profit off of immigration represented a dangerous collusion of public and private interests, and introduced an unsavory profit-seeking element to immigration policy.

Frederic C. Howe assumed the position of Commissioner in 1914, with a reputation as a major liberal reformer who focused on a more humane approach to immigration. In 1916, Hudgins and Dumas, Co.’s contract to provide food for Ellis Island expired. Commissioner Howe chose not to renew the contract, and instead declared that federal employees would exclusively operate Ellis Island. Howe was similarly critical of Ellis Island’s relationship with private railroad and steamship companies. Through contracts and collaboration, several vessels and railroads companies controlled almost all transportation to Ellis Island, reaping huge profits for the companies and eliminating almost all competition.⁷⁰ Howe described the relationship between the private companies and the Commissioner of Immigration as “guerilla warfare.” He passed several restrictions to improve transportation conditions and protect newly arrived immigrants from swindlers.⁷¹ Howe’s attempts at reform sparked the first national dialogue about the role of private companies in the immigration bureaucracy.

⁶⁸ William H. Allen, “Two New York Health Universities,” in *The American Review of Reviews*, ed. Albert Shaw (New York: The Review of Reviews Company, Jan-June 1914), 315.

⁶⁹ “For Ellis Island Reforms: Research Bureau Would Abolish Commissary Contract System,” *New York Times*, September 27, 1913.

⁷⁰ Kenneth E. Miller, *From Progressive to New Dealer: Frederic C. Howe and American Liberalism*. (University Park, PA: The Pennsylvania State University Press, 2010), 220.

⁷¹ *Ibid.*, 221.

Howe based the decision not to renew Hudgins and Dumas' private contract on two premises: first, that the profit seeking nature of corporations compromised the treatment of detainees and second, that the federal government should retain all responsibility for the management of Ellis Island. Howe stated, "I wanted the government to do it right, and take the element of profit out of it...(it is) my duty to protect the immigrant who has to run the gauntlet of all kinds of private interests from the time he leaves the steamship until he reaches his destination."⁷² Howe faced a growing detention system as the nation entered World War I. Increasing numbers of immigrants from Germany, Russia, and Austria-Hungary came through Ellis Island but could not be deported since war zones made it dangerous for ships to cross the Atlantic.⁷³ As Howe reported to Congress, "The war turned Ellis Island into a detention camp."⁷⁴ However, Howe did not anticipate the political landmine he would detonate by eliminating the government's private contracts.

While other agency leaders warned Howe that several Congressmen had connections with Hudgins and Dumas, Co., Howe disregarded their warnings. He believed that removing private corporations would protect immigrants and that Congress would prioritize this protection over any private interests.⁷⁵ Almost immediately, Congressman William S. Bennet (R-NY), a former attorney for Hudgins and Dumas, launched an all-out attack on Howe. Bennet accused Howe of being "an extremist," "a negligent commissioner," "a half-baked radical with free love ideas"⁷⁶ In Bennet's 1917 speech before the House of Representatives, he criticized Howe not for eliminating the private bidding process, but for allegedly admitting prostitutes into the United

⁷² Fredrick A. Howe, "Denies Scandals at Ellis Island: Commissioner Howe Answers Bennet's Charges of Immorality Among Immigrants," *New York Times*. July 20, 1915.

⁷³ Barry Moreno, *Encyclopedia of Ellis Island* (Westwood, CT: Greenwood Press, 2004), 252.

⁷⁴ Howe.

⁷⁵ Miller, 222.

⁷⁶ *Ibid.*, 223.

States.⁷⁷ Bennet called for the commissioner's impeachment, saying that Howe's actions harmed New York City and threatened the nation. However, in the last line of his speech, Bennet also asked to have Hudgins and Dumas, Co.'s contract reinstated—a rather transparent (and ultimately unsuccessful) attempt to sway public power for private profit.⁷⁸

The intersection of profit-seeking companies and the immigration bureaucracy at the beginning of the 20th century foreshadowed many themes of detention privatization in the 21st century. The rhetoric of Commissioner Howe in addressing private corporations and the federal government became highly reminiscent of the rhetoric that emerged in later immigration detention debates. Howe's comments reflected a fundamental uneasiness with both the criminalization of immigrants and the administrative authority his agency possessed. However, while Howe questioned the conditions of detention, he never questioned the process of detention itself. As early as 1914, detention had proved itself an integral and accepted part of the border control proceedings.

Increasing Visibility of Detention

The Immigration Act of 1924 severely restricted immigration to the United States. The Act mandated that the 1890 census would serve as the barometer for establishing quotas, allowing entry to substantially lower numbers of immigrants. With large masses of European immigrants no longer moving through Ellis Island, the Bureau of Immigration chose to utilize the facility primarily as a center of detention and deportation for aliens who had entered the U.S. illegally or had violated the terms of admittance.⁷⁹ As the Great Depression further reduced

⁷⁷ "Charges Scandals on Ellis Island: Bennet Attacks Commissioner Howe on House Floor for Alleged Immoral Conditions," *New York Times*, July 16, 1916.

⁷⁸ *Ibid.*

⁷⁹ Pitkin, 155.

immigration, and new policies required immigrants to be pre-screened for entry at their local American embassy, the role of Ellis Island rapidly transformed. As Commissioner I.F. Wilson reported in 1931, there had occurred “a complete reversion at this Port of Immigration work...whereas previously it was regarded as the gateway to America, it is now the port of expulsion, and our Law Division and Deporting Division are the two most important at the Station.”⁸⁰ From June 1932 to June 1933, 7,037 outgoing aliens passed through Ellis Island.⁸¹ The majority of the deportees entered the U.S. illegally. Immigrants with illnesses and those labeled “subversive” or criminal constituted smaller portions of the detained population. Due to the economic depression in the U.S., Ellis Island also held a number of “repatriates” or those seeking to return to their home nation at the expense of the government.⁸²

The new era at Ellis Island initiated a renewed focus on maintaining the public image of the United States’ detention practices. In the years of peak immigration, Ellis Island became a center of media attention and exposé for both the domestic and foreign language press. Newspapers such as the *New York Times* often wrote highly critical pieces on both unmerited exclusions and detention conditions, using Ellis Island employees, missionaries, and steamship captains as sources.⁸³ Alarmist newspaper headlines such as “BARON A PRISONER ON ELLIS ISLAND” and “BABIES FACE DEPORTATION,” became human interest mainstays, increasing the visibility and public awareness of detention practices.⁸⁴ The foreign language press wrote even harsher diatribes, particularly when people of their own nationality faced detention and exclusion. The *Staats-Zeitung*, a German language paper based in New York City,

⁸⁰ Ibid.,160.

⁸¹ Ellis Island Committee, *Report of the Ellis Island Committee, March 1934* (New York, 1934), 23.

⁸² Ibid., 23.

⁸³ Pitkin, 48.

⁸⁴ “Baron a Prisoner on Ellis Island; Von Hasperg, Son-in-Law of Commodore McVickar, Held for Investigation,” *New York Times*, January 22, 1918; “Babies Face Deportation: Father Kept Them Two Years at Ellis Island, but His Funds Are Gone,” *New York Times*, September 4, 1910.

often led the charges of corruption and inhumane conditions at Ellis Island. In 1903, the paper published an article entitled “Hell on Earth” claiming that “people on the Island were literally eaten up by vermin.”⁸⁵ The claims by the *Staats-Zeitung* generated enough public outcry for President Theodore Roosevelt to launch an investigation into Ellis Island.⁸⁶ Roosevelt’s committee ultimately found that while detention conditions remained cramped, they provided clean and safe accommodations. Although the newspapers of the time often based their claims on unsubstantiated second-hand claims, they served an important role in keeping detention visible and holding officials accountable in the early 20th century. As the immigration bureaucracy now held most power over detention, it often took public and media outrage to spark executive branch inquiry into the bureaucracy’s practices.

With the knowledge that Ellis Island would now function solely as a detention center, immigration bureaucrats became more mindful of the center’s public image. Commissioner Edward Corsi, a former Italian immigrant, took office in 1931 with a goal of reforming the public perception of the new Ellis Island and “(removing) the air of mystery with which it had been surrounded.”⁸⁷ Commissioner Corsi wrote:

Many mistakes blot the record of Ellis Island and great have been the hardships, the humiliations and the exploitation suffered by the immigrant. Yet, I am sure, there have also been instances of exaggeration in which the vitriol of the public and the press has been unwarrantedly directed at a Service which, in a last analysis, has been more sinned against than sinning.⁸⁸

⁸⁵ Vincent J. Cannato, *American Passage: The History of Ellis Island* (New York: HarperCollins Publishers, 2010), 155.

⁸⁶ “Probing Ellis Island: President Roosevelt’s Commission Hears Many Complaints,” *New York Times*. October 6 1903.

⁸⁷ Edward Corsi, *In the Shadow of Liberty: The Chronicle of Ellis Island* (New York: Macmillan Company, 1935), 308.

⁸⁸ *Ibid.*, 296.

Corsi believed his predecessors had been the victims of "...a hostile press, sharp shooting at details over which (they) had no control" and saw greater visibility of detention practices as key to positive press.⁸⁹ Corsi firmly stated that Ellis Island had nothing to hide and immediately began implementing new reforms. The Commissioner later wrote, "In my own mind Ellis Island was not a prison, not even a prison for the deportees, who had served their prison terms and presumably paid their penalties to society. Accordingly it was wrong to treat them as prisoners."⁹⁰ Corsi allowed detainees more outdoor recreation time, visitations with family, and the ability to use the telephone and mail service. He also held personal meetings with detainees to discuss conditions and grievances.⁹¹

Commissioner Corsi held three major meetings upon attaining his new position: one with New York reporters, one with foreign newspaper correspondents, and one with Consuls of foreign nations. Corsi told reporters they would "have free entry to the hitherto forbidden ground."⁹² Reporters gained the ability to freely interview detained aliens, Commissioner Corsi, and other officials at Ellis Island.⁹³ Corsi claimed that the meetings led auspicious publicity of the U.S. to spread throughout Europe. Relations with Washington also improved markedly. Secretary of Labor William N. Doak made several visits to the Island and reported back favorably. This allowed Corsi to gain additional funding to improve facilities. The Roosevelt administration gave a record \$1,100,000 allotment for improvement of the Island.⁹⁴

Along with increasing visibility, Commissioner Corsi also made progress in redefining the role of the Bureau of Immigration. Corsi discontinued the more aggressive deportation tactics

⁸⁹ Ibid., 297.

⁹⁰ Ibid., 300.

⁹¹ Ibid., 301.

⁹² Ibid., 308.

⁹³ Ibid., 308.

⁹⁴ Ibid., 310.

of the past, such as deportation raids on immigrant-heavy areas. He also expanded the role of the Bureau in providing “an Americanizing influence” to newly arrived immigrants. He saw the responsibility of the State in both training immigrants in the U.S. language and customs and in protecting them from exploitation by swindlers in the immigration process. These reforms also found positive reception. In the 1934 Ellis Island Committee Report, the Committee wrote, “The spirit and policy at Ellis Island depend chiefly on the ability, humanity, and disinterestedness of the Commissioner in charge. The Committee trusts that for the future the high standards of the past year may be resolutely maintained.”⁹⁵ By the time of Corsi’s resignation in 1934, even the *Literary Digest* noted, “Only occasionally now does this most famous of national gateways appear in the news.”⁹⁶

The visibility of detention practices in the pre-World War II era is particularly notable because the modern detention system operates with an enormous lack of transparency. The liberal policy of media access under Commissioner Corsi experienced a complete reversion by the turn of the century. Whereas Corsi claimed to use visibility as a way to empower the agency and gain political and public support, the 21st century immigration bureaucracy chose the opposite approach: the less the public knows, the better. Corsi also represented an anomaly in the immigration bureaucracy, as he made efforts to decriminalize the detention system. While other Commissioners attempted to play to public favor with rhetoric of protecting U.S. interests and keeping out deviants and burdens, Corsi sought to win public favor by framing immigrants as sympathetic figures. The decriminalization of immigrants won favor with both the domestic and foreign press, and ultimately led to less regulation of the Bureau’s actions. In Corsi’s case,

⁹⁵ Ellis Island Committee, 59.

⁹⁶ Pitkin, 167.

cooperating with the media and detainees put the federal government's mind at ease, allowing the Bureau of Immigration to become even more powerful and autonomous.

“During the National Emergency:” The Cases of Knauff & Mezei

While activity at Ellis Island plateaued during the economically depressed 1930's, World War II signaled a revival for detention and deportation practices. The Bureau of Immigration, now renamed the Immigration and Naturalization Service (INS), became part of the Department of Justice in 1940. This change signaled that the compassionate days of the Corsi administration had passed. President Roosevelt stated that “the startling sequence of international events” demanded “a review of measures required for the nation's safety.”⁹⁷ Roosevelt said that while he had no intention of infringing on the civil rights of non-citizens, that this transfer of power would afford the government “more effective control over aliens.”⁹⁸ Within days of the agency's transfer, the Department of Justice had already proposed registering and fingerprinting 3,500,000 aliens “as a defense measure to combat the activities of a ‘fifth column.’”⁹⁹

By 1946, Ellis Island held nearly 7,000 detainees, primarily of German, Italian, and Japanese origins, who authorities believed may pose a threat to American society. Many faced deportation based on suspected communism, leading Ellis Island to create a “Communist Wing” of its detention facilities. A 1949 report from the Department of State reported that the average detention period for all cases at Ellis Island was 8.5 to 10 days, at the taxpayer cost of \$9.75 a patient per day. About one-third of detainees sought entry to the United States, with status not yet determined, while the other two-thirds were considered inadmissible and awaited

⁹⁷ Felix Belair, Jr., “President Offer Alien Control Plan: Says ‘Startling Events’ Abroad Call for Transfer of Duties to Justice Department,” *New York Times*, May 23, 1940.

⁹⁸ *Ibid.*

⁹⁹ Lewis Wood, “Alien Registering Asked in Defense: Attorney General Proposes Listing 3,500,000 to Check Subversive Activities” *New York Times*, May 21 1940.

deportation.¹⁰⁰ The report painted a pleasant picture of the detention practices, describing Ellis Island as a “self-contained city” rather than a prison-like setting. Indicating that Corsi’s legacy of reform had endured, the report described central heating systems, laundry facilities for detainee use, and a kitchen, as well as rations that catered to national and religious preferences. Ellis Island also had its own post office, chapels, telegraph office, railroad-ticket office, and a library with over 20,000 books for detainee use. The U.S. State Department reported that since detainees could not leave the island, social service workers ran errands, distributed newspapers to detainees, informed relatives of a detainee’s status, and even provided a free notary service.

While the conditions of Ellis Island seem accommodating by contemporary standards, the circumstances surrounding detentions often remained deeply problematic. The post-WWII exclusion cases of Ellen Knauff and Ignatz Mezei proved particularly notable. The INS excluded both Knauff and Mezei based on secret evidence and deemed neither eligible for judicial review. Legal scholars have called these cases “the Supreme Court’s fullest statements of the plenary power doctrine.”¹⁰¹

Ellen Knauff was born in Germany in 1915 and fled to Czechoslovakia during the Hitler regime.¹⁰² In 1939, she traveled to England as a refugee and served in the Royal Air Force. In 1948, she married a naturalized citizen and veteran of the United States. On August 14, 1948, Knauff attempted to enter the United States and was placed in detention at Ellis Island. Two months later, the Assistant Commissioner of Immigration and Naturalization recommended her permanent exclusion without a hearing on the ground that her admission would “be prejudicial to

¹⁰⁰ Frances W. Kerr. *Immigration and Naturalization Service Monthly Review*. Ellis Island, May 1949.

¹⁰¹ Weisselberg, 985.

¹⁰² *Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950).

the interests of the United States.”¹⁰³ The Justice Department refused to disclose the evidence against Knauff, claiming that it would put the nation at risk.¹⁰⁴

Knauff remained in Ellis Island detention until the Supreme Court agreed to hear her case in December 1949. The Supreme Court ruled in a four-to-three decision that the power to exclude aliens without a hearing derived from the Act of June 21, 1941. The Act provided that “the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the national emergency.”¹⁰⁵ Therefore, in a time of “national emergency,” in this case World War II, the plenary power to exclude would lie even further outside judicial norms. The 1941 Act reinforced that plenary power intended to privilege the President during a national emergency, but as seen in Knauff’s case, had actually privileged bureaucrats. The Assistant Commissioner of Immigration, rather than the President, made the ruling against Knauff. The Supreme Court also cited *Fong Yue Ting v. United States* and *Nishimura Ekiu v. United States* in determining that the admission of aliens to the United States represented a sovereign right of the U.S. under whatever standard of entry the executive branch determined.¹⁰⁶ In a particularly strong authorization of plenary power, the Supreme Court asserted that “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹⁰⁷

¹⁰³ 338 U.S. 537, 540.

¹⁰⁴ The allegations against Knauff were never made explicitly clear. However, the gist of the allegations was that Knauff was formerly a paid agent of the Czechoslovak government and reported on American Personnel assigned to the Civil Censorship Division in Germany. (Weisselberg, 960)

¹⁰⁵ 338 U.S. 537, 540.

¹⁰⁶ 338 U.S. 537, 542.

¹⁰⁷ 338 U.S. 537, 544.

Knauff's case received strong support both inside and outside the court as many people questioned this dramatic, unchecked use of plenary power. Supreme Court Justice Robert H. Jackson became an outspoken supporter of immigrants' due process rights and delivered the Court's primary dissent. Jackson argued that because no hearing occurred, the Court could not ascertain that Knauff's admission would compromise national security. Jackson also feared that the use of secret evidence in exclusion cases could lead to foul play, as Knauff claimed that the source of the information against her was a "a woman jealous of (her) husband."¹⁰⁸ Jackson stated, "the plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, and the meddling, and the corrupt to play the role of informer undetected."¹⁰⁹ If the court did not know the evidence against Knauff, much less the source of the evidence, how could it fairly label Knauff as a threat? Furthermore, Jackson accused Congress of falsely utilizing the label of "security" to justify its arbitrary exclusion decisions. He stated that the greatest menace to liberty and the American way of life was not immigrants, but the oppressive, unconstitutional rulings generated to limit their freedoms. Like dissenters before him, Jackson never questioned the federal government's plenary power to authorize immigration officers to exclude aliens. However, Jackson labeled the Justice Department's refusal to reveal the evidence used in an "abrupt and brutal exclusion of the wife of an American citizen" as deeply objectionable.¹¹⁰ Even the *New York Times* noted Jackson's particularly "caustic language" in the dissent.¹¹¹

The Supreme Court's ruling evoked a massive outpouring of support for Ellen Knauff, due largely to the media coverage the case received. Both the *St. Louis Post-Dispatch* and the

¹⁰⁸ Lewis Wood, "U.S. Upheld on Bar to Alien Suspects," *New York Time*, Jan. 17, 1950.

¹⁰⁹ 338 U.S. 537, 551.

¹¹⁰ 338 U.S. 537, 550.

¹¹¹ Wood.

New York Post initiated publicity campaigns on her behalf, with the *St. Louis Post-Dispatch* calling the case “one of the most unusual spectacles in Supreme Court history” and the *Post* claiming “Justice Jackson’s dissent...far more eloquently voices the American conscience.”¹¹² The *St. Louis Post-Dispatch* ran a series of 15 editorials defending Ellen Knauff and generating substantial public backing.¹¹³ In late January, the *New York Times* published an editorial entitled “THE LETTER KILLETH” that commended Justice Jackson’s efforts. The editorial stated, “The country stands for some important and fundamental human rights, for its own citizens as for all peoples; and it is our belief that, one of these is the right of every human being to have a chance to defend himself.”¹¹⁴ By February, Congressman Franklin D. Roosevelt voiced his disapproval, accusing the Department of Justice of “departure from our civil liberties tradition.”¹¹⁵ A House subcommittee heard Knauff’s case on March 28, 1950 but again ruled that the Courts had followed the established procedures and committed no fault.

Public outrage continued to grow and at the urging of their constituents, several Congressmen introduced private bills to protect Knauff. As the public cried out for accountability, legislators could no longer continue the historical trend of ignoring decisions made by the immigration bureaucracy. Both Congress and the populace appeared unwilling to accept the immigration bureaucracy’s use of plenary power.¹¹⁶ Meanwhile, Knauff remained in detention at Ellis Island, unable to be either detained or released as the private appeal bills pended in court. One circuit court judge stated “...she will be detained in custody as the Attorney General deems reasonably necessary to safeguard the country’s interests. Therefore she cannot

¹¹² “The Banished War Bride,” *New York Post*, Feb. 14, 1950; “The Case of Ellen Knauff,” *St. Louis Post-Dispatch*, Jan. 18, 1950.

¹¹³ Weisselberg, 958.

