AS OLD AS THE HILLS: DETENTION AND IMMIGRATION

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How will you answer when you are asked:

Did you know people were being imprisoned?
Did you know how many?
Why did you let your government put immigrants in prison?

I. Detention is Not New: Is It a Necessary Part of Control over Immigrants?

If you are reading this essay and the related symposium articles, you will learn a great deal about the role detention plays in U.S. immigration law. You will become a witness to our government's use of a tool that directly and undeniably impinges on our most fundamental freedom: personal liberty. It is my hope that by writing this essay, I may contribute to a reexamination by all of us of the reasons we use immigration detention; and that we will ask fundamental questions about whether immigration detention is a legitimate tool. As we learn more, we all become witnesses to our government's actions.

Today we will become educated, and informed. We will have data: 30,000 men, women and children are in direct immigration detention every day.[1] More than 350,000 people were

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[1] For a detailed and critical assessment of U.S. Immigration and Customs Enforcement (ICE) detention, *see* Dora Schriro, *Immigration Detention Overview & Recommendations* (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/

held for some period of formal detention last year.[2] I have been a lawyer for approximately twenty-five years and this use of detention represents a 70-fold increase in detention since I graduated law school in the mid 1980's.[3] What justifies this dramatic increase in immigration detention? What policy rationales explain the explosion?

Detention is not new. What is new is the breadth, the length, and the scope of immigration detention. Detention is as old as immigration law itself. We use immigration law and detention as a weapon in the law's enforcement because we seek to control our border. Pause for a moment. "To Control Our Border" – What a euphemism. What an overt lie. We do not mean that our border is a wild, untamed, moving and dangerous entity. It is an imaginary line drawn on a map. We have no direct need to control a physical boundary between countries or our coast line; our "border control" is person control and containment. Let us abandon the mask of euphemism and admit that immigration law is fundamentally law about controlling people. We use detention to control people directly and because we hope that the use of detention will deter others from attempting to breach the border. Detention is people control.

We arrest, we interrogate, we incarcerate and we control the people within and arriving at the shores of our nation and the people in our immigration detention are not just the newly arrived or the "criminal offender." In fact, a large number of the detained are either long term permanent residents or those who are pursuing a claim for protection from persecution or torture.[4]

091005_ice_detention_report-final.pdf.

[2] *Id. See also* Donald Kerwin & Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?* (Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[3] *See* Schriro, *supra* note 1, at 2 (the annual detention in 1983 was less than 5,000 people per year. In 1995, the average population in immigration detention was 7, 500 and in 2009 ICE had 30,000 beds under management).

[4] *See* Kerwin & Lin, *supra* note 2, at 1 (suggesting that 58% of the individuals in immigration detention have no criminal record).

In this essay, I remind us of the close connection between the uses of immigration detention, particularly, the rapid expansion of detention and the need of our government officials to demonstrate "control over the border" by demonstrating the power to arrest and detain at length the undesirable alien from within our society.[5] And while not every immigration detention ends in removal, in fact, as you will hear from other speakers, there is a growing number of people whom our government cannot remove and in some cases has no intention of removing from the U.S., the power of detention itself serves the government's goals of showing control in times of fear.[6]

II. The Fundamental Question: Does the U.S. Government Employ Limited and Tailored Civil Detention?

In 2002 Professor David Cole of Georgetown wrote:

> [T]he Supreme Court's approach to the issue of physical custody has been relatively noncontroversial. While there have been disagreements around the edges, certain principles have garnered nearly unanimous consent. Foremost among them is the neo-Kantian notion that the government cannot lock up people without having a good reason, specific to the individual, for doing so. Outside of wartime, no Justice on the Court has even argued for civil detention in the absence of an individualized finding that the detention is necessary to protect against a distinct

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[5] *See* Jennifer Chacón, *Blurred Boundaries in Immigration: Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1837 (2007) (noting the pattern of conflating immigration control with national security concerns).

[6] There are several excellent books that report in depth some of our nation's history of fearing, detaining, and seeking deportation of aliens. *See, e.g.*, DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (The New Press 2003); WILLIAM PRESTON, ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (University of Illinois Press 1963)(1994); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (W.W. Norton & Co., Inc. 2004) (focusing on the general restrictions on free speech for aliens and citizens).

> danger posed by the individual sought to be detained. In a recent decision surveying the landscape, the Supreme Court stated that "government detention violates th[e Due Process] Clause" unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or "in certain special and 'narrow' non-punitive 'circumstances.'" Non-punitive, or preventive, detention is permissible only where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or flight risk; (2) is dangerous because of a "harm-threatening mental illness" that impairs his ability to control his dangerousness; or (3) is an enemy alien during a declared war.[7]

Thus, the basic constitutional principle is that civil detention must be measured and tempered by individualized decision making and by finding that the individual presents a "danger to the community" or a "flight risk." Yet, the Immigration and Nationality Act (INA) flatly and facially contradicts that essential concept of individual decision-making. In Section 236 of the INA, Congress created a presumption of detention for people apprehended by the federal government at the border who lack documents for admission or who seek asylum.[8] In the past ten years, Congress dramatically increased "mandatory" detention of people, including those who have held permanent resident status. For example, Section 236 sweeps into mandatory detention any person whom the Department

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[7] David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1008, 1010 (2002) (examining Supreme Court decisions concerning the incarceration of non-citizens and distinguishing carefully between strained statutory interpretations and constitutional analysis in the opinions).