¹¹⁴ “The Letter Killeth,” *New York Times*, Jan. 28, 1950; “Roosevelt Scores Aliens’ Exclusion: Criticizes Justice Department for Keeping 2 Out Without Giving Them Hearing,” *New York Times*, Feb. 22 1950.

¹¹⁵ *Ibid.*

¹¹⁶ Weisselberg, 964.

become a security risk."¹¹⁷ Detention no longer represented an administrative procedure in the processing of immigrants, but became a means of protecting the American people and keeping alleged criminals off the streets.

In March 1951, the Attorney General finally relented and allowed Knauff a full exclusion hearing before a Board of Special Inquiry. At the hearings, the government brought charges of espionage against Knauff. Despite Knauff's convincing defense, the Board of Special Inquiry determined that "it was reasonable to suspect" that Knauff would engage in espionage or other subversive activities if admitted into the United States.¹¹⁸ Knauff appealed the exclusion decision to the Board of Immigration Appeals. Knauff's counsel gathered substantial evidence that Knauff had no access to secret or confidential material, and on November 2, 1951, the Board reversed the exclusion decision.¹¹⁹ After almost three years of detention and legal limbo, Knauff finally gained admission into the United States. The case strongly reestablished the plenary power of the federal government—the executive branch possessed the unchallengeable power to exclude an alien, use secret evidence, and decide whether to conduct trials or hearings. But the case of Knauff also showed the power of the populace in demanding transparency and accountability in detention and deportation cases. When the Department of Justice had to find substantial evidence to justify its decision—both to the judiciary and to the public—their case against Knauff fell apart.¹²⁰

Knauff's initial expulsion coincided with an even more controversial 1950 legal case, that of Ignatz Mezei. An alien resident of Hungarian descent, Mezei lived in the United States from

¹¹⁷ "War Bride Scores in Fight with U.S.: Mrs. Knauff Wins Appeal in Habeas Corpus Phase of Her Deportation Proceedings," *New York Times*, March 29, 1950.

¹¹⁸ "Mrs. Knauff is Called a Spy: Immigration Unit Bars Her," *New York Times*, March 28, 1951.

¹¹⁹ "Mrs. Knauff Leaves Ellis Island after Winning Fight to Enter U.S.," *New York Times*, Nov. 3, 1951.

¹²⁰ Weisselberg, 964.

1923 to 1948.¹²¹ In May 1948, Mezei traveled to Romania to visit his dying mother. Romania denied Mezei entry, and he stayed in Hungary for 19 months due to difficulty securing an exit permit. He arrived back in the United States on February 9, 1950, where he was detained at Ellis Island. Three months later, the Attorney General ordered his permanent exclusion without a hearing before a Board of Special Inquiry, on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”¹²²

The immigration bureaucrats were not the only government officials exploiting secret evidence in February 1950. On the same day that Mezei entered detention, anti-Communist crusader Joseph McCarthy delivered a famous speech in which he claimed that the U.S. State Department had become “infested with Communists.”¹²³ Based on undisclosed evidence, McCarthy announced that he held a list of 205 known Communists working for the State Department. Cold War concerns over national security bred paranoia that permeated throughout the federal government, further threatening Mezei’s chance at a fair trial.

While the circumstances surrounding Mezei’s exclusion certainly recall the case of Ellen Knuaff, Mezei’s case contained one critical difference—Mezei had nowhere to go and nowhere to be repatriated *to*. The United States sought to deport Mezei, but quickly realized that no nation acknowledged Mezei as a citizen. Both France and Great Britain refused Mezei permission to land, Hungary denied his readmission, and a dozen Latin-American countries turned down Mezei’s pleas for entry.¹²⁴ Since the powerful United States had deemed Mezei dangerous, albeit

¹²¹ *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

¹²² 345 U.S. 206, 208 (1953).

¹²³ Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate* (Amherst: University of Massachusetts Press, 1987): 49.

¹²⁴ 345 U.S. 206, 209 (1953).

based on unseen evidence, no other countries wanted to offer Mezei entry either.¹²⁵ With nowhere to go and no admission into the United States, Mezei stayed in detention on Ellis Island for 21 months before his Supreme Court trial.

In November 1951, a District Court decided the government could not justify Mezei's extended detention, stating that to "continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty."¹²⁶ The case arrived in the Supreme Court in 1953, where the District Court's decision was overturned in a five-to-four decision. The Supreme Court found that Mezei's indefinite detention made no difference and ruled the court would again abstain from interfering with the INS' decision. The Court's decision reflected the Cold War mentality of every immigrant as a potential national security threat, stating "The decision...provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back." The Court went as far as to frame Mezei's detention as a benefit to him, writing that the government had granted Mezei a haven on Ellis Island, and labeling it "an act of legislative grace."¹²⁷

The Court also reaffirmed that indefinite detention did not merit a criminal trial, nor a constitutional acknowledgement of Mezei's rights. The Supreme Court stated that even though Mezei had nowhere to go, he still had the right to leave. Therefore, this remained a simple exclusion case, not a legal trial. Although Mezei lived in the United States for 25 years and spent over two years in a U.S. detention system, the legal precedent said he must be treated "as if

¹²⁵ Marvin M. Karpatkin, "Immigration Law Criticized: Elimination Asked of Provisions Deemed Illogical and Unfair," *New York Times*, Jan. 6, 1954.

¹²⁶ 345 U.S. 206, 209 (1953).

¹²⁷ 345 U.S. 206, 215 (1953).

stopped at the border.”¹²⁸ Since the Constitution did not extend extraterritorially, Mezei did not hold claim to traditional, judicial due process.¹²⁹ While the Ellis Island detention center stood on American soil, its residents did not technically reside “in” America. This peculiar logic for removing entrants from constitutional rights became known as the “entry fiction.”

Justice Jackson again wrote a strongly worded dissension to the Supreme Court’s decision. While Jackson conceded that the Court used the proper legal logic in determining Mezei had not technically entered the United States, he argued “No society is free where the government makes one person’s liberty depend on the arbitrary will of another...individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information held secret from courts.”¹³⁰ Jackson argued that Knauff’s case should have shown the courts the necessity of due process, calling it a “near miss” in punishing an innocent person.¹³¹

While Mezei’s case did not generate the same outpouring of support that Knauff’s did, it served as an important milestone in generating public awareness of plenary power. The decision that Mezei could be detained forever challenged how far Americans could justify detention in the name of security. One letter to the *New York Times* called the incident “the saddest commentary on American justice since Sacco and Vanzetti.”¹³² Other letters commented on the legality of using secret evidence and the ethical pitfalls of detaining someone indefinitely without trial. One citizen expressed concern that the practice of detention brought the nation closer to the Orwellian

¹²⁸ 345 U.S. 206, 215 (1953).

¹²⁹ Weisselberg, 951.

¹³⁰ 345 U.S. 206, 217-18 (1953).

¹³¹ 345 U.S. 206, 225 (1953).

¹³² Robert B. Dodd, “Plight of Ignatz Mezei Protested,” *New York Times*, April 25, 1953.

police state described in the novel *1984*.¹³³ Even more explosively, many commenters linked the U.S.' deprivation of liberties to the atrocities seen in World War II. In the dissension, Justice Jackson recalled that "the Nazi regime in Germany installed a system of 'protective custody' by which the arrested could claim no judicial or other hearing process, and as a result the concentration camps were populated with victims of summary executive detention for secret reasons."¹³⁴ While World War II had initiated the increasingly restrictive, security-driven detention decisions, the war also illustrated the abuses that could occur when executive power was taken too far. Though the public remained fearful of communism, it also became increasingly conscious of the risks surrounding extralegal executive authority.

The decision of *Mezei* coincided with groundbreaking shifts in U.S. immigration policy. In 1952, Congress passed the Immigration and Nationality Act, a significantly more liberal policy which eliminated racial restrictions and Asian exclusion, and gave priority to highly skilled immigrants or those with family in the United States.¹³⁵ The 1952 Act also transformed the practice of immigration detention by codifying the practice of "immigration parole."¹³⁶ Attorney General Brownell reported that in the previous year, the United States detained some 38,000 people, yet the INS only excluded 1,600 immigrants.¹³⁷ Rather than detaining immigrants, the state would now release potentially excludable immigrants into the United States until the INS officially determined their immigration status. Ellis Island held fewer than 30 detainees following the passage of the 1952 Act, and officially closed in November of 1954.

¹³³ Karpatkin.

¹³⁴ 345 U.S. 206, 225-26 (1953).

¹³⁵ U.S. Department of State, "The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)" <http://www.state.gov/r/pa/ho/time/cwr/87719.htm> (accessed April 21, 2012)

¹³⁶ Weisselberg, 951.

¹³⁷ Cannato, 375.

The limiting of detention in 1954 came as part of a larger government effort to tone down its antiradical crusades.¹³⁸ In 1954, Joseph McCarthy targeted his anti-Communist investigations on the U.S. Army, generating much public backlash. As the United States established itself as the protector of liberty, in opposition to the fascist regimes proliferating around the globe, it became more difficult to justify the controversial detention practices.¹³⁹ The letters comparing U.S. detention to Nazi Germany showed that American citizens had grown increasingly conscious of human rights and human rights violations. This made the concept of detention without trial all the more disconcerting. The extreme visibility of the Ellen Knauff and Ignatz Mezei trials made Ellis Island synonymous with jailing and deprivation of rights. The public outcry towards these detentions created a system that proved widely unpopular and politically unfeasible. As Ellis Island closed in 1954, the Eisenhower administration quietly granted Ignatz Mezei parole into the United States—four years after his initial detention.

Although the rulings incurred of Knauff and Mezei incurred controversy almost immediately, they remain some of the most frequently cited cases in immigration law. The cases of Knauff and Mezei solidified the entry fiction, detention as an administrative practice, and the rights of Congress to exclude based on undisclosed information. However, these cases also provoked some of the most volatile public reactions in immigration history. Citizens and the media no longer questioned the conditions of detention, but the entire *practice* of detention. In examining both the cases and the opposition, it becomes clear how the framing of immigration as a security issue enabled the expansion of plenary power. Detention would come to derive its validity as a means of ensuring a façade of public safety. We can also see how plenary power, and the precedents of the Chinese Exclusion cases, gave rise to a system that deprived

¹³⁸ Cannato, 375.

¹³⁹ Ibid.

immigrants of due process and allowed immigration authorities disproportionate discretionary authority.

Control over plenary power in the early 20th century illustrated a key tension between the power of policymakers and the power of immigration bureaucrats. The Chinese Exclusion cases exemplified how plenary power privileged legislators, allowing Congress' restrictive policies and racialized exclusions to become enforceable, unchallenged law. However, as the immigration bureaucracy became more organized, first as the Bureau of Immigration, and later as the INS, it gained a larger share of the plenary authority previously designated to the legislative and executive branches. As the immigration bureaucracy grew, its agents became pseudo-lawmakers, determining everything from who would be excluded to what would constitute "due process." The challenges of Ellis Island led Congress to take a more "hands-off" approach, designating authority to the Commissioner and his officers. The Commissioners, in turn, became highly influential in determining what role Congress would play in immigration operations. While some Commissioners chose to make Ellis Island accessible and open, others sought to limit visibility and promote the autonomy of the Bureau of Immigration. The cases of Knauff and Mezei illustrate the limits on bureaucrats' use of plenary power. While the INS had the authority to exclude Knauff and Mezei, the cases generated much dialogue around the fairness and ethicality of such decisions. As the public and media demanded a more transparent, legitimate decision-making structure, both policymakers and the judiciary interfered to place a check on the bureaucracy's use of plenary power. Though other branches of the government proved reluctant to get involved with the decisions of the immigration bureaucracy, the cases of Knauff and Mezei showed that there existed a tipping point, where backlash against administrative use of plenary power could no longer be ignored.

Chapter Two: The Rebirth of Detention: 1980 – 1996

The United States entered the 1980's entangled in a number of politically-charged international incidents. After the loss of the Vietnam War, the Watergate scandal, and the recessions of the 1970's, President Jimmy Carter proclaimed that Americans faced a "crisis of confidence" in their government.¹⁴⁰ In a 1979 speech to the nation, President Carter ominously stated, "The erosion of our confidence in the future is threatening to destroy the social and political fabric of America."¹⁴¹ The events of 1979, including the Soviets' invasion of Afghanistan and heightened Cold War tensions between the U.S. and the Soviet Union, left many Americans anxious about the possibility of nuclear war. Domestic issues also weighed heavily on the United States, as the nation saw unemployment rise from 5.8 percent in 1979 to 7.1 percent in 1980, along with a 13.5 percent overall inflation rate.¹⁴²

A defining moment for the Carter Presidency came in 1980, when militant Islamists overtook the American Embassy in Tehran and took 52 Americans hostage. This hostage crisis, if successfully resolved, held the potential for President Carter to secure a political victory after a string of shortcomings. But as Carter attempted to manage the diplomatic crisis in the Middle East, murmurings of discontent began to emerge from the Caribbean. Fidel Castro, the Communist dictator of Cuba, sought a way to both remove his regime's dissenters and further overwhelm the United States with international entanglements. On April 23, 1980, Castro opened the Port of Mariel, allowing any Cuban citizens to freely leave the nation and depart for the United States. Castro's announcement took place less than 24 hours before the United States'

¹⁴⁰ Engstrom, 76.

¹⁴¹ James Earl Carter, "Energy and National Goals," Address to the Nation, July 15, 1979. *Public Papers of the Presidents, Jimmy Carter, 1980-1981*. Vol. 1 (Washington D.C.: U.S. Government Printing Office, 1981), 1235.

¹⁴² U.S. Bureau of the Census, *Statistical Abstract of the United States: 1985 (105th edition)* (Washington D.C.: U.S. Government Printing Office, 1984), 391.

ill-fated Iranian rescue mission, giving the U.S. two major international emergencies to manage at once. After a chain of policy failures and eroding public confidence, capped by the previous day's humiliating military debacle, the federal government could not afford to mishandle the Mariel crisis.

The mass arrival of Caribbean immigrants in the 1980's profoundly complicated the narrative of immigration control. With the nation's eyes on the Florida beaches, the government had to decide how to process thousands of refugees and asylum seekers. Unlike the mostly economic-migrants who came through Ellis Island, both the Cuban and Haitian immigrants claimed they were fleeing political persecution and sought refugee status. Beyond issues of classification, the boatlift created countless problems through the magnitude of people the government needed to assess. After all but retiring its detention practices for the previous thirty years, the INS suddenly needed to make nuanced, ethically-complex determinations about how, why, and who it would detain. Could minors be detained? What happened if Cuba refused to take back refugees with criminal records? Should the United States detain people in federal prisons or in separate detention centers? Did the U.S. even need to detain these people in the United States at all?

While the Mariel boatlift may have created an ideal political moment for the return of immigration detention, the practice could never have reemerged without the immigration bureaucracy's history of extralegal authority and plenary power, described in the previous chapter. The INS approached all of these decisions with the same sense of extralegal authority that characterized the agency throughout the Ellis Island years. With no clear precedents for dealing with this type of influx, the INS anticipated little judicial interference and created makeshift, ad hoc policies as problems arose. The Mariel boatlift and the subsequent mass arrival

of Caribbean immigrants catalyzed a radical expansion of INS responsibility in the 1980's. Opportunistic policymakers seized these distinct circumstances to enact a historic policy shift expanding the authority of INS to detain immigrants pending trial. While the boatlift created the perfect circumstances for detention to reemerge, the power to implement mass, mandatory detention had been gradually building over the previous 100 years.

Perhaps the most fundamental question raised by the rebirth of detention in the 1980's remains how detention resurfaced at this moment in time. This chapter will pay special attention to the process through which detention reemerged in mainstream immigration policy and how the INS responded to polarizing public and political pressures. Visibility proved to be a controversial factor of detention in the early 20th century, with some Commissioners of Immigration seeking to bring greater visibility to the bureau's practices, and others trying to push the bureau further outside the bounds of federal oversight. Because the executive branch had delegated unique plenary authority to the bureaucracy, immigration officers maintained the ability to create new policies without going through traditional congressional channels. Plenary power therefore gave the bureaucracy the opportunity to minimize the visibility of their actions, due to the assumed lack of oversight. But while the bureaucracy valued invisibility, it proved to be an elusive goal, particularly in the age of the boatlift.

This 1980's were characterized by a distinctive back-and-forth between the immigration bureaucracy and its critics, testing how far plenary power could reach during a period of national emergency. While the INS' plenary authority rarely faced judicial interference prior to the 1980's, the emergency status and extreme media coverage of the boatlift tested the limits of the plenary power doctrine. The boatlift generated unprecedented levels of visibility for the agency, creating a new awareness of immigration policy among citizens and policymakers alike. The

bureaucracy could no longer operate independently, but now had to justify the legitimacy of its actions to the legislative and judicial branches, as well as to the public. The hyper-visibility of the Mariel boatlift created more judicial regulation of the INS than the bureaucracy anticipated, as the courts erratically attempted to maintain control over the INS' policymaking. The INS spent the majority of the 1980's trying to determine what the proper usage of plenary power would look like, envisioning a discretionary authority that gave the agency the autonomy it desired while also placating public and political demands for legitimate policymaking.

Ultimately, answering the question of why detention reemerges in the 1980's connects to a larger, ongoing assessment of how far the INS could go in separating immigrants from what many believed to be constitutional rights. Detention became an arena for the immigration bureaucracy to test its own discretionary authority and determine how far its plenary power could reach. The first section of this chapter will look at how the federal government leveraged plenary power during the Mariel crisis. In the months following the boatlift, plenary power became a way for the government to assert its authority and control over the unprecedented influx. The second section will examine how plenary power took shape under President Reagan, and specifically, how plenary power enabled the rebirth of mass immigration detention. In the final section, I will present a case study of Krome Service Processing Center, one of the nation's earliest federal detention centers, to illustrate what the INS' plenary authority looked like in the "new" detention system. The story of Krome shows how INS detention evolved from an administrative procedure, necessary to process new Cuban entrants, to a punitive measure meant to dissuade immigrants (and in particular, Haitians) from attempting entry at all. Krome became a highly contested site, fueled by detainee uprisings, public protests, and political uncertainty about the ethics and legality of detention. But through all of the controversy, the authority of the

immigration bureaucracy to detain never faced legal challenges. In this chapter, I will argue that while the events of the Mariel boatlift contributed substantially to the political climate that reinitiated detention, that the authority to detain came from the plenary power doctrine, the judicial deference, and the administrative authority that had long characterized the U.S. immigration bureaucracy. Detention in the 1980's became a matter of how quietly the INS could make decisions and minimize controversy in a period of hyper-visibility for the immigration bureaucracy.

“The Cuban-Haitian Problem” - Boatlifts and Boatpeople in the 1980's

On April 23, 1980, Fidel Castro opened the shipping port of Mariel and indicated that any Cubans wishing to leave the Communist nation could freely go. Quietly slipped into the back pages of the Cuban Communist Party newspaper *Granma*, an announcement stated that vessels coming to pick up Cubans would not be “[received] with cannon fire”—a dramatic departure from militant emigration policies of Cuba's past.¹⁴³ This section will illustrate how the Mariel boatlift altered the rhetoric surrounding immigration in the United States and enabled the expansion of plenary authority. Castro subtly endorsed the removal of these Cuban citizens, who he labeled “antisocial elements,” for their lack of adherence to Communist ideology.¹⁴⁴ Catalyzed by both an economic depression and a tense diplomatic situation involving Cuba's refusal to let political asylum seekers leave the nation, Castro saw the boatlift as a way to remove non-allegiant citizens and initiate a large-scale refugee crisis for the United States. The U.S. State Department warned that sending U.S. boats to Mariel would mean “playing into Castro's

¹⁴³ Marlise Simons, “Cuba Approves Refugees' Departure in Florida-Chartered Flotilla of Boats.” *Washington Post*, April 22, 1980.

¹⁴⁴ *Ibid.*

hands” and feared that over 10,000 Cubans may come to Miami.¹⁴⁵ But within 24 hours, over 1,000 boats traveled from Florida to Cuba, launched mostly by Florida’s Cuban-American community, to stage a staggering humanitarian rescue.¹⁴⁶ By the end of May 1980, an astounding 94,181 Cubans had arrived in the United States of America.

Most historians and scholars consider the Mariel boatlift an episode of profound mismanagement in both domestic and foreign U.S. policy. The boatlift exposed both the dearth of workable immigration policy in the United States, and more importantly, the United States’ inability to enforce its own immigration laws. After an extended period of quiet and manageable immigration to the United States, the events of 1980 caught the nation entirely off guard. Mariel rang in a new era for immigration policy, one in which “control” became both the buzzword of the moment and the ultimate goal for the immigration bureaucracy. Reactive plenary authority characterized the Carter administration’s response to the boatlift, as the executive branch futilely generated, then revoked, new reforms on an almost weekly basis. The U.S government’s inability to stop the massive influx of Caribbean migrants, to manage its resettlement infrastructure, or to reassure the public that they did not face physical or economic danger, shook public confidence in the immigration bureaucracy. The policy failures of 1980 meant that the immigration bureaucracy now had something to prove—their ability to control, and not be controlled by, immigrants. Immigration detention became one way to prove just that.

In the first weeks of the boatlift, the State Department warned Cuban-Americans that anyone sending boats to pick up relatives could face prosecution. The State Department feared the implications of allowing Castro to set the rules and told the press, “While we are deeply

¹⁴⁵ John M. Goshko, “State Dept. Seeks to Halt Sealift,” *Washington Post*, April 24, 1980.

¹⁴⁶ David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* (New York: Rowman & Littlefield Publishers, Inc, 1997), 67.

sympathetic with those...who are seeking freedom from Castro's regime, we cannot condone this procedure."¹⁴⁷ Two weeks later, President Carter ad-libbed a line during a speech to the League of Women Voters, saying that the United States would provide "open hearts and open arms" to refugees fleeing Cuba.¹⁴⁸ The public interpreted Carter's improvised statement as a formal declaration of U.S. intentions, further complicating the process of creating a politically and publicly acceptable solution. The next day, Carter authorized \$10 million in refugee emergency funds for Florida. By the end of May 1980, the United States still did not have a formal policy regarding the admission or status of Cuban entrants, yet Carter assured the media that the government was putting the "final touches" on its new refugee policy. Meanwhile, over 100,000 Cubans resided in resettlement camp purgatory, unsure of their future. As one Cuban man lamented, "All I do is sit here in the sun and wait."¹⁴⁹

Neither the INS nor the White House, nor any other bureaucratic agency seemed capable of remedying the influx, thus perpetuating the image of the U.S. as unable to control its borders. Ward Sinclair of the *Washington Post* described the Carter administration's response as "quirky undulations of policy" and observed that the "zigs, zags, swings, swerves and indecision over Cuban refugees...have produced a new froth of unhappiness in their wake across Capitol Hill."¹⁵⁰ Rep. Les Aspin corroborated, stating, "...we have been treated to the spectacle of a floundering administration declaring first a 'closed-door' policy and then an 'open-door' policy and then a 'closed door' policy again."¹⁵¹ The White House and the INS needed to find a workable solution before both the flood of migrants and the flood of negative public attention

¹⁴⁷ Goshko.

¹⁴⁸ Martin Schram and Charles R. Babcock, "Carter's Ad Lib Affected Policy," *Washington Post*, May 15, 1980.

¹⁴⁹ Ward Sinclair, "Anxiety Plagues Hearts and Souls of Cuban Refugees," *Washington Post*, June 8, 1980.

¹⁵⁰ Ibid.

¹⁵¹ Normal L. Zucker and Naomi Flink Zucker. *Desperate Crossings: Seeking Refuge in America* (Armonk, New York: M.E. Sharpe, 1996), 57.

threatened to undermine any control they had left. As Senator Walter Huddleston critically assessed, “We are, deliberately and by inattention, weakening our ability to say ‘no’ to those who break down our doors... We have lost control of immigration to this country.”¹⁵²

While the Cubans received the lion’s share of public attention, they were not the only group of people flooding onto the Florida shores. In 1980, the United States also saw over 11,000 Haitian asylum seekers, often called “boatpeople,” arrive on makeshift boats and rafts, following a treacherous journey across the Atlantic.¹⁵³ Throughout the 1970’s the political and economic conditions in Haiti had grown increasingly volatile. Under President Jean-Claude Duvalier, the U.S. State Department noted a rapid deterioration of human rights, including an expulsion of opposition leaders and journalists, torture of political detainees, and the violent reign of a state-sponsored Haitian militia known as the *tonton macoutes*.¹⁵⁴ But despite a questionable history of human rights, Duvalier’s Haiti had one significant difference from Castro’s Cuba—Haiti did not have Communist leadership. Duvalier took a strong anti-Communist stance in foreign affairs and regularly expressed fear of Communism spreading from Cuba to Haiti. Since the Cubans fled an enemy political regime, the United States could open its doors to them with relative ease. However, the Haitians did not have the same symbolic or political resonance of the democracy-seeking Cubans. The United States classified the Haitians as “economic migrants,” ineligible for political refugee status. What would be done with the escalating number of Haitian entrants remained unclear until the Reagan administration took action in 1981.

¹⁵² Sinclair.

¹⁵³ Gilbert Loescher and John Scanlan, “Human Rights, U.S. Foreign Policy, and Haitian Refugees,” *Journal of Interamerican Studies and World Affairs* 26.3 (Aug. 1984): 340.

¹⁵⁴ U.S. Department of State. *Country Reports on Human Rights Practices for 1979*. (Washington, DC: Government Printing Office, 1980): 341.

The United States' initial response to the boatlift attempted to downplay the event to both U.S. citizens and to the international community, in order to avoid heightening public panic. The United States Interests Section in Havana noted, "Public statements or postures on our part suggesting alarm or intentions to block the flow will only encourage [Castro] and give him fuel for his propaganda."¹⁵⁵ While the Carter administration remained overwhelmed by the massive influx, it made every effort to minimize alarming news coverage and political statements. Rather than allowing the INS to manage the crisis, the State Department immediately assumed responsibility for new policy. Advisors considered the leadership of the White House necessary to a successful response, particularly because of the profound foreign policy implications of the event.¹⁵⁶ The boatlift represented not only a matter of immigration, but a matter of Cold War tensions, complex diplomatic relations, and political refugees. The White House therefore assumed the plenary authority that had been largely reassigned to the INS in the previous century, allowing President Carter to create the ever-changing, undemocratic policies characteristic of the INS. The foreign policy implications of the event made plenary power appear even more necessary, as the United States now had a vivid example of why it needed full discretionary control of its borders. However, this effort also posed serious drawbacks, as the White House lacked the INS' more specific expertise. The Deputy Director of the Office of Management and Budget stated, "We were all simultaneously learning immigration law and everything else. It was not as if it was a mainstream public policy where...all the collective expertise comes together."¹⁵⁷

¹⁵⁵ Engstrom, 69.

¹⁵⁶ Ibid, 68.

¹⁵⁷ Ibid, 70.

The ill-defined nature of plenary authority meant that sovereign powers could now be reassigned to which ever bureaucratic entity the executive branch decided should possess it. The INS' initial role in the Mariel crisis came in the form of the Cuban-Haitian Task Force. President Carter created the Cuban-Haitian Task Force (CHTF) in July 1980, just as the number of Cuban refugees surpassed 120,000. The CHTF represented an entirely new bureaucratic entity, involving members from more than ten different federal agencies, including the INS, the Federal Emergency Management Agency (FEMA), the Department of Education, the Department of Transportation, and others. The Mariel boatlift signified an intriguing period for immigration bureaucracy because power over immigrants became extremely decentralized. Rather than the INS holding all the discretionary authority over aliens, the authority now belonged to nearly a dozen different agencies, all of which could create makeshift immigration policies. While the agency of the INS took a backseat in the first year of the Mariel crisis, its legacy of bureaucratic discretion endured.

A major element of the CHTF's responsibilities in 1980-1981 involved managing public opinion and perception of the Mariel crisis, or as some critics have assessed, serving as "chief apologist" for the White House.¹⁵⁸ The CHTF needed not only to find a way to manage and process the 120,000 refugees, but also to create a public appearance of competence, control, and confidence. While in the past immigration bureaucrats relied on invisibility or removing immigrants from public consciousness, this was not an option with Mariel. Media coverage proved unwavering. Immigrants continued to show up by the boatload on a daily basis. Citizens and politicians alike expressed fear and concern about immigrants in their communities. News that Castro had opened prisons and released Cuban "anti-social elements" onto boats bound for

¹⁵⁸ Mario A. Rivera, *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis* (Lanham, MD: University Press of America, 1991), 173.

the United States proved particularly volatile. The story became a public relations nightmare for the United States government, as the media shifted from framing Mariel as a refugee issue to an issue of “social undesirables” (Castro’s own term) flooding into American communities.¹⁵⁹

While the official U.S. policy remained to downplay the event, authorities did not always adhere to their own rule. In the *Washington Post*, one White House spokesperson accused Castro of taking “hardened criminals out of prison and mental patients out of hospitals,” and warned “We will not permit our society to be used as a dumping ground for criminals who represent a danger to our society.”¹⁶⁰ Many of the Mariel Cubans disputed these sweeping generalizations, arguing that what had been considered crimes in Castro’s Cuba would not qualify as crimes in the United States. Some Cuban entrants faced jail time in their homeland for political reasons, such as trying to escape to the United States or speaking out against communism. One refugee protested, “You can get 20 years for stealing a bottle of rum. Many people are in prison for taking a few beans to feed their family.”¹⁶¹ With no reliable data on criminal entrants, the public had to rely on speculation and hearsay about the illicit pasts of their new neighbors.

The first step for the Carter administration in establishing control, or at least the illusion of control, involved creating a way to process the thousands of new entrants. Cuban refugees to the United States faced two potential paths, both of which involved a period of either administrative or punitive detainment by the U.S. government. The vast majority of Cuban immigrants went to refugee resettlement camps, known formally as “processing centers,” while a smaller percentage of entrants were placed in U.S. federal prisons. The federal government

¹⁵⁹ Brian Hufker & Gray Cavender, “From Freedom Flotilla to America’s Burden: The Social Construction of the Mariel Immigrants,” *The Sociological Quarterly* 31.2 (1990): 321.

¹⁶⁰ Edward Walsh, “17 Americans Summoned Home: Carter Moves to Stop Cuban Boatlift,” *Washington Post*, May 15, 1980.

¹⁶¹ Charles R. Babcock and Margot Hornblower, “U.S. Plans Refugee Center: Air Force Base in Florida Will Process Refugees,” *Washington Post*, May 2, 1980.

initially allocated responsibility for the refugee camps to FEMA, whose previous responsibilities dealt primarily with natural disasters. The government later admitted that they reallocated responsibility in order to use the earmarked disaster funds for financing the camps.¹⁶² FEMA lacked the experience of the INS, and when funds became more reliable a year later, responsibility for detention transferred back to INS. The rapid shifting of responsibility again reinforced the fluidity of plenary power and the ease with which sovereign powers could be extended or revoked at the federal government's convenience. From May to July 1980, FEMA established four processing centers: one in Fort Chaffee, Arkansas; one in Fort Indiantown Gap, Pennsylvania; one in Fort McCoy, Wisconsin; and one in Eglin Air Force Base, Florida.¹⁶³ The processing centers held refugees while FEMA attempted to locate family members or other organizations that would serve as sponsors for the refugees' release.

This release process at resettlement camps often took a month or longer and the camps quickly became "a breeding ground for frustration."¹⁶⁴ To be released from a camp, the Cubans underwent several rounds of screening, and then had to receive final clearance from Washington and wait for available transportation out. Headlines like "Cubans Riot at Center in Arkansas"¹⁶⁵ splashed across the *Washington Post*, telling stories of frustrated, uncontrollable immigrants pelting police and soldiers with rocks, trying to escape over camp fences, and being subdued with tear gas. Alongside the June 2, 1980 *Washington Post* article about the camp riots one could find another article, entitled "A Resurgence by the Klan: Symbol of Racism Exploits New

¹⁶² Sinclair.

¹⁶³ Ariel W. Simmons, *A Guide to the Microfilm Edition of Immigration during the Carter Administration: Records of the Cuban-Haitian Task Force* (Bethesda, MD: LexisNexis, 2009), V.

¹⁶⁴ Warren Brown, "Hours and Days of Red Tape Anger Refugees and Families," *Washington Post*, May 28, 1980.

¹⁶⁵ News Services, "Cubans Riot at Refugee Detention Center," *Washington Post*, June 2, 1980.

Tensions.”¹⁶⁶ The article featured quotes from new Klan members, expressing their discontent with America’s accommodation and support of refugees. Paired together, the two articles conveyed a powerful statement: the federal government appeared to have lost control of its immigrants and of its image.

As refugees became increasingly exasperated and violent, the camps became increasingly visible in the national media. Instead of arousing sentiment to abolish refugee camps, the stories of rioting refugees made the camps appear all the more indispensable. After all, if not for the refugee camps, the alleged immigrant-deviants would wander the streets of American communities. Managing the various publicity crises at several different camps proved more than FEMA could reasonably handle. In September 1980, the Cuban-Haitian Task Force made the decision to consolidate all of the refugees at Fort Chaffee.¹⁶⁷ An examination of the CHTF Records reflects the careful media strategy surrounding the decision. Peg Maloy, FEMA Office of Public Affairs, wrote to the CHTF: “In light of recent news coverage of the refugee hijackings and the coverage of the refugees who have lost sponsors and are roaming the Miami area, there are no plans to generate national media coverage of the consolidation.”¹⁶⁸ The CHTF clearly realized the relationship between visibility and power—the more visible the bureaucrats’ actions became, the more justification it had to offer for its actions. The CHTF had no desire to remind the public of rioting detainees, nor to explain that the agency could not manage the logistics or

¹⁶⁶ Karlyn Barker, “A Resurgence by the Klan: Symbol of Racism Exploits New Tensions,” *Washington Post*, June 2, 1980.

¹⁶⁷ Sergio Pereira, “Letter to Chris Holmes from Sergio Pereira, U.S. Dept. of State, re: Camp Consolidation” *Immigration during the Carter Administration: Records of the Cuban-Haitian Task Force*. August 20, 1980. Reel 1, Box 1, Slide 184. (Atlanta, GA: LexisNexis - Jimmy Carter Library, 2009.) Microfilm.

¹⁶⁸ Peg Maloy, “Letter to Tom Casey, Cuban Haitian Refugee Resettlement, from Peg Maloy, Acting Director, FEMA Office of Public Affairs, re: Final Plans for Refugee Consolidation Public Information Program” *Immigration during the Carter Administration: Records of the Cuban-Haitian Task Force*. August 21, 1980. Reel 1, Box 1. (Atlanta, GA: LexisNexis - Jimmy Carter Library, 2009.) Microfilm.

the image of multiple camps. Maloy went on to write that she believed the consolidation could be contained to a local news story, a clear underestimation of the boatlift's national resonance.

Drawing upon his discretionary authority, President Carter created a new legal category of “entrant” for Cubans arriving in 1980, making them not technically “refugees” nor “immigrants.”¹⁶⁹ Almost all Cubans in refugee resettlement camps would eventually find classification as “entrants.” Under this new classification, the federal government offered to pay resettlement costs, as well as initial health screening and education costs, amounting to about \$385 million in the first six months.¹⁷⁰ However, Mariel Cubans would differ from refugees in that the government would not pay for welfare and social program costs. Instead, the government subsidized the social programs and made the state governments responsible for 25% of the costs.¹⁷¹ Although the federal government demanded all the plenary authority in creating boatlift policies, it shifted the burden of payment to the local governments.

The immigrant processing centers represented the first experience that most members of the Carter administration had with the practice of interning immigrants. The resettlement camps also laid the foundation for how the public would view the detention of immigrants in years to come. In 1980, the processing centers served, as their name suggests, as sites of administrative processing—simply pit stops on the path to citizenship for the thousands of Cubans that the United States guaranteed entrant status. The processing center became such a ubiquitous mainstay in the months following the boatlift that by the time the United States began using processing centers as sites of mandatory detention for Haitian immigrants, most Americans

¹⁶⁹ “Cuban/Haitian Entrant Act of 1980” *Immigration during the Carter Administration: Records of the Cuban-Haitian Task Force*, Reel 12, Box 15, Slide 506. (Atlanta, GA: LexisNexis - Jimmy Carter Library, 2009.) Microfilm.

¹⁷⁰ Editorial, “The Cubans and the Haitians,” *Washington Post*, June 25, 1980.

¹⁷¹ *Ibid.*

would not have noticed a difference. The INS continued to utilize the boatlift-era language of detention as an “administrative procedure” even as their practices became increasingly punitive. Unlike the Cubans, the Haitians and other foreign detainees held little chance of ever gaining citizenship. Their detention served as a means of dissuasion, punishment, and deportation. But because it took place within the same infrastructure that had become a socially accepted element of the immigration system, it registered as less alarming on the public radar.

Federal prisons became the other potential destination for Cuban entrants. With rumors of formerly incarcerated persons arriving in the U.S., the INS began a more rigorous questioning process for Cuban refugees. The INS transferred any new arrivals who admitted to having a criminal record to a U.S. jail, predominately the Atlanta Penitentiary in Atlanta, Georgia and the Oakdale Federal Detention Center in Oakdale, Louisiana. Building on the legal precedents of *Knauff v. Shaughnessy* and *Shaughnessy v. Mezei*, the INS retained the right to place immigrants in indefinite detention without trial and with little promise of judicial review. Just like the detentions of Knauff and Mezei thirty years prior, the detention of Cubans in federal prisons did not legally constitute a punishment, and therefore barred the detainees from a right to a legal hearing. Since the United States did not maintain any diplomatic relations with the Cuban government, there stood little chance of deportation back to Cuba. 1,769 Cubans entered federal correctional facilities in the first year of the boatlift.¹⁷²

Conditions within the prisons became another key public relations issue for the INS. With little reliable evidence on the actual criminal backgrounds of the detained persons, many human rights groups protested the incarceration of immigrants. Investigations into the jails showed that

¹⁷² Larzelere, 383.

immigrants lived alongside some of America's most dangerous felons.¹⁷³ The possibility of indefinite detention with little prospect of release into the United States or return to Cuba led to hundreds of detainee suicide attempts and widespread reports of self-mutilation.¹⁷⁴ All too frequent detainee riots further complicated the INS' attempts to keep the prisons out of the news. Even when the United States government attempted to create control through use of discretionary power, in the form of imprisonment without trial, it still did not appear to truly have control of the situation at hand.

The visible fumbling of post-Mariel policy and the controversial incarceration of excludable Cubans led to one of the first legal challenges for the Mariel-era INS. In August 1981, U.S. District Court Judge Marvin Shoob ordered the release of 322 Cubans from the Atlanta Penitentiary. Calling the INS' handling of the Mariel situation "a disgrace," Shoob cited evidence that at least 322 of the Cubans held in detention for over a year had entered detention solely because they lacked paperwork or committed anti-Communist crimes in Cuba. INS director Russell Ahr admitted that a number of Cubans signed confessions in English, but had no translator to inform them of what they signed.¹⁷⁵ He also conceded that the INS placed many detainees in solitary confinement, despite their allegedly administrative detention. Justice Shoob declared that "the continued detention of these Cuban refugees with no history of criminality after approximately 15 months no longer reflects 'the humane qualities of an enlightened civilization'" but rather "an abuse of discretion of the parole authority."¹⁷⁶

¹⁷³ Kemple, 1741.

¹⁷⁴ William G. Belden, "Paradise Lost: The Continuing Plight of the Excludable Mariel Cubans," *The Kansas Journal of Law & Public Policy* (Winter 1996): 182.

¹⁷⁵ Art Harris, "Judge Set to Release 322 Cubans," *Washington Post*, August 18, 1981.

¹⁷⁶ Art Harris, "17 Cuban Refugees Freed From Prison," *Washington Post*, August 22, 1981.

While previously the plenary power doctrine required that the judiciary take a limited role in interfering with the rulings of the executive branch, the incarcerations of excludable Cubans appeared to cross a line. The plenary power doctrine became momentarily suspended, as the visibility of the incarceration issue overpowered the judiciary's ability to turn a blind eye. However, the effects of this legal ruling proved limited. Though the INS released many of the Cubans that Judge Shoob demanded, they continued to utilize prisons as holding centers for Cubans with a criminal past. Judge Shoob's reluctance toward detention did little to prevent the federal government's push for mandatory detention later that year. While the INS faced checks on its plenary authority in the 1980's, the judiciary's actions remained largely inconsequential in influencing the larger goals of the INS. Judicial interference served more to question how INS implemented policies created on plenary authority, than to challenge the doctrine of plenary power itself.

With the Mariel crisis demanding almost all of the INS' attention, the bureaucracy's other responsibilities fell largely by the wayside. One Border Patrol official complained, "The Florida system and the Federal system are inundated with *Marielito* problems. Most of the INS funds...go to dealing with their problems. The other people who need INS attention are not getting it."¹⁷⁷ Nowhere was this attention more needed than with the Haitian asylum seekers. Although Cubans faced hasty, discretion-driven entry proceedings, their situation remained markedly better than that of Haitian entrants, who beginning in 1981 would face mandatory detention without trial in the United States.

¹⁷⁷ Larzelere, 384.

Ronald Reagan and the 1981 Decision to Detain

Mandatory detention, as implemented by President Reagan in 1981, derived traits from both the refugee camps and the federal prison programs for processing and holding immigrants. While maintaining a language of “administrative procedure,” the United States shifted its detention practices to hold all entrants (not just those with a criminal history) in federal penitentiaries and newly constructed government detention centers. Two factors initiated this shift. First, the INS needed to become more efficient. With huge numbers of Mariel Cubans to respond to, a uniform policy of Haitian detention proved more manageable and required less discretionary decision making. Second, Reagan needed to show that the United States could control its borders and take a strong stance on illegal immigration. A mandatory incarceration policy certainly served as a strong symbol of enforcement.