[8] INA § 235(b)(1)(B)(IV) (requiring mandatory detention of asylum seekers at the border); INA § 236(c)(1)(A) (requiring mandatory detention of non-citizens who are inadmissible due to convictions or admissions of crimes of moral turpitude); INA § 236(c)(1)(B) (requiring detention of those who are deportable for a crime of moral turpitude committed within five years of admission where the sentence was at least one year). *See* INA § 237(a)(2)(A)(ii) (an alien who has been convicted of a controlled substance violation and is deportable due to that conviction is subject to mandatory detention regardless of the nature of the criminal sentence).

of Homeland Security (DHS) believes has been convicted of multiple crimes of moral turpitude, such as two shoplifting convictions, or a crime related to a controlled substance. For example, a person might be detained by immigration due to *any* conviction relating to a controlled substance, whether it was simple possession of marijuana or possession of a prescription medicine without a prescription.[9] No matter how minor the criminal offense, Congress appeared to mandate detention for this category of non-citizens during their removal hearings.

The DHS repeatedly relied on the mandatory language in the INA to justify the use and growth of detention.[10] Litigation expanded challenging the use and breadth of detention. In a series of U.S. Supreme Court cases, where the Court relied frequently on the doctrine of constitutional avoidance to avoid reading the INA as creating unlimited detention, we begin to find some restraint. These cases have been thoroughly analyzed and deconstructed elsewhere and I present only a basic outline here. First, in *Zadvydas v. Davis,*[11] a five to four majority of the Supreme Court held that the INA did not authorize unlimited detention of a non-citizen who had a final order of removal where the government could not effectuate the removal because no country would accept the individual.[12] Stopping short of reaching a constitutional basis for the decision, the majority concluded that Congress had meant to create a real deadline for executing orders of removal and if the DHS could not execute the

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[9] *See* Christopher Shea, *Sullivan Avoids Pot Charge; Judge Objects*, BOSTON GLOBE, Sept. 11, 2009, *available at* http://www.boston.com/bostonglobe/ideas/brainiac/2009/09/sullivan_avoids_pot_charges.html.

[10] Dep't of Homeland Security, Office of the Inspector Gen., *Detention and Removal of Illegal Aliens,* OIG-06-33 (Apr. 2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf. The report states, "A sharp increase in the number of aliens requiring mandatory detention may soon limit DRO's ability to detain non-mandatory aliens who pose a potential national security or public safety risk . . . DRO's ability to detain high-risk aliens is impacted by the mandatory detention requirements set by the Immigration and Nationality Act." *Id.* at 5-6.

[11] Zadvydas v. Davis, 533 U.S. 678 (2001).

[12] *See* INA § 241(a)(6) (stating that after an order of removal, the non-citizen may be detained for ninety days and that further detention requires a finding that the detainee is a risk to the community or unlikely to comply with the order).

order, then they could use an additional period of detention only where they could show they were making progress toward final removal from the U.S.[13]

Next, in *Demore v. Kim,*[14] a five to four majority distinguished the limit on removal post the deportation or removal proceedings. The Court held that a permanent resident alien, who had conceded removability due to a conviction and sought discretionary relief, could be detained during the pendency of the removal proceedings and administrative appeal. The majority of the Court concluded that mandatory detention without the possibility of bond was not an unconstitutional deprivation of his liberty. The majority expressly assumed that the detention period would be brief, relying on agency data that indicated that the vast majority of detained immigration cases were decided in less than forty-seven days.[15] The Court also noted that the respondent alien, by conceding removability, had lost his permanent resident status and did not express an opinion about the use of mandatory detention for those permanent residents who contested removal.

Finally, in *Clark v. Martinez,*[16] the Supreme Court extended the limited detention interpretation used in *Zadvydas* to even those aliens who had never been formally admitted to the U.S. and whose

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[13] *Zadvydas*, 533 U.S. at 688 (explaining that the Court determined that it was reasonable for the government to have an additional period of ninety days after the statutory period and thus *Zadvydas* is interpreted as creating a six month period of presumed reasonable and lawful post removal order detention). *See* 8 U.S.C. § 1252 (a)(2)(B)(ii) (1994).

[14] Demore v. Kim, 538 U.S. 510 (2003).

[15] *See id.* at 527-29 (Chief Justice Rehnquist citing to the Executive Office for Immigration Review (EOIR) statistics that 85% of all detained cases were completed within an average of 47 days and the median was 30 days of detention. The Court went on to note that even longer cases where the non-citizen appealed to the Board of Immigration Appeals took an average of four months); *see also* Kerwin & Lin, *supra* note 2, at 17-18 (reporting that the length of detention was artificially lowered by counting one day detentions in removals to Mexico). This study showed that many people were in detention in excess of 90 days and several hundred more than one year. *Id.* at 6.

ICE states that 2,100 people are held over one year but that the average length of detention is thirty days. Schirio, *supra* note 1, at 6.

[16] Clark v. Martinez, 543 U.S. 371 (2005).

detention was initiated as part of their apprehension at the border. *Clark* involved the long term detention of Cuban nationals who were apprehended trying to seek admission to the U.S. during the *Marielito* boat lift in 1980.[17] While the Supreme Court had traditionally afforded few constitutional rights to noncitizens at the border, the fact that the individuals in *Clark* had been incarcerated for much of twenty-five years as "inadmissible" aliens and lacked any possibility of legalization under the INA, made the majority conclude that Congress must have intended to allow individualized assessments and release where there was no possibility of removal from the U.S.

Thus, detention per se in the immigration context has not been found to be a violation of civil rights nor an unconstitutional deprivation of liberty. There is something about immigration law, a species of civil and not of criminal law that allows the government to make a presumption of either "harm to the community" or "flight risk." Why is detention permissible in immigration law, as opposed to other important areas of civil law enforcement, whether it be tax collection or environmental protection? In a nation that abolished federal debtor's prisons in 1835, why does the status of an individual's citizenship allow a civil detention and restriction of individual liberty without individualized decision making?

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[17] Clark, 543 U.S. at 374-75. *See* Brief of Phil Crawford, Interim Field Office Director, Portland Oregon, United States Immigration and Custom Enforcement, et al. as Amici Curiae Supporting Petitioners, Clark v. Martinez, No. 03-878, 543 U.S. 371 (2005) (explaining how it is extremely difficult for the U.S. to return an individual to Cuba due to the breakdown of negotiations with the Cuban government over repatriation of Cuban nationals). Over 125,000 Cubans originally arrived during the Marielito boatlifts and, although the vast majority had been able to successfully adjust status to permanent resident, more than 4,020 individuals had, due to criminal convictions within the U.S., been subjected to arrest and detention by the immigration authorities more than once. *Id.* at 7-8. The government asserted that although it had been able to return a significant number of people to Cuba, the current negotiations can be described as "halting" and suspended due to the refusal of the Cuban government to discuss "migration issues seriously." *Id.* at 9.

In this essay, I turn to some of the historical roots of immigration law enforcement and the use of detention to explore the answer to these questions. Perhaps by turning away from our own immediate time period and our current justifications, we can examine in a more detached manner the justifications of this fundamental encroachment on personal integrity and liberty.

III. Beware the "Wild Irish" and the Blood Thirsty French: The Alien and Sedition Laws

Since the attacks of September 11, 2001, many people have the impression that we must tighten immigration laws and control over non-citizens in order to secure the nation. Most people are unaware of the prior periods in history when we have turned to detention and immigration controls as part of federal government's reactions to a fear of revolution, attacks or the spread of political movements that might use violence. Yet, almost from the birth of our federal government, Congress has passed legislation restricting or limiting the rights of non-citizens.

Most infamously, in 1798, the U.S. Congress passed the Alien and Sedition laws, a set of four statutes that restricted the rights of citizens and non-citizens to criticize the government or to take acts that might organize opposition to the sitting federal government. In justifying this restrictive legislation, passed so soon after our own national rebellion against British rule but at a time when Congress was preoccupied with a possible war with France, Congress member Harrison Gray Otis stated that the young nation had to be protected from the French revolutionaries who would bring bloody terror and destruction of the propertied classes to the U.S. shores.[18] In an earlier session he called for limiting naturalization to

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[18] *See* 8 ANNALS OF CONG. 2150 (1798). For an excellent examination of these statutes, *see* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1967). *See also* STONE, *supra* note 6. A descendant of Representative Otis published a thoughtful biography that takes great pains to explain the context of his remarks made in a time where many believe war with France was imminent. *See also* 1 SAMUEL ELIOT MORISON, THE LIFE AND LETTERS OF HARRISON GRAY OTIS: FEDERALIST: 1765-1848 (1912).

protect the nation from the dangerous actions of the "Wild Irish."[19] These statutes called for detention with bond for any person, alien or citizen, who might advocate for revolution.[20] While most of these statutes expired two years later, one statute remains in force today, The Enemy Aliens Act, passed in 1789, gives the President the power to detain, deport, or control the liberty of any person over fourteen years old who is a national or citizen of a country with which we are at war.[21]

The Alien and Sedition laws are often viewed as a low point in American history and the constitutionality of the statutes debated even at the time. But they mark the important first steps where Congress has authorized the detention of "enemy aliens" throughout our history. Some would vigorously defend the right of the government to use preventative detention during times of war and we certainly know that during our nation's history we have utilized such detentions.[22] The rationales are usually clear; the demands of war do not afford us the time and luxury to make case by case determinations of the dangerousness and loyalties of foreign nationals residing in our country. Yet, what may be reasonable in

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[19] SMITH, *supra* note 18, at 24 (noting that Harrison Gray Otis' proposed legislation was defeated but soon thereafter the federalists limited naturalization to white males who had resided fourteen years within the U.S., the longest period of residence required in the history of our nation. When the federalists lost control of Congress, the residence period was reduced again to five years, the maximum time period required of most applicants for naturalization). *See* INA § 316, 8 U.S.C. § 1427 (1998).

[20] *See* Larry Gragg, *American History: Passage of the Alien and Sedition Act,* AMERICAN HISTORY, Oct. 1998, *available at* http://www.historynet.com/american-history-passage-of-the-alien-and-sedition-acts.htm/5.

[21] 50 U.S.C. § 21 (1923). For a discussion of this statute and the relevance today to the detention during the war on terror, *see* Cole, *supra* note 7, at 1009-10.

[22] Korematsu v. United States, 323 U.S. 214 (1944). Our nation has also detained other nationalities during time of war. In World War I, many Germans were detained. In a speech to Congress requesting a new statute to support the deportation of the detained Germans, Congressman John L. Burnett of Alabama testified that there were 4,020 Germans detained in 1919 and half of those were Germans detained aboard ships seized at sea. *See To Expel and Exclude From the United States Certain Undesirable Aliens: To Accompany H.R. 16017 Before the H.*, 65th Cong. (Feb. 19, 1919) (Rep. by John L. Burnett, Chairman, House Comm. on Immigration and Naturalization), *available at* http://pds.lib.harvard.edu/pds/view/7455009?n=1&imagesize=2400&jp2Res=0.5.

theory is often abused in scope and application. Many scholars and historians report the examples of large scale detentions as periods of the failure of our country to protect liberty and acknowledge the sacrifice that individuals made to the political exigencies of war.[23] What political leader during war time wants to risk releasing a foreign national who might, in some way, directly or indirectly, aid a war effort against us?