President Reagan’s quiet decision to implement mandatory detention of all Haitian asylum seekers represented a major departure from the immigration policy of the previous thirty years. One may therefore assume that the decision would serve as a lightning-rod of controversy and debate. But when searching for documentation or press on Reagan’s decision-making process one thing becomes apparent—almost no documentation exists. As a result, almost all historical recounts of the 1981 policy shift gloss over the process of policymaking and simply state the outcome—Reagan approved a policy of mandatory detention for excludable entrants. In reality, Reagan made the decision to radically change U.S. immigration policy as an administrative order, quietly issued to the INS. The government held no formal debate over the policy shift. In a moment of political panic, catalyzed by the thousands of Caribbean immigrants pouring into the U.S., Reagan swiftly executed a radical political maneuver. It was not until a year later that Reagan faced legal challenges for his decisions to detain.

Reagan did not reach the decision to reinstate detention on his own. Upon attaining the Presidency in 1981, Reagan possessed little experience with immigration issues and rarely commented on immigration.¹⁷⁸ But the unwavering influx of immigrants and refugees forced Reagan to take action. He created the President's Task Force on Immigration and Refugee Policy which worked from February to June 1981 to create policy recommendations on how to address the United States' escalating immigrant situation. The Task Force issued a final report on July 1, 1981 and stated that it had reached consensus on all but two issues: what to do with the 135,000 Cuban and Haitian refugees who fled to the U.S. during the Mariel boatlift, and what to do in the future to prevent illegal immigration. In both cases, the real question remained simply "should the United States begin detaining its illegal entrants?"

In a memo to President Reagan regarding the report, Reagan's Deputy Assistant Francis Hodsoll wrote that the major disagreement among the Task Force surrounded "whether we should detain undocumented aliens upon arrival pending exclusion or granting of asylum." He reported,

State, Justice, Treasury, Labor, and HHS recommend detention. The problem is that we lack adequate camps for this purpose...If you decide in principle to approve a detention policy, it is recommended that you ask the Attorney General to lead an effort...to review all federal facilities with a view to identifying the sites of least political and operational costs.¹⁷⁹

The statement shows that the Task Force did not reach a unanimous decision to reinstate detention. The practice faced dissenters from the beginning, and the Task Force left the final decision to the President. The memo also displays how the moral and ethical implications of

¹⁷⁸ Maddux, 196.

¹⁷⁹ Nicholas Laham, *Ronald Reagan and the Politics of Immigration Reform* (Westport, CT: Praeger Publishers, 2000), 105.

detention drove bureaucratic behavior. Hodsoll wrote to Reagan that the decision to detain immigrants would come down to his “principle(s).” Also apparent in the memo is the implication that this policy would not be incontrovertible. Hodsoll addressed the “political costs” of detention, likely indicating the resistance of constituents to having detainees in their communities, as well as the response from NGO’s and human-rights groups. Conscious of the political costs detention would bring, the Reagan administration moved the detention plan forward in a calculated and discreet manner.

On July 30, 1981, President Reagan delivered a statement on U.S. immigration policy, stating that “[i]mmigration and refugee policy is an important part of our past and fundamental to our national interest.”¹⁸⁰ At the same time, Reagan declared that the United States must “establish control over immigration.” He explained that in the days to come, the Attorney General would take administrative actions on behalf of the Reagan administration to guarantee the admission of foreigners to the United States “in a controlled and orderly fashion.”¹⁸¹ Reagan continued to employ the rhetoric of “control” that had emerged in the Mariel crisis, as a means of establishing the stakes of the immigration issue and the need for plenary power. Later that day, the Attorney General presented a new plan before a joint session of the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees, and International Law. Attorney General William French Smith told Congress, “We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively.”¹⁸² Smith therefore stated that both the President and the Task Force endorsed “the

¹⁸⁰ Ronald Reagan, “Statement on United States Immigration and Refugee Policy,” July 30, 1981. Available at: <http://www.reagan.utexas.edu/archives/speeches/1981/73081a.htm> (accessed April 22, 2012).

¹⁸¹ *Ibid.*

¹⁸² *Louis v. Nelson*, 544 F. Supp. 973, 982 - Dist. Court, SD Florida (1982).

necessity of detaining illegal aliens pending exclusion.”¹⁸³ The need to maintain “control” became the primary rationalization for the Reagan administration’s use of plenary authority.

A massive shift in immigration policy occurred in 1981, nullifying the no-detention, “immigration parole” policy the INS employed for the previous thirty years. However, historians have struggled to comprehend this radical policy maneuver, in large part because the government failed to generate any actual, formalized *policy*. Although the Attorney General addressed Congress, no proposed legislation followed his speech. Instead, the President used the Administrative Procedure Act to delegate all responsibility for the proposed changes directly to the INS.¹⁸⁴ The court would later find that INS could “point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy.”¹⁸⁵ Neither President Reagan nor the INS ever established guidelines as to who would be detained or what detention would look like under the 1981 mandate. Instead, the INS issued vague directions to its field officers to begin detaining aliens who did not have “a *prima facie* claim for admission.”¹⁸⁶ The federal government used plenary authority to give full control of the practice to the INS, and the INS subsequently used plenary authority to pass control to its executive officers. Even though no formal policy existed, these executive officers now held the right to

¹⁸³ 544 F. Supp 973, 980 (1982).

¹⁸⁴ The Administrative Procedure Act (APA) is the law under which some 55 U.S. government federal regulatory, including the INS, create the rules and regulations necessary to implement and enforce major legislative acts. Agencies are unique governmental bodies, capable of exercising powers characteristic of all three branches of the United States federal government: judicial, legislative and executive. Generally, rules made under the APA are not subject to judicial review unless the rulemaking process is deemed “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.”

(Cornell University - Legal Information Institute - <http://www.law.cornell.edu/uscode/text/5/706>)

¹⁸⁵ 544 F. Supp 973, 981 (1982).

¹⁸⁶ 544 F. Supp 973, 981 (1982).

The term ‘*prima facie*’ is Latin for *on its first encounter* or *at first sight*. It is often used in legal settings to indicate that evidence would be sufficient (at first sight) to prove a particular proposition or fact. *Prima facie* evidence is not considered irrefutable, but it is considered sufficient enough to demand a legal trial. In immigration proceedings, not having a *prima facie* case for admission simply indicates that upon initial review of an immigrant, there is not sufficient evidence to indicate they have a right to stay.

detain non-citizens without trial—a power that would not be possible except through the broad, extralegal rule of “sovereignty.”

The makeshift policy initiated by Reagan in July 1981 led to the detention of 2,100 Haitians throughout the U.S. before meeting its first legal challenge in June 1982. In a case brought forth by the Haitian Refugee Center, Inc. against the INS, the plaintiffs challenged the legality of the INS’ 1981 policy shift. The Haitian Refugee Center claimed that the INS’ implementation of mandatory detention breached standard administrative procedure laws and had a disproportionate impact on Haitian entrants. *Louis v. Nelson* remains vastly overlooked by historians as, like the legal challenges before it, its ruling proved short-lived. However, the case offers perhaps the strongest retelling of how the Reagan administration actually implemented its detention policy.

The stakes of *Louis v. Nelson* proved extremely high, as it challenged the fundamental plenary authority of the government in creating immigration law. As Judge Spellman wrote in the case’s introduction, “This case has been described by the Government as nothing more than an attack on the proper constitutional effort of the U.S. to protect its borders from invasion. It has been described by the plaintiffs as the worse possible case of the Government...engaging in invidious discrimination.”¹⁸⁷ The plaintiff’s claims against the government were at once incredibly ethical and emotional (the claims of blatant discrimination against the Haitian community) and incredibly mundane (the charges of not following proper administrative procedure, which included giving 30 days’ notice for the policy shift and allowing for public hearings on the new policy). The government fought politically-charged topics of racism and fairness, but also fought over the abstract minutiae of what constituted “rulemaking.”

¹⁸⁷ 544 F. Supp 973 (1982).

Nonetheless, the topic of administrative procedure ended up becoming the most crucial part of the *Louis v. Nelson* ruling, exemplifying the opaque ways in which the government created immigration policy.

The bulk of the debate surrounding the actions of the INS involved whether or not the agency had violated the 1939 Administrative Procedure Act (APA) in creating a radically new policy with no fair warning and no legislative oversight. The APA mandated that any government agency adopting new policies that carried the weight of law must have proper political oversight, ensuring the principle of government by consent of the governed.¹⁸⁸ For an agency to create a “rule” it must provide adequate notice and publication of the proposed rule, afford interested persons an opportunity to participate in the decision-making process, publish the final rule 30 days before it goes into practice, and allow for petition and modification of the rule.¹⁸⁹ The INS did none of these things. The INS never documented the policy shift, nor did it establish any parameters for the practice of detention. Furthermore, it made the policy with almost no public awareness. Ronald Reagan’s public statement on immigration reform made vague references to stronger enforcement of immigration laws, but did not explicitly name detention. Only the most politically-savvy of citizens may have noticed the dramatic policy shift, subtly slipped into the Attorney General’s statement to congressional subcommittees. In court, the INS argued that because the decision dealt with foreign affairs and sensitive information it held no obligation to publicize the change. However Judge Spellman found no evidence that promulgation of the detention policy would have resulted in “undesirable international

¹⁸⁸ Charles Whited, “Haitian Aliens Have a Right to be Paroled,” *Miami Herald*, July 6, 1982.

¹⁸⁹ 544 F. Supp 973, 994 (1982).

consequences.”¹⁹⁰ He further argued that if the U.S. sought to use the detention policy as a deterrent to future entrants, it should have made all the more sense to publicize the practice.

Louis v. Nelson ultimately upheld the legality of detention itself, but ruled illegal the way INS created the policy.¹⁹¹ The judicial ruling reestablished the plenary authority of the Reagan administration to detain non-citizens, but it rejected the way in which the administration had executed that authority. Judge Spellman concluded that the INS blatantly disregarded procedural norms in implementing detention policy and deemed the practices unconstitutional.¹⁹² Spellman argued that the INS policy marked a radical departure from previous policy as “it makes detention the rule, not the exception” and therefore required that the INS follow the APA’s rulemaking requirements. The language of ethical obligation also appeared in Spellman’s decision, as he wrote “The Court cannot think of any administrative action that would have a greater impact...than a change in policy which results in [immigrants’] indefinite incarceration where, under the previous policy they would have been free.”¹⁹³ Spellman ultimately declared that the Plaintiff’s opposition ensured that “the Government follows the procedural safeguards that Congress established to protect *all* persons from arbitrary Government action.”¹⁹⁴ The ruling of *Louis v. Nelson* ordered the release and parole of 1,900 Haitian detainees and nullified the INS’ detention policy. While the language of Judge Spellman’s decision reflects a discomfort

¹⁹⁰ 544 F. Supp 973, 996 (1982).

¹⁹¹ 544 F. Supp 973, 1004 (1982).

¹⁹² While it was clear that the INS violated administrative procedure law, the ruling regarding the discriminatory nature of the policy was less conclusive. Judge Spelling acknowledged that the policy had disproportionately affected Haitian entrants. (One statistician who analyzed the case described the difference between detention of Haitians and non-Haitians as so great that it was a “statistical joke.”) However, the statistics did not necessarily indicate that the policy was targeted at a certain group of people due to their race or national origin. Spelling stated, “The mere fact that Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminator. Regardless of its ultimate impact, the policy was intended to be applied to all similarly situated aliens regardless of their race and/or national origin.” (544 F. Supp 973, 1004 (1982).)

¹⁹³ 544 F. Supp 973, 997 (1982).

¹⁹⁴ 544 F. Supp 973, 1003 (1982).

surrounding arbitrary government detention, the judicial branch had little power to oppose detention itself. The government argued that its ability to detain was an extension of its sovereign right to control its borders. Therefore, improper administrative procedure seemed the only grounds on which the judiciary could legally oppose the practice.

INS' actions and the court's subsequent legal decision showed that, although the immigration bureaucracy had placed a thirty-year moratorium on detention, its guiding principles had changed little since the early 20th century. The themes of plenary power, extrajudicial authority, and disregard for due process, as established in Chapter One, had unquestionably endured into the 1980's. In rewriting immigration law without informing the public, the INS prioritized efficiency over due process. Since the plenary power doctrine ensured that courts rarely interfered with the immigration bureaucracy, the INS reasonably assumed that they could reinstate detention without judicial interference. However, the mandatory incarceration of people pending trial proved to be too contentious of an issue to slip by undetected. Even if the government did maintain the sovereign right to detain, it could not make this decision without any public or congressional involvement.

Backlash to the district court's decision began immediately, as the opposition argued that the INS, not the judiciary, knew how to best create immigration policy. Robert Bombaugh, the chief Justice Department lawyer on the case, told the *Miami Herald*, "We cannot abide by this court's decision. The government is firmly committed to detention."¹⁹⁵ Florida Governor Bob Graham reinforced the Justice Department's statement and argued that the discontinuation of detention put Florida at risk for another episode of mass immigration which it did not have the

¹⁹⁵ Anders Gyllenhaal and Alice Klement, "If Spellman Won't Budge, Appeal by U.S. is Vowed," *Miami Herald*, June 30, 1982.

resources to handle. Governor Graham stated that Florida could face “a potential emergency” and that he feared “a renewed influx of Haitian and other aliens into South Florida if the court’s judgment...is not stayed.”¹⁹⁶ Detention not only served as an administrative procedure, but also as a deterrent to other potential immigrants. Due to strong political pressure from the federal government, Judge Spellman heard an appeal within a week of his initial decision. In a particularly colorful anecdote, Assistant Attorney General Jim Peters told the judge, “There is a very real, very immediate, and very telling threat to the people of South Florida. And we don’t need to take the affidavit of the fox to know that if we leave the chicken coop open, the fox will get in to take the chickens.”¹⁹⁷ Peters’ statements reflected two hallmarks of immigration policy. Firstly, it echoed a disregard for the role of the judiciary—“we don’t need to take the affidavit of the fox”—and secondly, an unshakable inclination by some authorities to criminalize immigrants. As Peters’ words suggest, by not allowing for detention, the United States left its citizens vulnerable to the devious “foxes,” who sought to attack and take what did not rightfully belong to them. Detention not only fulfilled an administrative role, but also served policymakers as a way to keep the immigrant-criminals off of the streets.

Within a week, Judge Spellman oversaw a hearing on the *Louis v. Nelson* decision, in which Florida politicians and federal officials argued that the judiciary placed the United States at dire risk with its revocation of detention. Spellman eventually determined that while the 1,900 Haitians detained under the previous, unconstitutional policy still merited release, the United States held the right to create a new, administratively-legal detention policy that accomplished the same thing.¹⁹⁸ This again reiterated that the Judge did not oppose the legality of detention,

¹⁹⁶ *Ishtyaq v. Nelson*, 627 F. Supp. 13, 22 (1983).

¹⁹⁷ Alice Klement. “U.S. May Detain New Illegal Aliens, Judge Says,” *Miami Herald*, July 3, 1982.

¹⁹⁸ *Ibid.*

but the legality of implementing such a policy with no oversight. Spellman gave the INS ten days to formally establish procedures and parameters for its new detention policy. The case reinforced the role of the judiciary in the 1980's. While the court more actively challenged the discretionary decision-making process of the INS, it refused to challenge the sovereign rights of how immigration bureaucrats chose to police U.S. borders.

Although Spellman essentially gave the INS what it wanted, the language of INS leaders did not reflect relief or even contentment with the decision. Instead, the INS expressed profound annoyance that the judiciary interfered with the agency's plenary authority. An agency that derived much of its plenary authority from the judiciary's reluctance to interfere appeared truly awestruck when the District Court placed a check on its power. In the days following the Judge's decision, a Department of Justice spokesperson obstinately responded, "We're thinking about it," when asked if the INS would write down the new detention policy.¹⁹⁹ Even Judge Spellman acknowledged that the executive branch still had the power to overrule him and issue an executive order initiated by the "national emergency."²⁰⁰ Several days later, the INS published its policy in the Federal Register, but not without objection. The document stated, "INS strongly disagrees that its detention policy is subject to and falls within the (APA) rulemaking requirements and strongly disagrees that its detention policy is null and void...Accordingly, this rule is being published 'under protest.'"²⁰¹

While detention may have hit a road block with its legal challenge, powerful political allies coupled with public fear of illegal entrants ensured detention a future in the early 1980's and beyond. The same week as the *Louis v. Nelson* decision, INS Commissioner Alan Nelson

¹⁹⁹ Alice Klement & Guillermo Martinez, "U.S. Given 10 Days to Define a New Policy," *Miami Herald*, July 1, 1982.

²⁰⁰ *Ibid.*

²⁰¹ Alfonso Chardy, "INS Complies with Judge, Publishes Detention Rules," *Miami Herald*, July 9, 1982.

partook in a hearing before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, with the topic “Detention of Aliens in Bureau of Prison Facilities.”²⁰² In the hearings, Rudolph W. Giuliani, then the Associate Attorney General, requested \$35 million to construct two new permanent detention facilities for immigrants awaiting trial.²⁰³ The INS proved ready to begin building the infrastructure that would allow detention to become *the* policy of immigration enforcement in the 21st century. Even with the constitutionality of its detention practices facing contestation, the INS held no doubt that detention would serve as an enduring, long-term solution for the agency and that these judicial challenges would have minimal lasting effects.

Krome Service Processing Center: Miami, Florida

As the INS formally initiated its process of mandatory detention, plenary power once again moved to the forefront of INS decision-making. The INS anticipated nearly full control over the operation of detention centers, and expected that this authority would bring limited visibility for those outside the bureaucracy. The issue of visibility had emerged as an ongoing contradiction in the INS. While the INS expected its new detention policy to be visible enough to dissuade illegal immigration, it also sought to minimize federal oversight and congressional visibility in the new process. The INS simultaneously expected the policy to serve as a visible indication of U.S. immigration control, but also to operate quietly outside the bounds of judicial and constitutional norms. The final section of this chapter will examine what Reagan’s 1981 policy of mandatory detention looked like in practice, throughout the 1980’s and early 1990’s. The story of Krome Service Processing Center illustrates how discretionary authority allowed the

²⁰² House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. *Detention of Aliens in Bureau of Prison Facilities*, 97th Cong., 2d Sess., 1983: 1.

²⁰³ *Ibid.*, 3.

INS to create a highly punitive form of detention that placed non-criminal detainees in prison-like conditions, disallowed almost all public and media access, and routinely prioritized efficiency over human rights. In addition, Krome exemplified the INS' internal struggle to maintain plenary authority despite growing visibility. While invisibility would allow the INS to have full use of its plenary authority, preventing all external interference remained an elusive goal.



Two Haitian women rest outside the Krome Service Processing Center, 1981.²⁰⁴

Krome Service Processing Center, located on a former Army missile testing grounds 23 miles from downtown Miami, predates even the refugee resettlement camps.²⁰⁵ Opened in 1979, Krome served as the initial site of processing for Cuban refugees, with thousands of new arrivals moving through its “tent city” before traveling on to resettlement camps. Krome stood, both

²⁰⁴ Gary Monroe, “Krome, Women Outside Apartment,” (1981) Duke Digital Collections, Gelatin Silver Print (http://library.duke.edu/digitalcollections/garymonroe_gmpph010010060/#).

²⁰⁵ U.S. Dept. of Justice & Office of the Inspector General, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-finding Visit to the Miami District of INS in June, 1995* (Washington D.C.: U.S. Dept. of Justice, 1996), III

geographically and figuratively, far outside the public consciousness, in the eastern portion of the Florida Everglades. Former INS Commissioner Joseph Swing admitted that during the 1950's the agency "deliberately placed the new [regional offices] in out-of-the-way places in order to make it difficult for immigration lawyers to access them, and to insulate the agency from the input of individual members of Congress."²⁰⁶ The site for Krome, situated in an undeveloped Florida swampland, certainly seemed to perpetuate this logic of INS isolation. Although Krome initially opened as a short-term staging area, it evolved into a long-term detention facility following Reagan's 1981 mandatory detention policy. In 1982, the INS took over operation of Krome and constructed new buildings to accommodate the enormous numbers of Haitians the center would now detain.



This aerial image shows the location of Krome relative to Miami and the Everglades, and highlights how isolated the facility is. Miami development can be seen in the bottom right-hand corner, but to the left of Krome (red circle) is nothing but Everglades wetlands. At the time of Krome's construction in 1979, urban development would not have reached nearly as far west as this 2011 satellite image depicts.²⁰⁷

²⁰⁶ Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the INS*, (New York: Routledge, 1992.)