The focus of this essay is not detention of the "enemy alien," but instead, the justifications our government has used to justify civil detentions as a part of immigration enforcement. Still, a keystone to the justification comes first from the acceptance that during war, enemy aliens may be detained and an acceptance that non-citizens have not fully established themselves as presumptively loyal. Because war was never declared against France, the original Enemy Alien Act was not used to detain or deport any non-citizens because no formal declaration of war was ever made.

In the first Supreme Court case to seriously address the rights of citizens apprehended during wartime, the Court, in a 5 to 4 decision, wrote that the law was "almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."[24] The majority did not offer any other explanation to justify detention and yet the 5-4 decision should by itself, raise questions as to the scope and validity of the precedent. Professor Cole has noted that the decision has been recently cited by the Supreme Court to stand for the proposition that even Enemy Aliens cannot be detained without some finding of danger and he suggests that the finding must be made on an individualized basis.[25]

The Enemy Alien Acts and the justified use of detention have sown the seeds and fostered the growth of at least one foundation argument that justifies immigration detention. The "alien," regardless of length of residence in the U.S., can be detained during

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[23] *See, e.g.,* JOHN HIGHAM, STRANGERS IN A STRANGE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (Rutgers Univ. Press 2d ed. 1983) (1955); COLE, *supra* note 6.

[24] Ludecke v. Watkins, 335 U.S. 160, 171 (1948); Cole, *supra* note 7.

[25] Cole, *supra* note 7, at 1013.

the time of war. How did this war power expand so dramatically into our general civil law? Moreover, even where Congress sought to insulate decisions about Enemy Alien Combatants held on Guantanamo, the Supreme Court has recently upheld the right of such individuals to seek individualized decision making about the legitimacy of their continued detention.[26] It is beyond the scope of this article to fully explore how the recent Guantanamo decisions might mean that aliens held in immigration detention should have even greater procedural rights but, given those cases, it does appear that the Supreme Court may be open to revisiting some of the prior assumptions our law has made about the use of civil detention in this context.[27]

IV. Detention as the Necessary Tool of Admission Controls

In the beginning of the United States as a federal entity, there were not detailed immigration controls at the border. While some busy ports and states tried to regulate admissions through head taxes or used laws to regulate the importation of goods or to quarantine infected sailors, passengers and products, Congress had no centralized law requiring the inspection of people seeking admission to the U.S. until 1875.[28] This statute delegated inspection authority to the federal port officials and authorized the exclusion of criminals and prostitutes. This law was soon expanded in both the general Immigration Act of 1882[29] and the specialized Chinese Exclusion Act of 1882.[30] Together, these statutes created a federal regime of border inspections and a system for the inspection of people arriving at ports by the officials under the control of the Secretary of the

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[26] Boumediene v. Bush, 553 U.S. 723 (2008), 128 S. Ct. 2229, 2240 (2008).

[27] *See* Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009).

[28] Act of March 3, 1875, ch. 141, 18 Stat. 477.

[29] Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

[30] Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58.

Treasury. In *Lem Moon Sing v. U.S.*, the Supreme Court rejected a challenge to the authority of the federal government to detain or arrest a non-citizen.[31] These early statutes contained a right of detention as a right of delayed admission to the U.S. but the authority executing the detention was usually the private shipping company. Just as goods might be forbidden, and sailors carrying infection might be quarantined, these first statutes similarly required the detention of immigrants on board or at the bond and expense of the shipping company.

These detentions were contemplated as brief, short term periods where the infection could run its course or the person's admission would be refused and the shipping company would bear the cost of removing the individual refused admission. With the passage of the Chinese Exclusion laws, the use of detention as a delayed admission control became more prevalent. One of the problems in enforcing the exclusion law was that Chinese individuals claimed to have entered the U.S. before the 1882 exclusion act. In 1888, Congress authorized the arrest of any Chinese person found to be unlawfully within the U.S.[32] Still, the government found that many people continued to argue they had entered before the ban. Thus, in 1892, Congress authorized the expulsion or deportation of Chinese who could not prove in a judicial hearing that they had resided within the U.S. prior to the 1882 exclusion acts.[33] The statute specifically required that at least one White witness testify as to the longevity of the Chinese person's residence. The deportation statute specifically authorized detention by the U.S. Marshal while the hearing was held about his or her eligibility to remain.[34]

In her book, *Laws Harsh as Tigers*, the historian Lucy Salyer, studied the hundreds of writs of habeas corpus filed to challenge the detention of Chinese nationals.[35] Her masterful discussion brings the

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[31] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

[32] An Act To Prohibit the Coming of Chinese Laborers to the United States, ch. 1015, § 13, 25 Stat. 476, 479 (1888).

[33] Geary Act, ch. 60, §§ 2-3, 27 Stat. 25 (1892) (giving people one year to apply for a certificate). *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (upholding constitutionality of power to deport and not just to exclude).

[34] Geary Act, ch. 60, § 6, 27 Stat. 25 (1892); *Fong Yue Ting*, 149 U.S. at 727.

[35] LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE

stories of ordinary men and women into vivid focus. Reading her description, you learn how both the detained immigrants and the government inspectors viewed their roles in the inspection process. Her book also amply documents the successful litigation strategies employed by attorneys and immigration advocates that resulted in a modest expansion of the rights of individuals to have individualized determinations made about their eligibility to enter the U.S. And yet, for almost every advance in ensuring fair procedures and individualized decisions making, the Supreme Court or Congress curtailed the process and truncated or restricted judicial review. In several important Supreme Court cases, the court established that the factual determinations of the immigration inspectors could not be disturbed in judicial review[36] and that even summary removal procedures, conducted in a language the immigrant did not understand could comport with the due process standards of the time.[37] Salted into these early cases are some of the fundamental principles of immigration law that provide the doctrinal foundation for detention, perhaps even a prolonged detention. Similarly, Congress in this period expanded the authority of the immigration officials and truncated the scope of judicial review.[38]

These key principles were that even though immigration laws might use detention, provided the incarceration was not one ordered as punishment or at hard labor, the detention would be civil in nature and not represent the use of criminal authority by the federal government.[39] In the seminal case of *Wong Wing v. U.S.*, the Court

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[36] Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892), *aff'd*, United States v. Ju Toy, 198 U.S. 253, 646-47 (1905).