²⁰⁷ "Krome Service Processing Center," Satellite Map. *Google Maps*. Satellite Map, 2011.

Krome quickly acquired a reputation as the INS' busiest and most controversial detention site. In 1982, the *Washington Post* published a photography piece entitled "Where Refugees Await Their Fate" which labeled Krome a site "of crushing boredom and boiling frustration."²⁰⁸ The photos and captions became one of the first media pieces to address how punitive the tone at Krome had become. Describing Krome as resembling "a military installation," the article and photographs captured the barbed wire, armed guards, subpar medical conditions, and the near impossibility of gaining media access.²⁰⁹ When the INS took over the camps, the agency forbade detainees from speaking to any reporters, and therefore photographs became the best insight into the camps.



Guards at Krome Service Processing Center, 1982.²¹⁰ This image represented the new, punitive vision of immigration detention that proved fundamentally discomforting to both the public and politicians. Due to backlash from images such as this, Krome became much more restrictive with media access in years to follow.

²⁰⁸ James M. Thresher, "Where Refugees Await Their Fate," *Washington Post*. March 23, 1982.

²⁰⁹ *Ibid.*

²¹⁰ James M. Thresher, "Where Refugees Await Their Fate," (March 23, 1982), *Washington Post* news photograph, page A8 [accessed through ProQuest Historical Newspapers, Feb. 19, 2012].

Other media attention addressed not just the conditions at Krome, but the general injustice of the predominately-Haitian detention. In a 1982 *Washington Post* letter to the editor, a commentator described the imprisonment of Haitians as “a tragic breakdown of American idealism.”²¹¹ After accepting 98% of Mariel Cubans as legal immigrants, many people questioned the fairness of then detaining nearly all Haitian entrants, who had also come from a politically volatile, though not Communist, homeland. While the Reagan administration sought an immigration policy of control, this policy incurred a backlash all its own, as Americans began questioning the moral, ethical, and human stakes of the punitive reforms. But despite some vocal opposition, the majority of the public remained largely unaware of the detention practices. With limited media access to Krome, most newspapers simply did not have a story to report.

Perhaps the most illustrative example of plenary power in the new detention regime occurred in June 1995, when the Congressional Task Force on Immigration Reform visited Krome to investigate allegations of abuse and inhumane living conditions. Prior to the Task Force’s visit, overcrowding at Krome had become so prevalent that 55 detained women slept on cots in the clinic lobby.²¹² While Krome’s legal holding capacity rested at 226 detainees, 1994 reports conveyed that Krome held almost 700 immigrants at various points during the year, relying on tents for additional housing.²¹³ Dr. Ada Rivera, the chief of the Public Health Service Clinic at Krome warned that the overcrowding could have “serious health consequences” and recommended immediate action to “prevent any potential epidemics.”²¹⁴ The Congressional Task Force reported that it could not rely on the INS’ records for accurate information, as they were

²¹¹ Colman McCarthy, “Prisoners Who Put Us on Trial,” *Washington Post*, May 8, 1982.

²¹² Susana Barciela, “Covering the INS in South Florida,” *Nieman Reports*. Winter 2002.

<http://www.nieman.harvard.edu/reports/article/101300/Covering-the-INS-in-South-Florida.aspx> (accessed April 21, 2012)

²¹³ U.S. Dept. of Justice & Office of the Inspector General, III.

²¹⁴ Cheryl Little and Joan Friedland, “Krome’s Invisible Prisoners: Cycles of Abuse and Neglect,” (Miami, FL: Florida Immigrant Advocacy Center, 1996): 17.

largely hand-written and contained “too many discrepancies and variances.”²¹⁵ Thus, they sent a team of investigators on a fact-finding mission regarding the conditions of Miami’s detention center.²¹⁶

Internal documents later revealed that the INS went to extensive lengths to hide the true conditions at Krome. Upon hearing of the congressional visit, the INS cleaned up the facility and temporarily transferred many detainees to other centers in order to make the dramatic overcrowding appear less significant. Reports stated that the INS undertook these actions “with the explicitly stated intent to deceive the delegation.”²¹⁷ An INS e-mail regarding the investigation specified, “Current population is 377. We intend to move 40-50 aliens to non-Service facilities upstate...to be stashed out of sight for cosmetic purposes.”²¹⁸ Prior to the Task Force’s visit INS abruptly released 58 detainees and hid more than 100 others within the facility. Inspectors at Krome removed their gun holsters and handcuffs in order to portray a “kinder, gentler” vision of immigration detention.²¹⁹ The 1995 scandal, which the media labeled “Kromegate,” became symbolic of how far INS would go to avoid federal oversight or intervention. Fully aware that stories of Krome’s overcrowding would lead to negative press and political intrusion, the INS blatantly attempted to deceive Congress. The Office of the Inspector General’s 1996 report on the incident stated that “the culture at INS appears to be such that

²¹⁵ U.S. Dept. of Justice & Office of the Inspector General, II.

²¹⁶ The INS’ poor record keeping has often been cited as another example of the agency’s bureaucratic secrecy. In her 1992 book *Inside the State: The Bracero Program, Immigration, and the INS*, Kitty Calavita writes, “Unlike most other government agencies the Immigration Service has relinquished virtually no internal documents since World War II to the National Archives in Washington, D.C.” and that the agency even revoked records from the archive after they were used in a book that the INS disapproved of.

²¹⁷ Women’s Commission for Refugee Women and Children, “Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center,” (New York: Women’s Commission, 2000): 10.

²¹⁸ U.S. Dept. of Justice & Office of the Inspector General, III.

²¹⁹ U.S. Dept. of Justice & Office of the Inspector General, IV.

inspectors...would feel that their jobs would be in jeopardy if they failed to obey an order to lie to Congress."²²⁰

The 1995 incident reflected the increasingly tenuous relationship between the INS and the federal government. While the INS and Congress worked hand-in-hand during the Mariel crisis, they functioned almost totally independently by 1995. Congress perceived immigration detention as an ethical gray area and a political liability. The Mariel boatlift had created a public relations disaster for Congress and the White House, and therefore most lawmakers sought to distance themselves from immigration policy. From the INS' perspective, oversight in the form of Congressional Task Forces, threatened to undermine the autonomy and discretionary practices of detention centers. Though technically categorized as federal detention centers, the federal government maintained minimal involvement with these locations. The INS held almost all power over operations and management, and delegated the authority to its officers and immigration judges. Much of this independence served as an intentional form of self-preservation for Congress. Policymakers generally remained uninvolved unless public outrage and media coverage forced them to take investigative measures, as happened in 1995. Therefore, minimizing visibility of detention centers seemed in everyone's best interest, as it allowed the INS to maintain self-governance, and the federal government to plead ignorance. Plenary power and a historical precedent of non-interference allowed this unusual relationship to flourish.

While media coverage of Kromegate generated short-term visibility for U.S. detention practices, it ultimately did little in terms of industry reform. Walter Cadman, the top INS official in South Florida, initially faced legal action for his involvement in the conspiracy to mislead the Congressional Task Force. The Justice Department recommended possible criminal prosecution

²²⁰ U.S. Dept. of Justice & Office of the Inspector General, IV.

and strong disciplinary action against Cadman.²²¹ Inspector General Michael Bromwich stated, “Cadman was a willing participant in efforts to mislead INS headquarters and then to mislead and delay the investigation into this matter.”²²² Instead, INS transferred Cadman from his position in Florida to INS’ D.C. headquarters, where he received a temporary demotion to investigator.²²³ But within two years, Cadman received an even larger promotion, to director of the INS National Security Unit, one of the most senior positions in the bureaucracy. The INS effectively disregarded the Justice Department’s recommendations altogether, and did so without consequence. Rep. Elton Gallegly, chairman of the Krome Task Force, said of the Cadman promotion, “This is a case where truth is stranger than fiction. And I think this explains in some way what is wrong with INS.”²²⁴ While INS did not want the federal government to interfere in the issue of detention, the federal government also showed no inclination to become involved with a system rapidly spiraling out of control. Even when attempting to oversee the INS, the executive branch appeared to have astoundingly little control.

The importance of the 1995 Kromegate incident came in showing the ease with which the INS could abuse its sweeping authority. The media responded in disbelief and outrage to the events in Miami, calling the reports “a shocking accusation” and writing that the INS’ actions “defied logic.”²²⁵ However, most commentators failed to note how extraordinarily predictable this kind of behavior could have been.²²⁶ The INS historically operated with such limited judicial or congressional oversight, that the bureaucrats genuinely believed in their own immunity to punishment. As journalist Mark Dow points out, Krome detainees themselves wrote a letter to

²²¹ Warren Richey, “Justice Department Recommends Sanctions Against INS Managers,” *Sun-Sentinel*, June 22, 1996.

²²² Bob Norman, “Admitting Terror, Part 3,” *New Times Broward-Palm Beach*, November 1, 2001.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Editorial, “A Stunning Accusation,” *Miami Herald*, June 22 1996.

²²⁶ Mark Dow, “Deception, Dehumanization, and the INS,” *This Week in Haiti*, July 24, 1996.

the media in February 1996, imploring, “Please do not notify the Center... that you will be coming out to see the conditions or they will tidy up and make the place look livable.”²²⁷ The actions taken at Krome in 1995 reflect how plenary authority created an agency that simply did not expect consequences or interference from the federal government.

Detention Post-Kromegate

Kromegate provided a powerful example of why Congress viewed immigration detention as a political liability. When Congress did breach the plenary power doctrine and attempt to regulate the INS’ detention practices, it generated media coverage and negative publicity for both the INS and Congress. The media coverage proved reminiscent of Mariel, as the public began to question if the federal government had control over its immigrants or even over its own bureaucratic agencies. However, Kromegate also illustrated the futility of federal oversight. When Congress attempted to punish those responsible for the conspiracy, the INS swiftly evaded the regulations and continued to operate on its own terms. Kromegate provided a strong illustration for who really controlled plenary power in the 1980’s. Though the authority over immigration was formally ascribed to policymakers, it appeared clear that the immigration bureaucrats had gained the power position in controlling and regulating non-citizens. This event reiterated for Congress that immigration detention may represent a no-win scenario. If Congress attempted to intervene, the controversial practices of the INS would become public, the media would demand answers, and ultimately, the plenary power held by the INS would seemingly prevent Congress from exerting any real control. At the same time, the INS realized that it needed a new strategy for eluding congressional challenges to the agency’s plenary authority.

²²⁷ Ibid.

The federal government and the INS eventually found a mutually beneficial solution—management of detention centers would be relegated to the private sector. By paying private corporations to operate detention centers, the federal government could distance itself from the controversial practices of detention centers. The INS would have the infrastructure necessary to accommodate its mass deportations, but would no longer have to answer for what happened within the detention centers. Through the plenary power doctrine, power over non-citizens would once again be transferred to a new stakeholder.

Chapter Three: The Securitization and Privatization of Immigration Policy 1996-2012

In 1997, fifteen year-old Maynor Cante left Guatemala for the United States, crossing over the Mexican border to join his seven older siblings who were legal residents working in Rhode Island's Blackstone Valley.²²⁸ Cante spent ten years in the United States, making his home in the small, struggling mill town of Central Falls, Rhode Island. He learned to speak near-fluent English, worked multiple jobs, and spent thousands of dollars trying to legalize his status. Cante gave little thought to the maximum-security prison, Donald W. Wyatt Detention Facility (henceforth referred to as 'Wyatt') that loomed over Central Falls. After all, the stated mission of the prison was "to protect the public from people who pose a threat to society," suggesting images of murderers, rapists, and other violent criminals.²²⁹ This made it all the more surprising when on the way to his cleaning job one morning, Cante was apprehended by five Immigrations and Customs Enforcement (ICE) agents, put into a van, and delivered to Wyatt in handcuffs.

Cante did not stand alone in his apprehension and subsequent imprisonment. His experience represented a larger trend of merging U.S. immigration policy with the private sector. As suggested by the residency of his seven siblings, Cante belonged to an influx of mostly Mexican and Central American immigrants to Central Falls, Rhode Island. While in 1990 29% of Central Falls residents identified as Hispanic, the 2010 Census showed that Hispanic residents represented a majority, comprising 60.3% of the city's population.²³⁰ After a history of financial troubles, the town bordered on bankruptcy in 1990 and sought a steady source of jobs and federal money. It found a solution for both when developers proposed the construction of a 410-bed jail within the city limits. Funding for the penitentiary would come from the city as well as from

²²⁸ Nina Bernstein, "City of Immigrants Fills Jail Cells With Its Own," *New York Times*, Dec. 27, 2008.

²²⁹ Donald W. Wyatt Detention Facility, "Mission Statement" <<http://www.wyattdetention.com>>

²³⁰ Paul Edward Parker, "Census: Central Falls has Hispanic Majority," *Providence Journal*, March 23, 2011.

private investors. A mid-size private prison company called Cornell Companies, Inc. would operate the facility. The federal government, which by 2009 paid \$101.76 per day for each detainee, contracted with the Central Falls prison.²³¹

Wyatt opened its doors in 1993, but quickly encountered financial trouble. Just six years after taking out a \$30 million loan to build Wyatt, Central Falls needed to borrow an additional \$38 million to refinance.²³² Wyatt paid the city a meager \$2 to \$3 a day per inmate, as most of the federal money went to paying Cornell Companies and the private investors. Furthermore, Wyatt quickly ran into a serious problem—it couldn't find enough inmates. For a period, Wyatt imported felons from North Carolina's overcrowded prisons, but public resistance quickly ended this practice.²³³

Wyatt languished and lost money for many years until a national tragedy presented the opportunity for a total business reform. September 11th initiated a turning point for the industry as immigration policy quickly shifted to greater criminalization of immigrants with even less focus on human rights and the judicial process. Suddenly, individuals like Cante, who had not committed any crime beyond illegal entry, found themselves actively pursued for detention and deportation. Just weeks after the September 11th attack, the chairman of Cornell Companies said the following regarding his company's future:

It is clear that since September 11th there's a heightened focus on detention. More people are going to get caught. So I would say that's positive. The federal

²³¹ Bernstein.

²³² Ibid.

²³³ Arjan Bol, "Donald W. Wyatt Detention Facility" *Harvard Design School: Center for Design Informatics* http://www.dunwalke.com/resources/documents/Events/Harvard_Case_Study_940101-014.pdf (accessed April 22, 2012.)

business is the best business for us, and September 11th is increasing that business.²³⁴

And indeed, the chairman proved correct. Three years after the attack, the Intelligence Reform and Terrorism Prevention Act of 2004 authorized 40,000 new immigrant detention beds, tripling the number of beds available to ICE and leading the agency to rely heavily on private detention companies to bear both the burden and the profits of the rapid expansion.²³⁵

In this chapter, I examine two central themes of the immigration bureaucracy in the past twenty years. First, concern with securitization grew. Enabled by 19th and 20th century precedents of plenary power, and gaining momentum from public reactions to the Oklahoma City bombing and the Mariel boatlift, securitization became even more important following 9/11. Americans increasingly labeled non-citizens as threats, who fell outside the norms of the Constitution, judicial oversight, and habeas corpus. The second trend was the move towards privatization for prisons and jails holding detainees after 9/11. The 21st century immigration bureaucracy became increasingly decentralized. A small number of executive immigration officers no longer directed the bureaucracy, as they did in the days of Ellis Island. Instead, the immigration bureaucracy broadened to include (and assign plenary authority to) community members, local law enforcement, federal agencies, and as I will primarily focus on, private corporations.

Securitization and the consequent criminalization of immigrants, however, did not necessarily result in the proliferation of privatization within the immigration bureaucracy. In many ways this trend seems contradictory. If the government perceived undocumented immigrants as a threat, whether in reality or rhetoric, would they not want to ensure that the

²³⁴ Judy Greene and Sunita Patel, “The Immigrant Gold Rush: The Profit Motive Behind Immigration Detention,” Submitted to the U.N. Special Rapporteur on the Rights of Migrants, 2007.

²³⁵ Ibid.

federal government had full control over them? Why did the government place immigrants in the hands of corporations? And how did the history of privatization, usually justified as an economic solution, become linked to the history of immigration detention, a practice rarely considered economically risky? In short, how did the securitization of American immigrants post-9/11 connect to the privatization of detention post-9/11?

Because immigration detention expanded so rapidly, the government relied on private contractors, such as Cornell Companies, currently the nation's third largest contractor, to operate detention centers at a lower liability to the government. Much of the discretionary power that allowed immigration bureaucrats to outsource detention contracts derived from the peculiar role the agency occupies outside the usual policy structure. As established in the first two chapters, U.S. immigration policy has regularly been held accountable to the plenary power doctrine rather than to constitutional norms, and the judiciary rarely interfered with immigration laws. This allowed the often impulsive, reactive policies based on traumatic events or public fear to hold unusual weight and power in how the United States responded to those who breach immigration law. It also allowed the bureaucracy to swiftly redefine its own role and allocate plenary power to the private sector.

The privatization of detention posed an apparent paradox because it decentralized powers over immigration policy even further, now allocating authority to a number of private companies. To many observers, it seemed as if the government's centralized agencies were gradually relinquishing control over immigrants. I argue that, to the contrary, the privatization process actually continued an already established trend—the more INS and ICE separated their policing from judicial oversight and general regulation, the more powerful and expansive detention practices became. Privatizing detention did not mean giving up control, but instead

served as a way for the federal government to create one more layer of protection between itself and judicial action. While the doctrine of sovereignty long separated immigration policy from constitutional regulation, privatization separated one of the government's most controversial practices from visibility and state responsibility. By casting immigrants as a security problem and an "existential threat to the American way of life" the federal government further distanced immigration policy from constitutional norms and assigned the immigration bureaucracy even more plenary power—including the power to outsource the policy issue altogether.²³⁶

Although detention centers became privatized at a distinct moment in time, closely following the attacks of September 11th, events in the preceding years made privatization possible. I first look at both the organizational and rhetorical shifts of 1996, following the Oklahoma City bombing, as well as in 2001, to recast immigration as a security issue. These events enabled the detention system to expand exponentially with minimal public backlash. With this rapid growth came the rationale for privatization. I use Cornell Companies, Inc., the company that operated the Donald W. Wyatt Detention Facility until 2007, as a case study for viewing the relationship between private companies and the federal government. This story will illustrate how privatization further limited the visibility of this largely hidden industry. An analysis of the history surrounding Wyatt will illuminate the complexity of the link between privatization and securitization post-9/11. Privatization arose from many roots, including opportunistic policymaking, a desire for risk transfer, a growing public awareness of detention practices in the wake of Mariel, and pragmatic and financial concerns resulting from rapid expansion. 21st century immigration detention centers, a land of non-citizens with ill-defined

²³⁶ Robert Koulish, "Plenary Powers and Militarization: A 'Perfect Storm' Scenario for Immigration Control," *Journal of Migration and Refugee Issues* 3.4 (2007): 150.

rights, and non-State actors with ill-defined authority, provided the ideal arena for the privatization saga to play out.

Securitization as a Response to Public Fear

On the morning of April 19, 1995, an ex-Army soldier and security guard named Timothy McVeigh parked a truck in front of the Alfred P. Murrah Federal Building in downtown Oklahoma City, Oklahoma.²³⁷ Inside the vehicle rested a powerful bomb created from a potent mixture of agricultural fertilizer, diesel fuel, and other chemicals. McVeigh quietly exited his car and ignited two timed fuses. Within minutes, a third of the Alfred P. Murrah Federal Building had been leveled, taking 168 lives. McVeigh had committed what the FBI would later call “the worst act of homegrown terrorism in the nation's history.”²³⁸

In the days immediately following the bombing there was strong speculation that Islamic radicals committed the terrorist act, allowing the media and political affiliates to swiftly redraw the connection between security and immigration policy. Although it took just days to determine that the actual culprit was a U.S. citizen, it seemed simply predestined for the bombing to have implications for immigration, regardless of what the evidence would show. Two days after the attack, the *Wall Street Journal* published an article entitled “Oklahoma City terror bombing may intensify hardline views on crime and immigration” in which its reporters stated that “suggestion of a foreign terrorist connection to the bombing could easily strengthen both anti-immigrant and isolationist tendencies, which already have been growing more visible in American society.”²³⁹

Other media sources would go on to make the connection in more explicit ways. In a CBS News

²³⁷ Federal Bureau of Investigation, “Terror Hits Home: The Oklahoma City Bombing,” <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (accessed April 15, 2012)

²³⁸ Ibid.

²³⁹ Gerald F. Seib and John Harwood. “Oklahoma City bombing: Oklahoma City terror bombing may intensify hardline views on crime and immigration,” *Wall Street Journal*, April 21, 1995.

Interview, Journalist Steven Emerson stated that the bombing "...was done with the intent of inflicting as many casualties as possible. That is a Middle Eastern trait."²⁴⁰ The *New York Times* article the day after the bombing reported that some experts hypothesized the attack was "the work of Islamic militants" and observed that "Some Middle Eastern groups have held meetings (in Oklahoma City) and the city is home to at least three mosques."²⁴¹ Even after the perpetrator had been apprehended, suspicion of foreign connections lingered. On a CNN broadcast, Wolf Blitzer said, "there is still a possibility that there could have been some sort of connection to Middle East terrorism. One law enforcement source tells me...they may have been contracted out as freelancers to go out and rent this truck that was used in the bombing."²⁴²

By the time the police determined that the guilty party was actually an American citizen with no foreign connections, it did not seem to matter. The association between the alien and the terrorist proved too strong, both historically and in the dialogue following the Oklahoma City Bombing. The trajectory for increased criminalization of aliens had already been solidified in the minds of the American people. Policymakers responded emphatically, pushing through anti-terrorism legislation that had been in the works since 1993.²⁴³ In direct response to public fear, Congress proposed both the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). President Bill Clinton acknowledged the impetus to the bill's passage when, upon signing the bill into law, he stated,

²⁴⁰ "Target Terrorism" Narrated by Erin Moriarty. *48 Hours*. CBS. 30 Jan. 2002. Accessed April 7, 2012. <http://www.steveemerson.com/4266/target-terrorism>. Transcript.

²⁴¹ David Johnston, "At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building," *New York Time*, April 20, 1995.

²⁴² Jim Naureckas, "The Oklahoma City Bombing: The Jihad That Wasn't," *FAIR: Fairness & Accuracy in Reporting*, July/August 1995, <http://www.fair.org/index.php?page=3606> (accessed April 19, 2012)

²⁴³ *Ibid.*

“It stands as a tribute to the victims of terrorism and to the men and women in law enforcement who dedicate their lives to protecting all of us from the scourge of terrorist activity.”²⁴⁴

The stated intention of AEDPA was to “give law enforcement the tools it needs to do everything possible to prevent [a tragedy like the Oklahoma City bombing] from happening again.” Even though a citizen committed the previous year’s terrorist attacks, the event led to further securitization of the nation’s borders in order to limit the influence of “foreign terrorist organizations.”²⁴⁵ AEDPA increased the number of immigrants subject to mandatory detention by expanding the definition of what constituted an aggravated felony.²⁴⁶ The bill also severely restricted habeas corpus as it applied to immigrants accused of terrorist activity. Evoking the late 19th century case of *Nishimura Ekiu v. United States*, AEDPA allowed the government to present classified information in deportation hearings, with no obligation to share the classified information with the potential deportee.

The American Civil Liberties Union (ACLU) argued that the mandatory detention of undocumented people and the use of unseen materials in deportation hearings violated the detainee’s right to due process. The ACLU claimed that AEDPA had reinforced that the rights of the alien were not defined by the Constitution and could be easily rewritten through plenary power.²⁴⁷ Nonetheless, in the moment of public fear and widespread demand for formal response, AEDPA received broad bipartisan support. Still, not everyone proved receptive to the government’s further removal of immigration policy from the constitutional sphere. At a 1995 Senate hearing, Father Sean McManus, President of the Irish National Caucus, warned Congress,

²⁴⁴ President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 721 (Apr. 29, 1996).

²⁴⁵ Senate Passage of Antiterrorism Legislation, 31 WEEKLY COMP. PRES. DOC. 993 (June 7, 1995).

²⁴⁶ Sarah Gryll, “Immigration Detention Reform: No Band-Aid Desired,” *Emory Law Journal* 60.5 (2011): 1218.

²⁴⁷ Jennifer A. Beal, “Are We Only Burning Witches? The Antiterrorism and Effect Death Penalty Act of 1996’s Answer to Terrorism,” *Indiana Law Journal* 73.2 (1998).

"Destroying constitutional rights is not the way to build a memorial to the dead in Oklahoma City, nor is it the way to protect Americans from terrorism, nor is it the way to fight terrorism."²⁴⁸ Even President Clinton would later state that AEDPA "made a number of ill-advised changes in our immigration laws having nothing to do with fighting terrorism."²⁴⁹ The bombing and subsequent policy shift served as a powerful reminder of how opportunistic policymaking and public fear could drive immigration legislation.

The second piece of legislation, entitled the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), served a crucial role in establishing a more punitive and decentralized vision of immigration enforcement. The IIRIRA broadened the scope of criminal offenses for which immigrants could be detained to include minor crimes such as shoplifting, even if committed decades prior to migration. The legislation also dictated that deportees could be detained for as long as two years before seeing an immigration board, essentially granting the INS "incontestable authority" in detaining those classified as criminal aliens.²⁵⁰ The IIRIRA presented a much stricter policy than those previously put forth, and took a distinctive "criminal justice" approach to the immigration problem, choosing to focus on criminal aliens rather than those whose only crime was entering the country illegally. The Act limited due process rights for immigrants, eliminating judicial review for criminal aliens and deleting provisions in prior laws that granted habeas corpus review of claims by detained aliens.²⁵¹

²⁴⁸ *Counterterrorism Legislation: Hearings on S. 390 and S. 735 Before the U.S. Senate Subcomm. on Terrorism, Tech. and Gov't Info.*, 104th Cong. 61 (1995)

²⁴⁹ Anna Maria Tejada, "Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA): The Retroactive Effects on Lawful Permanent Residents Convicted of Aggravated Felonies and Drug Offenses," *Rutgers Race and the Law Review* (1998-1999): 394.

²⁵⁰ Michael Welch, *Detained: Immigration Laws and the Expanding INS Jail Complex* (Philadelphia: Temple University Press, 2002), 59.

²⁵¹ Koulisch, 8.

The IIRIRA represented a seminal piece of legislation in the history of decentralizing the immigration bureaucracy itself. Section 287(g) of the IIRIRA authorized the INS to enter into agreements with state and local law enforcement agencies. This allowed state and local police to perform immigration enforcement functions, including immigration detention. The plenary powers that the INS so strongly guarded would now be extended to other agencies, allowing for a broader coalition of immigration law enforcers. This set an important precedent for detention in the 21st century. By 2008 the immigration bureaucracy had contracted immigration detention services with approximately 350 state and county criminal jails across the country.²⁵²

A budget increase for the INS accompanied the 1996 legislation and officially made the immigration bureaucracy the largest federal law enforcement agency in the United States. President Clinton's 1996 budget called for \$171 million to double the capacity of detention facilities, as well as \$15 million to build new detention centers.²⁵³ The number of personnel employed by detention centers rose from 1,600 to 3,500 in the 1990's. Spending on detention and removal increased five-fold to a grand total of one billion dollars. By "criminalizing" immigration detention, these large budget increases seemed not only sensible, but necessary, to maintain public safety and order.²⁵⁴ The number of detainees expanded rapidly throughout the 1990's and an INS official testified before Congress that from 1994 to 2001, the average daily detainee population more than tripled, from 5,532 to 19,533.²⁵⁵

²⁵² Stephanie J. Silverman, "Immigration Detention in America: A History of Its Expansion and a Study of Its Significance," COMPAS Working Paper No. 80. Available at SSRN: <http://ssrn.com/abstract=1867366>

²⁵³ William Clinton, "The Budget for Fiscal Year 1996," (Washington D.C.: Office of Management and Budget, 1996), 77.

²⁵⁴ David Manuel Hernandez, *Undue Process: Immigrant Detention, Due Process, and Lesser Citizenship* (Berkeley, CA: University of California Press, 2008): 76.

²⁵⁵ Congress, House, Committee on the Judiciary, *Review of Department of Justice Immigration Detention Policies: Hearing before the Subcommittee on Immigration and Claims*, 107th Cong., 1st sess., 19 December 2001, 18.

Following the passage of the two 1996 Acts, the securitization of immigration policy remained fairly stagnant until the 9/11 terrorist attacks. Many immigration reform advocates felt they had reason to be optimistic in the early years of the George W. Bush presidency—President Bush called for a large-scale temporary worker program, courted Hispanic voters, and held five meetings in nine months with Mexico’s president.²⁵⁶ However, in the months following the 2001 terrorist attacks, the trend of securitization reemerged with staggering clarity.

The Homeland Security Act, enacted in November 2002, reclassified the immigration bureaucracy within the federal government and began the process of formally intermingling immigration and security. The Act dismantled the INS, and in its place created the Immigration and Customs Enforcement (ICE) agency. ICE would fall under the newly formed Department of Homeland Security (DHS), thereby generating a strong statement about the link between controlling immigration and protecting U.S. security. The creation of the DHS represented the largest restructuring of the executive branch since the establishment of the Department of Defense after World War II, transferring 185,000 federal employees and 22 federal agencies into the new department.²⁵⁷ Between 1940 and 2002, the INS belonged to the Department of Justice, with immigration seen primarily as a legal and civil rights issue.²⁵⁸ The move to the Department of Homeland Security foreshadowed a distinctive bureaucratic shift towards immigration enforcement and exclusion. It would soon be followed by dramatic new policies restricting non-citizens’ rights.

²⁵⁶ Marc R. Rosenblum, “US Immigration Policy since 9/11: Understanding the Stalemate over Comprehensive Immigration Reform.” (Washington DC: Migration Policy Institute, 2011): 1.

²⁵⁷ *Ibid.*, 4.

²⁵⁸ Prior to 1940, immigration affairs were overseen by the Department of Labor, as immigration was addressed as a means of fulfilling America’s need for workers.

The USA PATRIOT Act, initially drafted just eight days after the 9/11 attacks, gave plenary power renewed strength over immigration through a rhetoric of ensuring national security. The Act further removed immigration policy from judicial oversight and instead gave the Attorney General and the Executive Branch indisputable authority in detaining immigrants suspected of terrorist activity. While the PATRIOT Act appeared to strengthen executive branch power over immigration, as per usual, that power was quickly delegated to the immigration bureaucracy. U.S. Attorney General John Ashcroft gave ICE attorneys the power to override a judge's release order in cases pertaining immigrants, regardless of whether the individual was suspected of a crime.²⁵⁹ In March 2003, just as the US invasion of Iraq began, the DHS initiated a new program entitled "Operation Liberty Shield." The program's press release stated that "asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period."²⁶⁰ The DHS did not release the list of applicable nations, claiming it represented "law enforcement sensitive" information. This policy expanded mandatory detention to immigrants from terrorist-connected nations, whose victimized civilians would perhaps most need asylum and protection. It also reinforced the practice of viewing immigrants categorically rather than on a case-by-case basis. The DHS discontinued the program in 2003, but many immigration attorneys have claimed that this ideology continues to permeate decisions to detain.²⁶¹

²⁵⁹ "In Liberty's Shadow: US Detention of Asylum Seekers in the Era of Homeland Security" (Washington DC: Human Rights First, 2004): 19.

²⁶⁰ "Operation Liberty Shield Press Release," Department of Homeland Security, March 17, 2003, Available at: http://www.dhs.gov/xnews/releases/press_release_0115.shtm

²⁶¹ Human Rights First, 25.

Moving Towards Privatization

The trend towards securitization of immigration policy has clear historical roots, and seems to systematically reemerge in times of national crisis. However, to a casual observer, the privatization shift post-9/11 seems to come about far more abruptly. How does a terrorist attack suddenly initiate a dramatic recasting in the roles of the state and the private sector? Privatization affected not only the detention industry, but appeared visible in arrangements ranging from the U.S.' use of corporations to provide border security to the use of privatized militias to fight its wars. For a bureaucracy that long valued its unique discretionary powers and disproportionate authority, the shift towards privatization may seem a peculiar one. The move towards detention privatization demonstrates parallels to the evolution of detention policy, but also has a history all its own. Critics of immigration enforcement's shift towards privatized contracts have argued that we are now creating an "immigration industrial complex" in which profit-maximizing corrections firms have extraordinary power and influence over the policy-making process.²⁶² In turn, the government relies on the private sector to keep visibility and federal responsibility low.

Privatized immigration detention centers predate private prisons in the United States. The very establishment of private immigration detention centers derived from the controversial links between business and politics. As early as 1980, the Chairman of the Tennessee Republican Party, together with the Corrections Commissioners of Tennessee and Virginia, founded the

²⁶² The phrase "immigration industrial complex" invokes President Eisenhower's 1961 farewell address, in which he warned Americans to be vigilant towards the growing "military industrial complex" of the United States, defined as "a cooperative relationship between the military and the industrial producers of military equipment and supplies in lobbying for increased spending on military programs." (Dwight D. Eisenhower, *Public Papers of the Presidents*, 1960: 1035-40.) Eisenhower warned that this form of public-private partnerships would marginalize the best interests of the state as the "unwarranted influence" of private companies would prioritize building more elaborate and expensive equipment rather than providing for the most efficient defense of the nation.

nation's largest private-incarceration company, Corrections Corporation of America (CCA).²⁶³ In 1984, the CCA received its first governmental contract to operate detention centers for the Immigration and Naturalization Service in Houston and Laredo, Texas. When the CCA won its contract in Houston it had not yet built a facility to hold detainees. The CCA therefore detained 125 immigrants in a run-down motel surrounded with barbed wire gates.²⁶⁴ As a first foray into incarcerating people for profit, the government used the Houston detention center "as its canary in the coal mine" before moving on to privatizing prisons of citizen-criminals.²⁶⁵ Later that year, Hamilton County, Tennessee brought in CCA to operate its county jails. In 1985, CCA made an (unsuccessful) bid to take over operations for all prisons in the state of Tennessee, at a cost of \$250 million.²⁶⁶ By 2010, private companies managed only 8% of all state and federal prison beds, as compared with approximately 49% of all immigration detention beds.²⁶⁷

The move towards privatization reflected a distinct shift in how the government viewed immigrants. Rather than representing a burden to the government or a threat to federal control, as observed in the Mariel crisis, immigrants now represented a promising source of profit for private corporations. CCA's annual revenues leapt from \$14 million in 1986 to \$120 million in 1994. The complex (and often changing) chains of ownership and responsibility in detention operations made it difficult to assess the exact number of privatized detention centers. However, data obtained in 2009 through the Freedom of Information Act indicated that ICE utilized 286 facilities. Privatized detention centers comprised 12 of their 17 largest facilities (those holding an average daily population of more than 500 detainees). These 12 facilities accounted for nearly

²⁶³ Philip Mattera and Mafruza Khan, "Corrections Corporation of America: A Critical Look at its First Twenty Years," (Washington DC: Institute on Taxation and Economic Policy, 2003): 10.

²⁶⁴ Dow, 97.

²⁶⁵ Ibid, 154.

²⁶⁶ Philip Mattera and Mafruza Khan, "Jail Breaks: Economic Development Subsidies Given to Private Prisons," (Washington DC: Institute on Taxation and Economic Policy, 2001): 2.

²⁶⁷ Ibid.

50% of the detained population on these dates.²⁶⁸ CCA, still the recipient of the majority of federal detention contracts, has reported record profits every year since 2003. Their largest profit leap came in 2006, when ICE increased its beds from 19,500 to 27,500. In the same year, CCA won contracts to provide about half of the new detention beds.²⁶⁹ By 2009, immigration detention yielded 40% of CCA's \$1.7 billion revenue.²⁷⁰

Though private companies had been involved in the detention industry for less than 30 years, they quickly transformed their business model to revolve around profitable government contracts. Financial necessity largely drove this move, as CCA and other private prison corporations experienced great financial losses prior to the 9/11 privatization shift. In 1999, independent auditors expressed uncertainty that CCA would even stay in business after the company suffered a net loss of \$72 million, due mainly to an inability to fill prison beds.²⁷¹ When President Reagan declared a "War on Drugs" in October 1982, corrections companies built jails on speculation and a desire to cash in on the expanding arrest rate. The CCA initially benefited from the Reagan policies. The company won several large contracts in the 1980's, as it could build new facilities cheaper and faster than the federal government. However, by the 1990's, a series of well-publicized abuse scandals and inmate escapes turned many states against privatized prisons. The CCA struggled to fill beds and its stock value plummeted.

The early shift towards privatization of the prison industry reflected the political climate of the time. During his 1992 campaign, Bill Clinton promised to reduce the size of the government, but also to continue placing more criminals in federal prisons for longer sentences.

²⁶⁸ American Civil Liberties Union of New Mexico, "Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County," (Washington DC: American Civil Liberties Union, 2011): 9.

²⁶⁹ Renee Feltz and Stokely Baksh, "The Business of Detention: Profits" <http://www.businessofdetention.com/?p=71> (accessed May 6, 2011).

²⁷⁰ ACLU of New Mexico, 9.

²⁷¹ Feltz and Baksh.

The White House budget officials acknowledged that the growing influx of federal inmates would force the government to hire more than 3,000 new employees by the end of the decade.²⁷² However, if the government used private companies to run new prisons, the employees would not show up on the federal payroll. INS hoped that the private prison companies would compete for the federal contracts, leading to bidding wars and a reduced operating cost to the government. Ideological advantages complimented the pragmatic advantages to privatization. Politicians from both parties saw a shift towards privatization as desirable—while President Clinton needed privatization to reflect his fiscal responsibility, Republicans favored the policy because of its reliance on the free market.

The George W. Bush administration formulated a new role for government. Rather than holding responsibility for national security, the government's only responsibility was to purchase security in the most cost-efficient way possible.²⁷³ While President Clinton privatized many sectors including water, electricity, highway management, and garbage collection, it would be President Bush who would attempt to privatize “the core”—the responsibilities considered intrinsic to national governments.²⁷⁴ Bush entered the White House with a legacy of privatization behind him; under his Governorship, the number of private prisons in Texas grew from 26 to 42, and *The American Prospect* magazine called Bush's Texas “the world capital of the private-prison industry.”²⁷⁵ President Bush dramatically recast the role of the state in securitization, with immigration detention serving as one small part of a larger national shift towards outsourcing.

There are numerous reasons a government might choose to privatize a service. The events of the 20th century clearly show the financial incentives. By outsourcing detention operations to

²⁷² Jeff Gerth and Stephen Labaton, “Prisons for Profit: A Special Report,” *New York Times*, November 24, 1995.

²⁷³ Klein, 378.

²⁷⁴ *Ibid.*, 363.

²⁷⁵ *Ibid.*, 371.

private companies, the service could be provided at a slightly lower cost and reduce the overall federal budget, offering political benefits. Scholars have addressed “risk transfer” as another strong incentive for moving services out of the public sector. Traditionally, the concept of risk transfer applied to risky economic investments, in which the government transferred the risk to a private corporation or to the public itself. For example, if Medicare became privatized, the uncertainties associated with medical care costs would not be incurred by the government, but by both the private corporation (which receive compensation for this risk transfer through government contracts) and by the citizen. Political scientist Jacob Hacker labeled this transfer of responsibility to individuals and the private sector “the great risk shift” and called it “the defining economic transformation of our times.”²⁷⁶ Immigration detention complicated this view because the industry did not necessarily pose a financial risk, but a political and legal risk. A detention center represented a fairly reliable investment, particularly considering that the agency giving the contracts served as the same agency making increasingly restrictive detention policies. However, the federal government faced risks both in terms of legal liability and political association with detention’s controversial practices. As the government detained exponentially higher numbers of immigrants in the post 9/11 era, it sought to insulate itself from these risks through privatization.

Privatization as a Response to 9/11

While 20th century events such as the Mariel boatlift and the Oklahoma City Bombing established the “politics of the last atrocity,” or policy reform immediately following crisis, September 11th introduced the U.S. to the concept of mass privatization in the wake of crisis.

²⁷⁶ Jacob Hacker, “The Privatization of Risk and the Growing Economic Insecurity of Americans” June 7, 2006. <http://privatizationofrisk.ssrc.org/Hacker/index.html> (accessed April 6, 2012).

Neo-liberal economist Milton Friedman had long advocated for a minimalist state whose sole responsibilities were “to enforce contracts and protect borders,” with all other tasks left to the capitalist-driven free market.²⁷⁷ As Friedman wrote in his 1962 book *Capitalism and Freedom*:

Only a crisis, actual or perceived produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That I believe, is our basic function, to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes the politically inevitable.²⁷⁸

Because the 9/11 hijackers entered the country on legally attained visas and overstayed them with little government intervention, the public and political sentiment quickly shifted toward enforcing strict deportation policies as a means of enforcing the newly coined “homeland security.” September 11th served as the crisis that allowed the federal government to rebrand aliens as potential terrorists. In coming months, the immigration bureaucracy would call for reforms that pushed an already anti-democratic, plenary-power-driven system of policy even further outside the bounds of constitutional norms.

While prior to 9/11 many people felt uneasy about allowing corporate interests to enter into border enforcement, the attacks on America created a renewed focus on thwarting terrorism by any means necessary. The Bush administration insisted that private-public partnerships would prove crucial to effectively providing homeland security and ensuring public safety. This led to further decentralization in the detention industry, as corporations quickly moved to capitalize on the thousands of new beds contracted by the government. Conflicts of interests soon arose when it came to determining which corporations would receive federal contracts. In 2006, KBR, the engineering and construction subsidiary of Halliburton (the company of then-Vice President Dick Cheney) received a contract from the Department of Homeland Security worth \$385

²⁷⁷ Koulish, 4.