[37] Kaoru Yamataya v. Fisher, 189 U.S. 86, 102 (1903).

[38] *See* Act of August 18, 1894, ch. 301, 28 Stat. 390 (restricting judicial review in response to success of immigrants challenging inspector refusals of admission). *See also* SALYER, *supra* note 35, at 112 (noting in the past twelve years, Congress has used this same technique of attempting to restrict non-citizens' access to the federal courts to theoretically expedite and streamline the removal process). *See also* Table of Contents, N.Y.L. SCH. L. REV., VOL. 51 (2006-2007), *available at* http://www.nyls.edu/user_files/1/3/4/17/49/front%2051-1.pdf (volume discussing the recent history of court-stripping in the New York Law School Review symposium issue).

[39] Wong Wing v. United States, 163 U.S. 228 (1896) (rejecting criminal

wrote:

> We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions of the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.
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> So, too, we think it would be plainly competent for congress to declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment, *if such offense were to be established by a judicial trial.* [emphasis added]. *Wong Wing* at 235.

Thus, the federal authorities had an inherent authority to use detention as part of their power to enforce the immigration laws.[40] Yet, federal courts could use the vehicle of the writ for habeas corpus to challenge the legality of the immigration detention.[41]

The growth of this immigration authority was not, of course, limited to only the foreigner. U.S. citizens were far from immune. Once the Chinese Exclusion laws broadly precluded Chinese admissions, some people sought to avoid the laws by claiming U.S. citizenship. Until 1943, a Chinese national could not naturalize and obtain citizenship because only "Whites" were eligible for naturalization.[42] Therefore, the only way to secure citizenship was

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incarceration unless the non-citizen first receives a full criminal trial with all due process and Constitutional protections).

[40] Chae Chan Ping v. United States, 130 U.S. 581 (1889). For a fuller discussion of these important cases, *see* Gabriel Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power, in* IMMIGRATION LAW STORIES (David A. Martin & Peter H. Schuck eds., 2005).

[41] *See* Boumediene v. Bush, 553 U.S. 723 (2008) (stating the general authority for challenging federal civil detention).

[42] *See* Ng Fung Ho v. White, 259 U.S. 276 (1922) (the Supreme Court rejected a challenge that the statute requirement of "White" race membership was

by birth in the U.S. territory. Many Chinese families sent their young children back to China to be raised by grandparents and to acquire Chinese education and language training. Others, knowing they could not gain admission without a claim of citizenship, falsified birth records to make a citizenship claim. The lack of uniform records at the time and the inspector's fear of widespread fraud led to U.S. citizens of Chinese ancestry being detained while they tried to challenge the inspector's rejection of their claim of citizenship. Lucy Salyer writes of one U.S. citizen of Chinese ancestry who spent two years in fetid detention on the docks of San Francisco, California and gave up and returned to China. When the Supreme Court returned a judgment in his favor, the Court found that his initial hearing was unfair and that he could return to litigate his claim of citizenship. His reply to his U.S. lawyers was that he would "rather die" than risk further detention by immigration officials.[43]

These early immigration statutes and the history of Chinese exclusion built a foundation for later expansion of grounds of inadmissibility and of removal. The Supreme Court's posture of calling these removal proceedings civil proceedings remains undisturbed despite repeat challenges throughout the 20th Century.

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not meant to exclude people from Asia); s*ee also In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897) (similar arguments challenging the statute requirement of "White" race membership were also rejected for people from India but rejected in 1903 from Mexico of European dissent). For an excellent discussion of race and citizenship, see IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996). *See also* John Tehranian, *Performing Whiteness, Naturalization Litigation and the Construction of Racial Identity in America,* 109 YALE L.J. 817 (1999-2000).

[43] SALYER, *supra* note 35, at 177.

V. The Red Scare of 1919 and 1920

Terror strikes hardest when it comes in the form of an object we trust. None of us will ever again look at low flying airliners swooping over a city skyline without some small shiver of fear -a fleeting question in our mind about why the plane is so close, so low. If an envelope arrives with a hand printed address and white dust we freeze -we fear. In 1919, the fear came wrapped in the decorative boxes of Gimbel's Department store.[44] At the end of April 1919, Ethel Williams, a maid at the home of former U.S. senator Thomas Hardwick, opened a box from Gimbel's Department store and a crude bomb exploded. She lost both of her hands in the explosion. The explosion was so strong it knocked down Mrs. Hardwick and seriously injured her as well. The Gimbel's mail bomb story traveled fast and the New York morning edition papers ran front page stories. Around two in the morning on May 1, 1919, a day that was becoming aligned with worker's parades all over the world, a tired postal clerk Stanley Caplan picked up a copy of the early papers to read on the subway as he headed home from the main post office at 34th Street and 8th Avenue in New York. Stanley read the stories of the Gimbel's bomb. Earlier in his shift, he had set aside sixteen Gimbel's packages for insufficient postage. He jumped off the subway at the next stop and returned to the Post Office. There, he and his supervisor contacted the New York police. Just as Caplan had feared, the packages contained crude pipe bombs. It took six hours to disarm the first bomb. An hour later, the story of the Gimbel's bombs was being telegraphed across the country. Eventually 36 boxes mailed to U.S. attorneys, members of Congress and prominent business leaders were discovered. No one else was harmed by an exploding package. No person or organization came