²⁷⁸ Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), XIV.

million.²⁷⁹ The contract provided for “establishing temporary detention and processing capabilities to extend existing ICE Detention and Removal Operations Program” and led many to question how Halliburton’s relationship with the White House influenced the contracting policy.²⁸⁰ ICE never commented on the matter.

In the latter half of the 2000’s, criticism towards detention privatization escalated. In 2009, ICE released a report by Dr. Dora Schriro, the first director of ICE’s Office of Detention Policy and Planning. In the report, Schriro recommended that ICE “create capacity within the organization to assess and improve detention operations and activities without the assistance of the private sector.”²⁸¹ This was the first acknowledgement from within ICE that the reliance on privatization may not serve as the cure-all solution some had hoped. The increasing media attention drawn to government outsourcing left many officials uneasy. The *New York Times* published a front page story on detainee deaths in 2007. In 2008, the *Washington Post* offered a weeklong series entitled “Careless Detention” that identified 83 unreported detainee deaths in the past five years, many at CCA facilities. By 2010, private corporations played an enormous role in the management of the detention system, as they operated both their own detention centers, as well as the largest county jails with which ICE contracted.²⁸² Private corporations managed all but one of ICE’s own Service Processing Centers and its largest contract facilities. The Schriro report also noted that because of the private contracting, ICE officials and staff held no legal obligation to routinely tour detention facilities. Nearly all responsibility for supervision fell to the

²⁷⁹ Rachel L. Swarns, “Halliburton Subsidiary Gets Contract to Add Temporary Immigration Detention Centers,” *New York Times*, February 4, 2006.

²⁸⁰ Katherine Hunt, Market Watch, “KBR awarded Homeland Security contract worth up to \$385M,” *Wall Street Journal*, Jan. 24, 2006.

²⁸¹ Dora Schriro, “Immigration and Detention Overview and Recommendations” (Washington D.C.: Immigration and Customs Enforcement, October 6, 2009): 7.

²⁸² Meissner and Kerwin, 11

private corporations.²⁸³ Prisons such as Wyatt therefore held detainees of the U.S. government with almost no federal oversight.

Despite growing concerns about the role of privatization, between 2007 and 2009, Congress rejected two pieces of legislation that would have dramatically increased accountability for the private prison industry. In 2007, Rep. Tim Holden (D-PA) sponsored the Private Prison Information Act of 2007, which mandated that all privately-owned, federally-contracted correctional facilities would have the same obligation to release information about their operations as a federal facility would have.²⁸⁴ Under the proposed legislation, citizens and policymakers could file a Freedom of Information Act to obtain information from companies operating detention centers. As of 2007, the private prison industry had no requirement to release data on topics including detainee deaths, internal policies, or records of crime within the facilities.²⁸⁵ Its only commitment was to fulfill information requests from ICE and the DHS, the agencies that chose to outsource detention in the first place. The Subcommittee on Crime, Terrorism, and Homeland Security held hearings on June 26, 2008, but the bill never saw a formal vote. In the hearings, both CCA and Congress members argued that the Freedom of Information Act (FOIA) held the federal government accountable to the people. These opponents argued that private companies should not be held to the same standard.

²⁸³ Schriro, 14, 20.

²⁸⁴ House Subcommittee on Crime, Terrorism, and Homeland Security, *Hearing on H.R. 1889, the "Private Prison Information Act of 2007,"* 110th Cong., 2nd sess., 2008, 1-91.

²⁸⁵ In a testimony before Congress, Alex Friedmann, Vice President of the Private Corrections Institute, described how in April 2008 he filed public records requests to a number of local agencies that contract with CCA requesting data on the number of inmate-on-inmate assaults, inmate-on-employee assaults, and use of force incidents. The majority of jurisdictions said they could not provide the records, either because they did not have the numbers or because these records were maintained by CCA and not the local governments. CCA was not responsive to any public records requests. In 2008, the Texas Dept. of Criminal Justice corroborated this, acknowledging that "it does not collect basic statistics about private facilities, number that it routinely gathers for facilities it operates itself. (House Subcommittee, *Private Prison Information Act of 2007*, 28.)

Opponents of the bill overlooked that in the case of privatization, the government and the state become ill-defined, as private companies are performing the tasks generally associated with the state. If the FOIA ensures government accountability, but the government has passed along its responsibilities to the private sector, does this eliminate all right to public oversight? Michael Flynn, Director of Government Affairs for the Reason Foundation testified that “governments have incredible sovereign powers...to regulate us, to prosecute. Because of this we have the FOIA process...Private companies do not have this power.”²⁸⁶ In the next section of this chapter, I will explore a local history in order to argue that private companies indeed wielded the power to regulate and prosecute. The privatization shift blurred the line between the public and private sectors, as a combination of public and private powers could now utilize plenary power in regulating and prosecuting undocumented immigrants. This decentralization has allowed the federal government to minimize visibility and oversight of the detention industry, as it no longer held any legal obligation to oversee the detention operations of private companies. We have seen how, historically, the immigration bureaucracy has derived its power from limited judicial oversight enabled by the plenary power doctrine. The strong opposition to the Private Prison Information Act showed that the privatized post-9/11 detention industry derived much of its power from its lack of oversight from *anyone*, including the immigration bureaucracy itself. Because securitization frames immigrants as threats rather than as people seeking refuge or opportunity, it weakens public demand for accountability and fairness. Privatization allowed the detention industry to operate outside the traditional bounds of government accountability, and furthermore, outside the bounds of the public consciousness.

²⁸⁶ House Subcommittee, *Private Prison Information Act of 2007*, 11.

Building Wyatt: Connections & Controversies

In the summer of 2010, Central Falls, Rhode Island handed over control of its finances to a receiver, after years of struggling to control growing budget deficits and pay interest on its \$17 million of debt. A month prior, the town had attempted to file for bankruptcy, marking the sad tale of the former mill town (motto: “A City with a Bright Future”) coming full circle. Central Falls held 17,000 residents in just 1.2 square miles, making it the most densely populated city in Rhode Island. Once home to a thriving textile industry, the industry moved out by the end of the 1950’s, leaving Central Falls with run-down mill buildings, three-story tenements, and no vacant land to develop.²⁸⁷ By 1991, the city transferred operation of its schools to the state as it could no longer pay for their operation.²⁸⁸ At a time when the national unemployment rate remained at just 6.8%, Central Falls’ workforce saw 11% unemployment with almost 30% of its residents living below the poverty line.²⁸⁹ With a rapidly growing Latin American immigrant population and almost zero job growth, residents of Central Falls desperately sought an economic solution.

Thomas Lazieh, a life-long resident of Central Falls, won the mayoral election in November 1989 and promised to combat the rising unemployment rate and city deficit, estimated at \$2.4 million of the city’s \$10 million budget. In his first year as mayor he stated,

I am trying to restore pride and confidence in Central Fall's future. We need new, creative solutions to our problems. We will go after anything we can to produce the financial rewards for our community. We will consider all projects. We may not accept all, but we will consider them.²⁹⁰

²⁸⁷ Bol.

²⁸⁸ Katie Zezima, “A Jumble of Strong Feelings After Vote on a Troubled School,” *New York Times*, Feb 24, 2010: A14.

²⁸⁹ Rhode Island Department of Labor and Training, “Central Falls Labor Force Statistics,” 2010. <http://www.dlt.ri.gov/lmi/laus/town/centralfalls.htm> (accessed April 19, 2012).

²⁹⁰ Bol, 3.

When Donald W. Wyatt, head of the U.S. Marshals Service of Rhode Island approached Mayor Lazieh it seemed like an answer had fallen into his hands. The U.S. Marshals held responsibility for apprehending and transporting federal prisoners, but in New England they faced a serious obstacle; the region did not have nearly enough prison beds. Furthermore, the Bureau of Prisons had just announced that it expected the prison population to double in the next five years. Rhode Island contained only one prison and no federal detention centers. The nearest prison stood nearly four hours away, in Danbury, Connecticut. In an interview with the *New York Times*, Wyatt said that the Connecticut prison had a 514-inmate capacity but held 868 prisoners.²⁹¹ Wyatt encountered resistance from many towns he proposed the prison project to, as many disliked the idea of criminals “in their backyard.” For Central Falls, however, a publicly-owned, privately-operated prison could provide the jobs and tax revenue they needed to solve their dire fiscal problems.

Cornell Companies, Inc., a Houston-based operator of corrections facilities became involved with the Central Falls project in 1990. By all accounts, David Cornell, founder of Cornell Companies, Inc., encountered virtually no competition for the contract at Wyatt. He was simply in the right place at the right time due to his relationship with the developers. Cornell’s connections included involvement with Detention Center Associates (DCA), the Rhode-Island based prison consulting firm that campaigned for the facility in Central Falls, after attempting (and failing) to build a private detention facility in Plymouth, Massachusetts. The INS considered Cornell a desirable candidate for the contract due in part to his personal connections. Cornell offered an appealing building deal from fellow Houston-based construction company

²⁹¹ Associated Press, “U.S. Marshals Conferring on Overcrowded Prisons,” *New York Times*, Jan. 5, 1990.

KBR.²⁹² He also brought on board Norman Cox, a former US Marshal who offered operational expertise and a connection to the Department of Justice.²⁹³ No record exists of the Central Falls project ever being opened to a formal bidding process.

When the U.S. Marshals Service began using the Donald W. Wyatt Detention Facility in July 1993, they delivered only 40 inmates instead of the estimated 220. This created a shortfall in income to pay the first interest on the bonds in January 1994.²⁹⁴ Cornell and Central Falls realized they needed a quick way to find prisoners that could fill the jail. While the INS could easily find more than enough detainable immigrants to fill the facility, they did not yet possess sufficient funds to contract use of the prison. In 1993, Central Falls signed a two-year contract with the state of North Carolina to house 230 prisoners from the state's overcrowded prisons, at a price of \$71 per prisoner per day.²⁹⁵ When citizens of Central Falls caught wind of this deal it generated enormous public backlash, as the public considered the North Carolina prisoners a higher security risk than the pre-trial detainees that Wyatt initially intended on holding. Even with the importing of prisoners, Central Falls still did not receive substantial profits from the prison project. As Cornell Companies received the lion's share of revenues, the city earned only \$2 to \$3 a day for each detainee—less than \$400,000 in good years.²⁹⁶

With the massive post-9/11, securitization-fueled budget increase for ICE's Detention & Removal Operations, it suddenly became feasible for the immigration bureaucracy to contract with federal prisons such as Wyatt. This also offered a politically appealing solution for the city. Rather than detaining felons, the city could now receive immigrant detainees with no criminal

²⁹² As previously mentioned, KBR was the subsidiary of Halliburton that later came under fire for receiving massive federal contracts while its former CEO served as Vice President of the United States.

²⁹³ Bol, 8.

²⁹⁴ Ibid, 18.

²⁹⁵ Ibid.

²⁹⁶ Bernstein.

background. Immigrants already represented a target of state action and a source of public fear in Rhode Island. In 2008, Republican Governor Don Carcieri linked the state's \$550 million budget deficit to the proliferation of illegal immigrants. Carcieri issued an executive order creating an agreement between Rhode Island police and federal immigration authorities, permitting the police to access a specialized immigration database that would allow them to identify and detain illegal immigrants. He also increased the power of state correctional personnel to "perform certain immigration law enforcement functions," thus further decentralizing discretionary power. As the text of the order stated, "The Parole Board and the Department of Corrections shall work cooperatively with ICE personnel to provide for the parole and deportation of criminal aliens."²⁹⁷ The Bureau of Government Research and Services at Rhode Island College reported that Carcieri's order received 75% approval among Rhode Island citizens.²⁹⁸ In the same year as Carcieri's executive order, the revenues of Wyatt nearly doubled to \$21 million.²⁹⁹ The increase came primarily from increased detention of immigrants spurred by federal budget increases and Rhode Island's increasingly punitive stance.

The often hidden relationship between prison companies and the government represented a major point of controversy regarding ICE's privatization policies. Both Cornell Companies and the CCA had membership in the industry lobby group, Association of Private Correctional and Treatment Organizations (APCTO). APCTO described its mission as "to educate key elected officials about our membership and the whole spectrum of vital public services (private

²⁹⁷ Donald L. Carcieri, "Executive Order 08-01," March 27, 2008, http://www.riaclu.org/documents/Carcieri_Executive_Order_immigration.pdf (accessed April 19, 2012)

²⁹⁸ Rhode Island College, "The Bureau of Government Research and Services (BGRS) releases its latest survey results." July 2, 2008. http://www.ric.edu/whatsnews/WNArchive_displayNews.php?id=news-480 (accessed April 21, 2012)

²⁹⁹ Bernstein.

correctional facilities) provide.”³⁰⁰ The group created a privatization caucus in 2002 to push its federal legislative agenda, and in 2003, held meetings with more than 50 Congress members. Following the passage of the Intelligence Reform and Terrorism Prevention Act, which tripled the number of U.S. detention beds, CCA paid close to \$3.5 million for lobbying that highlighted the advantages of privatized prison services in ensuring national security. This increased the company’s visibility and helped the CCA gain the majority of new federal contracts. Phillip J. Perry, son-in-law of Vice President Dick Cheney, served as a key lobbyist for CCA, and in 2005, received an appointment as general counsel for the Department of Homeland Security.³⁰¹ Cornell Companies remained much smaller than CCA, but still contributed approximately \$218,000 of corporate funds to political activities from 2002-2009.³⁰² The Republican Governors Association received the largest share of Cornell’s donations which may have helped in influencing the detention-friendly policies of governors such as Don Carcieri.³⁰³

Accountability in the New Detention Regime

The political and economic interests of Wyatt prove complex and clearly well hidden from the average citizen. In the final section of the paper, I examine how privatization of detention, both at Wyatt and elsewhere, perpetuated a dangerous devolution of plenary power and lack of accountability for the detention industry. I will focus on how the system promotes this invisibility in three ways: transfers of detainees, conditions of confinement, and methods of oversight and accountability. Numerous cases illustrate how the privatized system hides cases of

³⁰⁰ Feltz and Baksh.

³⁰¹ Eric Lipton, “Bush Names Cheney Kin to Legal Post,” *New York Times*, March 31, 2005.

³⁰² It is likely that, in reality, Cornell Companies actually donated far more money to lobbying, as this figure excludes payments made to trade associations (such as APCTO) or tax-exempt organizations that fund political activities.

“Political Transparency and Accountability Profile: Cornell Companies, Inc.,” Center for Political Accountability, 2009. <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2087> (accessed April 7, 2012).

³⁰³ Ibid.

abuse and mistreatment, due largely to the reassignment of federal responsibility. I focus on a 2008 case that took place at Wyatt. This case exemplifies the advantages of privatization for a government agency seeking to limit its liability and operate outside judicial and constitutional authority.

In 1992, seventeen year old Hiu Lui (Jason) Ng, a China native, legally entered the United States with his parents on a B-2 visa.³⁰⁴ Ng built a life in the United States. He had a job as a computer engineer and a family with two young sons. However, Ng had also overstayed his visa. In 2000, the government ordered him to appear at an immigration hearing; the INS sent the notice to a nonexistent address and Ng never heard about his hearing date. Ng's wife Lin Li Qu, a U.S. citizen, filed an Immigrant Petition on behalf of her husband. U.S. Citizenship and Immigration Services scheduled an interview for adjustment of status on July 19, 2007, but when the couple showed up for the interview, ICE officials arrested and then detained Ng on the basis of the faulty 2001 immigration court order. Officials brought Ng to Wyatt Detention Facility, where he stayed for 175 days.³⁰⁵ Over the next year, ICE transferred Ng five times through three different states, in jails all under contract with federal immigration authorities. ICE transferred Ng without alerting his family or legal counsel and despite his frail health. In January 2008, officials relocated Ng from Wyatt to Franklin County House of Corrections in Greenfield, Massachusetts. Four months later, in April 2008, Ng moved to Franklin County Jail in Albans, Vermont, which contained no medical facilities. On July 3, 2008, as Ng's back pain "became so severe that he could not stand up straight," ICE transferred Ng back to Wyatt.³⁰⁶ According to the lawsuit filed by the ACLU, on July 30, 2009, Wyatt staff "knowingly lied to Mr. Ng about

³⁰⁴ *Lin Li Qu v. Central Falls Detention Facility Corporation*, __ F. Supp. 2d __, No. 09-53 S, 2010 WL 2380739 (D.R.I. June 14, 2010). <http://www.riaclu.org/documents/Ngcomplaintfinal.pdf> (accessed April 21, 2012)

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*, 15.

having a court appearance in Hartford.”³⁰⁷ Although Ng remained in tremendous physical pain, detention officers shackled his hands, feet, and waist, dragged him into a transport van, and brought him to Hartford. At Hartford, ICE officials attempted to pressure him to withdraw all pending appeals in his case and accept deportation.³⁰⁸ The following day the Wyatt staff brought Ng to a local hospital where doctors found him to have a fractured spine and previously undiagnosed liver cancer that spread throughout his entire body. On August 6, 2008, Hui Liu Ng died at age 34.

In 2009, the ACLU filed a lawsuit on behalf of Mr. Ng’s widow against Central Falls Detention Facility Corporation, ICE, and various other employees of the facilities which detained Ng.³⁰⁹ The ACLU filed the lawsuit on 14 counts including unconstitutional medical care, excessive force and brutality, lack of access to legal counsel, and civil conspiracy. The ensuing legal process clearly illuminated what the government sought to gain by privatizing immigration detention. On October 6, 2009, ICE filed a Motion to Dismiss and remove ICE from any liability in the Ng case. The motion plainly read, “The United States is not liable for the acts of Wyatt, Franklin House of Corrections, and the Franklin County Jail because they are contractors.”³¹⁰ Even though ICE awarded the detention contracts at these facilities, they claimed that as a result of these contracts, they held no responsibility for the actions of the companies. They also denied responsibility for the employees of these facilities who allegedly mistreated Ng, since they were

³⁰⁷ Ibid., 22.

³⁰⁸ Nina Bernstein, “Ill and in Pain, Detainee Dies in U.S. Hands,” *New York Times*, August 12, 2008.

³⁰⁹ Central Falls Detention Corporation was a private company that took over for Cornell Companies in 2007, but retained most of the Cornell employees and administrators. The contract with Cornell Companies, Inc. ended because they were unable to negotiate the finances of a new contract, and Central Falls Detention Facility Corporation offered services at a lower price. For more information on the transition from Cornell Companies to Central Falls Detention Facility, see: “Company contracted to run Wyatt prison ends work Aug. 1,” *The Providence Journal*, June 22, 2007.

³¹⁰“Defendant United States’ Memorandum of Law in Support of Motion to Dismiss.” *Lin Li Qu V. Central Falls Detention Facility Corporation*, 1-09CV0053S (2009).

<<http://www.riaclu.org/documents/NgGovMotiontoDismiss.pdf> (accessed April 21, 2012).

not federal employees. Furthermore, ICE stated they possessed “no supervisory authority” over the actions of Wyatt or other privately operated detention facilities.³¹¹

The federal government appeared correct in denying their legal responsibility for their contractors’ actions. The ACLU subsequently filed an Opposition to the Motion to Dismiss in which they did not argue that ICE held legal responsibility for what transpired at Wyatt. The Opposition now charged ICE solely on account of ICE agents’ actions, such as Mr. Ng’s unjustified transportation to Hartford despite his medical condition.³¹² Thus by privatizing the detention services at Wyatt and other jails throughout the country, ICE essentially washed its hands of any problems that arose at these centers. While ICE still received some negative media attention as a result of such scandals, the private contracts created a layer of legal protection for the government. ICE now possessed an easy scapegoat when controversial issues arose. Legal cases against small companies such as the Central Falls Detention Facility Corporation did not receive nearly as much publicity as a lawsuit claiming abuse by the U.S. government. This helped to further ensure detention practices stayed outside of the public consciousness, successfully accomplishing the aforementioned “great risk shift.”

The transfer of oversight constituted another problematic issue visible in the U.S.’ Motion to Dismiss. ICE freely admitted that after the finalization of the contract, the bureaucracy had no formal responsibility to oversee how corporations ran the contracted detention centers. The ruling reinforced that when responsibility for detention moved to the private sector, the already ill-defined parameters of oversight became even less clear. When ICE began in 2003, it followed a set of 38 national detention standards originally used by its predecessor, the INS. ICE

³¹¹ Ibid., 5.

³¹² “Plaintiff’s Opposition to the United States’ Motion to Dismiss.” *Lin Li Qu V. Central Falls Detention Facility Corporation*, 1-09CV0053S (2009): 7. <http://www.riaclu.org/documents/NgMTDOpposition.pdf> (accessed April 21, 2012)

is currently in the process of transitioning to a new set of “performance based national detention standards.” However, like the standards before them, these standards are not legally enforceable and do not address punishments or penalties for noncompliance.³¹³ Furthermore, these standards “do not expressly apply” to many of the state and local jails and private detention facilities under contract with the federal immigration bureaucracy. ICE remains most focused on enforcing standards for detention centers under its own jurisdiction, because as the Ng case illustrates, they have legally renounced almost all responsibility for malpractice in contracted facilities.

Under post-9/11 detention law, cases like Ng’s, in which an immigrant dies in detention, do not have to be legally reported. When in 2009 the ACLU filed a Freedom of Information Act to acquire a comprehensive list of deaths in detention since 2004, they found eleven deaths never publicly disclosed by the government or contracted companies.³¹⁴ Furthermore, no consequences seem to exist for detention corporations who perpetually face accusations of abuse. From October 2003 through February 2009, 18 people died in immigration detention facilities operated by CCA, yet the number of contracts they obtained continued to grow steadily.³¹⁵ A 2009 report by Human Rights Watch found that “ICE sends only a summary of a detainee’s medical records when sending him or her to one of the state and county jails where ICE rents bed space.”³¹⁶ Accordingly, ICE transferred Ng to Franklin County Jail, even though the prison did not have any medical facilities, This indicated that immigration officials either did not take Ng’s condition into consideration, or that they simply dismissed his symptoms and claims of illness.

³¹³ ³¹³ U.S. Immigration and Customs Enforcement, “Performance-Based National Detention Standards 2011.” <http://www.ice.gov/detention-standards/2011/> (accessed April 19, 2012).

³¹⁴ “DHS Announces 11 Previously Unreported Deaths in Immigration Detention,” American Civil Liberties Union Press Release, August 17, 2009. http://www.aclu.org/immigrants-rights_prisoners-rights/dhs-announces-11-previously-unreported-deaths-immigration-detenti (accessed April 19, 2012).

³¹⁵ Azadeh N. Shahshahani, “Private Prisons for Immigrants Lack Accountability, Oversight,” American Civil Liberties Union, June 11, 2009. <http://www.aclu.org/2009/06/11/private-prisons-for-immigrants-lack-accountability-oversight> (accessed April 19, 2012).

³¹⁶ Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*. (New York: Human Rights Watch, 2009): 24.

The case of *Qu V. Central Falls Detention Facility Corporation* also illuminated the difficulty for ICE detainees in ensuring adequate legal counsel, and thus in giving detainees a voice in the judicial process. Unlike U.S. criminal convicts, ICE detainees do not have the right to a court appointed lawyer and 90% face deportation without attorneys.³¹⁷ The difficulty in accessing reliable legal counsel is further exacerbated by the numerous transfers many detainees experience while in U.S. custody. The privatized system allows companies to create networks of detention centers across the country, and to transfer detainees as it best suits their business interests. If a CCA detention center in Connecticut has trouble filling beds, but a New York CCA facility has excess detainees, the company can easily move detainees from one center to another. ICE claims the legal authority to transfer immigrants to detention anywhere in the country, and extends this authority to the companies it contracts with.³¹⁸ While criminal defendants have a legal right to trial in the jurisdiction where their crime is alleged to have occurred, the non-criminal detainees have no similar rights.³¹⁹ The unfettered ability to transfer creates additional complications and opportunities for abuse. As detainees essentially become transient in ICE's network of government-operated centers, federal prisons, and privately contracted facilities, it becomes difficult for family and lawyers to monitor their whereabouts. ICE's 2008 detention standards state that "the attorney shall be notified of the transfer once the detainee has arrived at the new detention center" indicating that the attorney will receive no prior notification, even if

³¹⁷ Scott Lewis and Paromita Shah, *Detaining America's Immigrants: Is this the Best Solution?* Detention Watch Network, National Immigration Project, and Rights Working Group. <http://www.immigrationpolicy.org/just-facts/detaining-americas-immigrants-best-solution> (accessed April 19, 2012).

³¹⁸ Human Rights Watch, 24.

³¹⁹ *Ibid.*, 26.

the client is being moved across the country.³²⁰ From 1999 to 2008, private contract detention facilities transferred 32,080 detainees, and received about 75,000 detainees.³²¹

Many of the issues visible at Wyatt and privatized detention facilities are experienced at federally owned facilities as well, but the main difference comes down to two things: visibility and accountability. If the judiciary could hold the government legally accountable for detainee deaths, federal investigations of detention centers would be much more likely to occur. When in 2004 news broke of an immigrant dying at the government-operated Krome Service Processing Center, a local congressman immediately called on the Department of Homeland Security to launch a federal investigation. Within weeks an investigation of Krome was under way.³²² Simply put, when politicians' reputations are on the line, they are significantly more likely to act for justice. Privatization not only makes the issue less visible, but also allows the government to perpetuate the illusion that what happens in these facilities has become the exclusive responsibility of the private sector. Privatizing immigration detention gives the government minimal incentive to improve conditions of detention because no immediate financial or political advantage exists. As Judith Greene, of the research group Justice Strategies, wrote, "Private prisons have unleashed an entrepreneurial spirit in this country that is unhealthy. Standards are violated on a regular basis in order to cut costs."³²³ In the case of privatization, both the government and the private sector have much to gain, but immigrant detainees are repeatedly put at risk. Increasingly criminalized immigration policy, increasingly influential corporate interests, and increasingly nonexistent federal oversight have created a distinctly un-American system that prioritizes profits over human rights, and invisibility over accountability.

³²⁰ U.S. Immigration and Customs Enforcement, "Performance-Based National Detention Standards 2011." <http://www.ice.gov/detention-standards/2011/> (accessed April 19, 2012).

³²¹ Human Rights Watch, 41.

³²² Jim Defede, "Twice a Victim: First in Haiti, then in the U.S.," *Miami Herald*, November 14, 2004.

³²³ Meredith Kolodner, "Immigration Enforcement Benefits Prison Firms," *New York Times*, July 19, 2006.

The immigration bureaucracy's move toward privatization contributes a further element of confusion to the question of who controls plenary power. The private corporations contracting with ICE certainly gained discretionary authority in day-to-day immigration operations. Their lobbying efforts and political connections showed that these companies had the ability to distinctly influence U.S. immigration policy. However, I would argue that the immigration bureaucracy remained the foremost holder of plenary power following 9/11. Giving discretionary authority to the private sector did not serve as a means of transferring plenary power away from ICE. Instead, the transfer of authority meant that ICE could distance itself from the public outrage and judicial checks that had limited the agency's use of plenary power in previous decades. Privatization actually placed ICE in an even more privileged position within the federal government, as the bureaucracy could now drive immigration policy and exert their long-held administrative authority without becoming bogged down in the so-called "dirty work" of immigration detention. ICE still made the decisions of who to detain, but now it did not have to be legally or politically responsible for the logistics of such detention.

Conclusion: Plenary Power & the Role of the State Beyond 9/11

From the days of the Chinese Exclusion cases to the contemporary moment, the discretionary authority held by U.S. immigration bureaucrats has helped shape not only the composition of the American population, but also American political culture. It is simple to dismiss the actions of past immigration policymakers as indicative of a younger, less enlightened United States—the Chinese Exclusion cases proved radically xenophobic, the fear of Communist immigrants resulted in a paranoid wild goose chase, the resistance to Haitian refugees came as a result of racism and tense political times. However, absolving past immigration policies as manifestations of prejudice or panic overlooks the astounding longevity and deep influence of the plenary power doctrine on U.S. immigration law. Plenary power has made immigration law in the United States remarkably resilient and consistent. The pattern of judicial non-interference that defined the late 19th century has endured into the 21st century. Although most Americans now recognize the Chinese Exclusion Acts as racist, regrettable policies, since 2001, fifty federal court cases cited *Fong Yue Ting v. United States* in establishing the absolute sovereign right to exclude.³²⁴ Thirteen federal court cases cited *Nishimura Ekiu v. United States* in claiming the power of exclusion as beyond judicial interference.³²⁵ My examination of the immigration bureaucracy in the past 130 years has shown that plenary power routinely enabled immigration policy to occupy an exceptional role in the federal government. When the court in *Nishimura Ekiu v. United States* proclaimed federal immigration power as “inherent in sovereignty and

³²⁴ This statistic was determined by using the Google Scholar search engine, which aggregates all case citations in federal and district courts.

³²⁵ *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

essential to self-preservation,” it established one of the most enduring precedents in U.S. legal history.³²⁶

In the post-9/11 era the sovereign power of ICE to detain and deport has grown even stronger, while continuing to operate in the wake of crisis as it did in the late 19th century. In *The Shock Doctrine*, Naomi Klein claims that neo-conservative politicians utilize moments of public panic to implement deregulated, free-market principles. A similar argument may apply to the creation of immigration policy after crisis. Policymakers have routinely seized moments of high emotion and public uncertainty to pass and solidify discretionary immigration policy reforms. The Chinese Exclusion Acts came in the wake of rampant nativism and panic about U.S. jobs. Fear of foreigners during the World Wars brought mass detention at Ellis Island. Concern about losing control in the Mariel refugee crisis preceded the rebirth of a mandatory detention policy. And in the present moment, a fear of terrorist activity has influenced a non-transparent, privatized mass detention mandate. But a panicked populace alone could not have created such policies. While restrictive immigration policies may follow trends of public fear, the ease with which the immigration bureaucracy has implemented discretionary policies resulted directly from the extrajudicial precedent of plenary power. The immigration bureaucracy’s ability to create policy without going through traditional constitutional channels, along with its ability to reassign authority to immigration officers, local law enforcement, or private companies, has streamlined the creation of new administrative procedures.

Plenary power has given the immigration bureaucracy the ability to deny due process rights of immigrants pending detention and deportation. When Nishimura Ekiu fought against her exclusion order in 1892, she did so in part because she believed she had a right to know the

³²⁶ 142 U.S. 651, 659 (1892).

evidence being used against her. The trend of using secret evidence in immigration hearings provides one example of a 19th century immigration bureaucracy precedent that remains prevalent in the 21st century. The ability to use secret evidence took on a renewed strength in post-9/11 immigration hearings. The presentation of evidence and the right to refute one's charges represent two of the most essential rules of the judicial process. Thus, the immigration bureaucracy's ability to effortlessly override these long-held values reflects the true extent of plenary power today. As Georgetown Law Professor David Cole testified before the House Committee on the Judiciary,

Since 1987, I have represented 13 aliens against whom the INS has sought to use secret evidence. At one time, the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed—in many instances could not even be summarized—without jeopardizing national security. Yet in none of these cases did the INS's secret evidence even allege, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity.³²⁷

A particularly well-known example of secret evidence in immigration proceedings came in September 2002, when FBI agents detained Maher Arar, a Canadian and Syrian citizen, during a layover at JFK Airport.³²⁸ Authorities placed Arar in solitary confinement for a night before subjecting him to five hours of questions about Osama bin Laden, Iraq, and Pakistan. Ten days later, the INS declared that Arar was “clearly and unequivocally” a member of Al Qaeda, and therefore “clearly and unequivocally inadmissible to the United States.”³²⁹ When Arar's lawyer requested to hear the evidence authorities used against his client, the INS told him that the evidence must remain classified for national security reasons. With no hearing before an

³²⁷ Congress, House, Committee on the Judiciary, *Statement of Professor David Cole, Georgetown University Law Center, On the Use of Secret Evidence in Immigration Proceedings and H.R. 2121*, 106th Cong., 1st sess., 23 May 2000, 41.

³²⁸ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (2006).

³²⁹ 414 F. Supp. 2d 250, 254 (2006).

immigration judge, the United States deported Arar to Syria where he faced ten months of brutal torture and interrogation regarding alleged terrorist connections. Approximately a year later, the Canadian Embassy determined that the INS had misinterpreted the evidence against Arar—he had been a casual acquaintance of an alleged terrorist, and therefore the government placed him on a list of potential witnesses, not of potential suspects.³³⁰ Because the United States made the decision to deport solely on its discretionary authority, with no legal trial or formal review of evidence, this oversight led to grave human rights violations and further decreased the legitimacy of U.S. immigration proceedings. Plenary power has created a notion that national security interests and due process rights are mutually exclusive—a truly dangerous precedent.

The handling of Arar's case also drew from the 1893 case of *Fong Yue Ting*, in which the court established that deportation and detention constituted an administrative process rather than punishment for a crime. An administrative process, in turn, did not require due process. Thus, immigrants facing deportation or detention for an unspecified time could not call on due process rights. A century later, President Reagan recognized—likely even hoped—that mandatory detention would play a role similar to that of punishment: that is, as an example and deterrent for future potential immigrants. Nonetheless, the thousands of asylum-seeking Haitians found themselves essentially imprisoned not as a punishment but as an administrative process. Today, immigration detention's status as “not a punishment” means that 90% of detainees go to their hearings with no legal representation.³³¹ Administrative immigration officers, rather than federal judges, oversee these hearings just as they would have been in the days of the infamous Boards of Special Inquiry. In the case of alleged terrorists, such as Maher Arar, detainees rarely

³³⁰ Jaya Ramji-Nogales. “A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our System” *Columbia Human Rights Law Review* 39, 2008; Temple University Legal Studies Research Paper No. 2008-38. Available at SSRN: <http://ssrn.com/abstract=1080317>

³³¹ Deepa Fernandes, *Targeted: Homeland Security and the Business of Immigration* (New York: Seven Stories Press, 2007), 91.

receive even an administrative hearing. The staying power of the Chinese Exclusion cases does not represent the power of these specific decisions so much as it represents the continued strength of the plenary power doctrine. No court, no Congress, no human rights group has successfully changed the powerful, discretion-driven role that immigration law occupies in U.S. policy.

The use of secret evidence in the cases of Nishimura Ekiu and Mahar Arar bears a parallel to the application of plenary power itself. Both plenary power and secret evidence derive much of their influence from being enigmatic, and thus difficult to oppose. Much like secret evidence, plenary power may be invoked, but is rarely defined. It remains in the shadows, employed but not openly acknowledged. The agencies who use plenary power do not formally articulate their possession of it. Instead, plenary power serves as an unspoken basis for decision-making. Because both plenary power and secret evidence gain much of their clout from a lack of oversight and accountability, they tend to lose authority when openly challenged. When courts made their rare challenges in the cases of Arar, Knauff, and Mezei, the immigration bureaucracy failed to justify its use of secret evidence. Their cases against immigrants fell apart. Thus, subjecting the veiled practices to public and legal scrutiny can destabilize their power.

The decline of oversight, especially in the 21st century, thus strengthens plenary power and its denial of due process to immigrants. Throughout its history, the detention of immigrants fell under little oversight. But for most of that history, “lack of oversight” referred to the judiciary’s reluctance to interfere with decisions made by the executive branch. While the securitization of immigration policy post-9/11 certainly enabled more executive discretion, the executive branch itself retreated from immigration detention. In the 21st century, “lack of oversight” can refer to the reluctance of even the executive branch to interfere with the detention

system. The immigration detention industry suffers from complex chains of ownership and interest groups: including legislators who demand vast detention policies to thwart illegal immigration, private corrections companies who seek more detention beds and bigger governmental contracts, and local governments who see private prisons as an economic solution. As summarized in an April 2012 *New York Times* editorial, “privatization introduces a corporate veil that blurs both public oversight and legal accountability...the private nature of these companies breaks the ordinary administrative chain of command, placing both governments and the public at a disadvantage in terms of ensuring transparency.”³³² As illustrated by the story of Donald W. Wyatt Detention Facility, when private companies operate detention centers, the government does not hold legal responsibility for what transpires within the facilities. Therefore, the government does not have the same incentive to monitor rights and conditions within privately-run centers. The discretionary power reassigned to private companies can perhaps be most vividly represented by a high-ranking Corrections Corporation of America employee who, when asked about judicial review, told the *New York Times*, “I’m the Supreme Court.”³³³

The outsourcing of immigration detention to private companies by the federal government raises many larger questions about the roles of the public and private sectors in the 21st century. As a society, we largely accept that the nation-state’s primary responsibility is to protect its people. With private companies taking over responsibilities traditionally ascribed to the sovereign state—border control, policing, and incarceration—the issue of accountability arises. To whom are private companies accountable? Will they possess the same sense of obligation as elected officials or a government bureaucracy? This question is further complicated

³³² Thomas Gammeltoft-Hansen, “Can Privatization Kill?” *New York Times* 1 April 2012: A23.

³³³ Martin Tolchin, “Jails Run by Private Companies Force It to Face Question of Accountability,” *New York Times* 19 Feb 1985: A15.

because the nation-state's "people," in this case, are non-citizens. Rights that have historically proven ill-defined become even more diluted when placed in the responsibility of the private sector, a division that has traditionally held an obligation to ensure profits rather than human rights.

Examining the outsourcing of detention returns us to the same fundamental question of who possesses plenary power. In the most traditional sense, plenary power is ascribed to the executive branch, as a means of maintaining sovereign control of borders and foreign affairs. But in practice, the plenary powers are perhaps intentionally fluid. While plenary power is generally thought to empower the executive branch, in reality, the executive branch almost always defers its authority to the immigration bureaucracy. Through plenary power, immigration authorities who possess no judicial powers of their own, become judges in determining exclusions, detentions, and deportations. Simply put, the immigration bureaucracy has the most to gain through plenary power, as it transforms immigration authorities from administrative employees to a role evoking the power of the police, policymakers, and judges.

The detention system, whether run by the government or by private companies, has long relied on invisibility for its heightened authority. If the immigration bureaucracy keeps the media out of detention centers, if it places detention centers in far-away locations, if it perpetuates policymaking procedures based on unwritten rules and doctrines, if it allocates private contracts with no public record or negotiations, then plenary power can continue to dominate immigration lawmaking. Destabilizing the government's discretionary, extralegal claims to sovereignty is extremely challenging work. But throughout the history of immigration detention, public outrage sparks the closest thing we see to oversight. In each case study, I have examined how public backlash has served as an informal check on how far immigration bureaucrats can move outside

of judicial and constitutional norms. When the immigration bureaucracy asserted its authority to detain Knauff and Mezei indefinitely, it created a sense of moral outrage among the American people. The concept of indefinite detention based on secret evidence and no due process, created a vision of detention that proved unacceptable to citizens and non-citizens alike. As Americans grew increasingly anxious about the human rights abuses of World War II and fascist regimes, the immigration detention system lost all political viability. The public outrage sparked congressional and judicial action and eventually, a broad policy shift away from detention. Making plenary power visible will be crucial to reforming the current detention system.

Plenary power has become so strongly linked to the inalienable concept of sovereignty that detention has become perceived as an almost untouchable “right” of immigration bureaucrats. Because it is so difficult to legally challenge the concept of sovereignty, almost all judicial interference in the past 130 years has functioned to question how the federal government *implemented* policies created on plenary authority, rather than to challenge the doctrine of plenary power itself. Since the right of the nation-state to possess full control of its borders is accepted as a self-evident truth, plenary power drives immigration policymaking with only rare checks on its power. The problem arises when the sovereignty that is ascribed to the executive branch becomes transferred to new stakeholders. Though the President and Congress continue to create the formal policies dictating entry and exclusion, immigration bureaucrats exercise almost complete control over the day-to-day decisions of detention and deportation. While ascribing the extraordinary powers of sovereignty to a vast network of immigration officers proves extremely problematic, the post-9/11 years witnessed the further devolution of plenary power, extending to private companies. Plenary power has now been allocated to countless stakeholders, creating a dangerously decentralized notion of U.S. sovereignty.

Immigration detention, as we currently recognize it, was not inevitable. From as early as the Chinese Exclusion cases, both policymakers and immigration bureaucrats generated immigration policy in opposition to immigrants' challenges. The initial link between sovereignty and plenary power resulted from immigrants' demands for due process. Each so-called "immigration crisis" from Ellis Island to the Mariel boatlift to the present, has allowed the government to reestablish its need for full control of its borders—even if "full control" means delegating the politically sensitive work of detention to agencies and private companies. In 2012, securitization serves as the rationale of choice for mass, privatized detention and further devolution of plenary power. But if there is one element that proves consistent throughout the history of immigration detention, it is the instability of plenary power. Plenary power will continue to be challenged, reassigned, and reframed in years to come, as citizens, policymakers, and bureaucrats continue to seek a politically viable means of enforcing immigration law. Opposition to the unjust use of plenary authority will continue to rise, whether from judges, citizens, or policymakers. The tyranny of immigration bureaucrats in the past 130 years resulted from the three branches of government using "sovereignty" as a rationale for empowering the immigration bureaucracy. This flawed delegation of authority has permitted the immigration bureaucrats to control plenary power with almost no oversight from the federal government or the judiciary. But while the pretense of sovereignty has long allowed immigration detention to operate outside the bounds of judicial and congressional authority, its startling expansion, highly discretionary methods, and increasing media coverage suggest it cannot avoid the public consciousness much longer.

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