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[44] Much of this history is based on the book, EDWIN P. HOYT, THE PALMER RAIDS, 1919-1920: AN ATTEMPT TO SUPPRESS DISSENT (1969). Mr. Hoyt begins his book with the chilling story of the discovery of the Gimbel bombs and I have adopted his narrative to help us all relive the real fear that must have gripped Attorney General Palmer and many government leaders due to the discovery of these mail bombs in the summer of 1919. *See* Harlan Grant Cohen, Note, *The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 NYU L. REV. 1433 (2003) (an in-depth recitation of some of this history).

forward to claim responsibility. Journalists and politicians assumed the bombs were the coordinated work of radical aliens and labor activists -assumptions perhaps created by the fact that the people who were the targets of the bombings were perceived as open opponents of organized labor or of immigrants:

> John D. Rockefeller, the richest man in the U.S.
>
> J. P. Morgan
>
> Chair of the House Committee of Immigration, J.S. Burnett of Alabama
>
> Postmaster General Albert Burleson, who had administrated the Espionage Act of 1918 and sent approximately 800 "radicals" to jail during the war due to those prosecutions.
>
> Supreme Court Justice Oliver Wendell Homes
>
> Mayor Ole Hanson of Seattle who had broken a city-wide general strike
>
> Secretary of Labor William B. Wilson who directed the Immigration Service's work against anarchists and leftists.
>
> The New York City police commissioner
>
> The U.S. Commissioner of Immigration
>
> The Chief Office of Ellis Island[45]

Members of Congress immediately began to criticize President Wilson's administration. They asked why the Secretary of Labor and the recently appointed Attorney General, A. Mitchell Palmer, were not doing more to deport radical aliens. The Wilson administration had deported over fifty members of the Industrial Workers of the World using the 1917 immigration laws, authorizing deportation of people who advocate the violent overthrow of the government. At the time of the Gimbel's bombings, no other deportations were scheduled.

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[45] HOYT, *supra* note 44, at 20-23 (noting that perhaps all of these targets opposed radical organizers of labor. Certainly the response of the press and public officials to the information about the targets was to call for a crack down on the Industrial Workers of the World ("I.W.W.") and other communist sympathizers).

Mixed into the fear of these bombings were growing fears of general labor unrest. The U.S. experienced its first large scale strikes when almost the entire city of Seattle went on strike in 1919. Moreover, strikes were erupting in several industries from steel to mining. Hoyt reported this as one of the greatest periods of labor unrest in the history of the U.S.Perhaps the most important factor for raising fear in Congress was the Bolshevik revolution that had successfully overthrown the Czarist regime in Russia and had held onto power for more than a year despite armed opposition from White Russians and several allied armies including a contingent of U.S. troops. Just as we saw in the Alien and Sedition Laws, Congress again feared that a foreign revolution might find support and spread to the U.S. through the aegis of the immigrants from Europe.

The chair of the Immigration Subcommittee, Congressman John L. Burnett of Alabama and one of the intended recipients of an unexploded Gimbel's bomb, had introduced a bill to freeze all immigration.[46] Attorney General Palmer was still reluctant to attribute all radical activity to immigrants or to believe that there was a large organized revolutionary force at work in the United States. But all of that changed when, at 11:15 p.m. on June 2, 1919, a bomb exploded in front of Palmer's house in Washington D.C. The explosion was so loud that neighbors came running out of their houses. Quickly searching through the wreckage, Palmer and the others found pieces of a body. Apparently, the bomb's creator had

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[46] Chairman Hon. John L. Burnett had originally introduced a bill proposing the suspension of all immigration for a four year period after the peace treaty was signed ending World War I. *See Prohibition of Immigration: Hearing on H.R. 13325, 13669, 13904, and 14577 Before the H. Comm. on Immigration and Naturalization*, 65th Cong. 3 (3d Sess. 1919) (statement of Comm. Chairman Hon. John L. Burnett). The resolutions proposed restricted immigration in the winter of 1919. *Id.* (statement of Louis Marshall, President of the American Jewish Comm. And Vice-President of the American Jewish Cong.). Burnett also introduced bills to expand the use of deportation. H.R. REP. NO.1093. Burnett died in May of 1919 and in the tribute paid to him in the House, many spoke of his tireless work to control immigration. *See generally* H.R.J. Res. 1021, 66th Cong. (1920). *See also John L. Burnett Dies In Alabama: Congressman Whose Bill for Deportation of Dangerous Aliens Brought Him a Bomb: In Congress Since 1899: Chairman of the Committee on Immigration Had Long Been a Democratic Leader,* N.Y. TIMES, May 14, 1919, at 17.

mistimed the fuse. They also found several copies of a pamphlet "Plain Words." The pamphlet in part read as follows:

> The powers that be make no secret of their will to stop here in American the world-wide spread of revolution. The powers that be must reckon that they will have to accept the fight they have provoked . . .
>
> A time has come when the social question's solution can be delayed no longer; class war is on, and cannot cease but with a complete victory for the international proletariat . . .
>
> The challenge is an old one, O democratic lords of the autocratic republic. We have been dreaming of freedom, we have talked of liberty, we have aspired to a better world, and you jailed us, you clubbed us, *you deported us*, you murdered us whenever you could . . .
>
> There will be bloodshed, we will not dodge; there will have to be murder; we will kill, because it is necessary; there will have to be destruction, we will destroy to rid the world of your tyrannical institutions . . .[47]

That same evening, June 2, 1919, seven additional cities found bombs and Palmer was among other government officials from mayors to members of Congress who found their homes and offices bombed. The next morning Palmer spoke to the press:

> The outrages of last night indicate nothing but the lawless attempt of an anarchistic element in the population to terrorize the country and thus stay the hand of the government. This they have utterly failed to do.
>
> The purposes of the Department of Justice are the same today as yesterday. These attacks by bomb throwers will only increase and extend the activities of our crime-detecting forces.
>
> We are determined now, as heretofore, that organized crime directed against organized government in this

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[47] Palmer and Family Safe: On Second Floor When Explosion Wrecked Lower Part of House, N.Y. TIMES, June 3, 1919 (emphasis added), in HOYT, *supra* note 44, at 30-31.

country shall be stopped.[48]

Within a few weeks of the summer bombing, Attorney General Palmer and his young assistant, J. Edgar Hoover, began to plan for surveillance and arrest of radical aliens. In the fall of 1919, there were several major raids and the well publicized deportation hearings of prominent anarchist alien, Emma Goldman.[49]

The first great sweep aimed at the "Reds" was conducted on the anniversary of the Bolshevik Revolution, November 7, 1919.[50] That raid took place simultaneously in Newark, Detroit, Philadelphia, Hartford, Boston and New York. In New York, the officers had twenty seven warrants, prepared by the Department of Labor Immigration Bureau, for the arrest of aliens who were committed to the violent overthrow of the U.S. government. One report said that more than "700 policemen and state investigators raided 73 radical centers, arrested more than 500 people and continued the new policy of 'roughing up the reds.'" [51]

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[48] *Attorney General Palmer Warns the Anarchists That Bomb Attacks Only Increase His Activities*, N.Y. TIMES, June 4, 1919 (statement of Alexander Mitchell Palmer, Att'y Gen. of the United States), *in* HOYT, *supra* note 44, at 31-32.

[49] Emma Goldman maintained in her autobiography that she was a citizen by virtue of her early marriage to a United States citizen. *See* 2 EMMA GOLDMAN, LIVING MY LIFE 410 (Dover Pub. Inc. 1970) (1931) (the government denaturalized her husband using quasi-in-rem jurisdiction over his citizenship status. The government alleged that her husband had committed fraud. He never appeared at the hearings. Emma Goldman asserted that he did not appear because he was deceased at the commencement of the hearings). Until 1922, a foreign national woman became a United States citizen by operation of law if she married a United States male citizen. *See* Act of Feb. 10, 1855, § 1994, rev. § 2172, 604, *repealed by* Cable Act, ch. 411, 42 Stat. 1021 (1922). *See generally*, Marian L. Smith, *"Any woman who is now or may hereafter be married..." Women and Naturalization No. 2*, at 146, PROLOGUE (1998), *available at* http://www.archives.gov/publications /prologue/1998/summer/women-and-naturalization -1.html; *see also* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000) (historical analysis of women and citizenship).

[50] *See* HOYT, *supra* note 44 ("Reds" is the derogatory nickname given to followers of the Bolshevik revolution. The term is often used in the United States to refer to any person who is an anarchist or supports communism. The oral version of this presentation was made on November 5th, 2009, just one day short of the ninetieth anniversary of the Bolshevik revolution).

[51] HOYT, *supra* note 44, at 57.

The press reported the November and January Raids prominently. Historian Edwin P. Hoyt reports that throughout the country from May of 1919 to May of 1920 most newspapers were enthusiastic supporters of the raids.[52] A newspaper that many view as a protector of liberty today, *The New York Times,* championed the raids and called for greater use of deportation to remove the disruptive elements in the labor organizations that had so prominently been agitating for wage increases and better working conditions in the economic turmoil following World War I.[53]

Attorney General Palmer defended the violence of the raids:

> I apologize for nothing that the Department of Justice has done in this matter. I glory in it. I point with pride and enthusiasm to the results of that work; and if, as I said before some of my agents out in the field . . . were a little rough and unkind or short and curt, with these alien agitators whom they observed seeking to destroy their homes, their religion and their country, I think it might well be overlooked in the general good to the country which has come from it. . . .[54]

VI. Boston, January 1920: Revolution and Workers

In January of 1920, when, the chief of the Boston Bureau of the Department of Justice, Kelleher, received his instructions from the new Bureau of Investigation of the Department of Justice, he learned that he must be ready to execute hundreds of administrative warrants for the arrest of dangerous aliens all in the same night.[55] He

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[52] HOYT, *supra* note 44, at 128-29 ("[A]lmost all American newspapers were following a crusade led by government").

[53] *The Impunity of Bolshevism*, N.Y. TIMES, Nov. 10, 1919, *in* HOYT, *supra* note 44, at 58 ("Rightly or wrongly, the public is becoming cynical, suspicious of all these sporadic incursion of the federal authorities into Bolshevikia. Is the public to be contented with the inference that is it the government's purpose to deport as many of those taken as can be proved to be criminal anarchists?").

[54] HOYT, *supra* note 44, at 55.

[55] *See* Colyer v. Skeffington, 265 F. 17, 32 (D. Ma. 1920) (Kelleher, Chief of

was assured that the arrest warrants were all supported by evidence from undercover agents and other investigations and that he must coordinate support for the arrest with local authorities. His men should be ready at seven o'clock in the evening and prepare to be on duty for the next twelve hours: until seven o'clock in the morning. He must keep the arrests confidential and do his utmost to prevent any leaks of the intended round up.

He did his job well. Somewhere between 400 and 1,200 people were arrested that night. Agents from the Department of Justice, supervised by a handful of people from the immigration agency, then housed within the Department of Labor, combined with local police, roused hundreds of Lithuanians, Poles, Russians and other primarily Eastern Europeans out of club meetings, evening language classes, boarding houses and private homes.

The raid in Boston was not the only immigration raid in the country. On the same night, Department of Justice officials were arresting people: 700 in New York, 200 in Philadelphia; 400 in Detroit, and at least 400 in Boston.[56] Collectively more than 2,600 all together, although one newspaper account reported 4,000 "Reds" were arrested in 35 cities.[57]

While Palmer assured Congress that his raids had netted 3,000 perfect cases, many of those arrested were ultimately let go. By April of 1920, Louis Post, the Assistant Secretary of Labor who at this time had authority over the removal orders[58], had reviewed the

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the Boston Bureau of the Dep't of Justice, is named as head of the Boston bureau in the litigation surrounding the raids).

[56] HOYT, *supra* note 44, at 55, 88.

[57] HOYT, *supra* note 44, at 87-88.

[58] The authority for managing the immigration laws of the United States was not transferred from the Department of Labor to the Department of Justice until 1940. In 2002, Congress created the current agency, the Department of Homeland Security and transferred most immigration related agencies to that new department. The immigration courts remain within the Department of Justice and are currently called the Executive Office for Immigration Review. For a history of the agencies controlling immigration, *see* United States Citizenship and Immigration Services, Historical Immigration and Naturalization Legislation, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dc60e1df53b2f010VgnVCM1000000ecd190aRCRD&vgnextchannel=dc60e1df53b2f010VgnVCM1000000ecd190aRCRD (last visited Apr. 13, 2010).

administrative hearings in 1,600 cases and cancelled the arrest warrants for lack of evidence or violations of procedure in 1,141 of those.[59] He further ordered the release of hundreds who had been arrested without warrants.

Post's authority over these cases was challenged by Palmer and J. Edgar Hoover. They believed that Caminetti, as Commissioner of Immigration, should have the final authority over the validity of the orders of deportation. They accused Post of obstructing the work of the immigration commissioner. A Kansas congress member drafted a resolution calling for the impeachment of Louis Post and by April 27, 1920, Post was called before the House Rules Committee of the House to defend his deportation cancellations.[60]

For three days, the 73 year old Louis Post explained to the Rules Committee that he acted as he felt he must in order to defend the law. He explained that the law required more than guilt by association to establish deportability; that the raids had deliberately interfered with the right to counsel; that the right to seek a reasonable bond had been withheld; that in many cases no interpreter was present and the record clearly indicated that the individual had no knowledge of why he was arrested or of the tenets of any radical organization.

Perhaps most importantly, Post reminded Congress that the Supreme Court had insulated the decisions of the Department of Labor from judicial review and found that the normal protections of criminal prosecutions were not appropriate in administrative immigration proceedings. Thus, Post said, as the final arbiter of the rights of these individuals he felt it even more important for the agency itself to guarantee that the decisions were supported by competent evidence and not testimony obtained in violation of the law.

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[59] LOUIS POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF A HISTORIC OFFICIAL EXPERIENCE (Da Capo Press 1923) (1970) (Louis Post recounts these times in his excellent memoir).

[60] *Id.*

During this same time period, Palmer warned the press that the Department of Justice had uncovered a national plot for a May Day uprising or violent revolution. Police and federal forces mobilized across the country. No revolution occurred and, in fact, it was a quiet May Day.

Perhaps because of the quiet, perhaps because of the growing voices of opposition to the use of such large scale raids and detention, the political tide appeared to change. In early May, the House Rules Committee reconvened and told Post that he need not attend; instead, they called Attorney General Palmer before them to explain the actions of the Department of Justice. While the Committee ultimately issued a citation warning Post of obstructing the removal of dangerous aliens, far more damaging was the condemnation of the Attorney General that began to grow in that late spring of 1920. The tide seemed to shift as the abuses of the raids became apparent.

After Palmer's appearance before the Rule Committee the *New York Post* reported:

> The simple truth is that Louis F. Post deserves the gratitude of every American for his courageous and determined stand in behalf of our fundamental rights. It is too bad that in making this stand he found himself at cross-purpose with the Attorney General, but Mr. Palmer's complaint lies against the Constitution and not against Mr. Post.[61]

In late May of 1920, a number of very prominent law professors (including the future Supreme Court Justice Felix Frankfurter) and prominent attorneys wrote a report condemning the excesses of the Department of Justice.[62] They reported the following violations:

> Use of agent provocateurs, who infiltrated the radicals' organizations and incited others to violence;

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[61] LOUIS POST, *supra* note 59, at 271.

[62] R.G. BROWN ET AL., NATIONAL POPULAR GOVERNMENT LEAGUE, TO THE AMERICAN PEOPLE. REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (May 1920).

> Wholesale arrests and imprisonment of men and women without warrants for arrest in violation of the Constitution of the United States;
>
> Illegal search and seizure of persons and property;
>
> Forgery by agents of the Department of Justice to supply false evidence;
>
> Criminal thefts of money and valuable belonging to those arrested;
>
> Cruel and unusual punishment of prisoners including beatings, threats and unsanitary detention;
>
> Brutal and indecent treatment of women prisoners in searches and in detention;
>
> Filthy conditions of confinement and some prisoners were kept for weeks without having charges made against them; and
>
> Use of government funds to spread newspaper propaganda, sending out reports and cartoons to make a popular case for the Department of Justice.[63]

VII. Judicial Condemnation of the Palmer Raids: At Least for a Brief Moment

While political and public opinion was growing uneasy about the massive raids and the tactics of the government, what perhaps crystallized public opinion even more was the massive detention of men, women and children on Deer Island outside of Boston. When the Department of Justice had organized the massive raids in the winter of 1920, they had not made many arrangements for the detention of the people they would arrest. In haste, they decided to use a medical research station, abandoned after World War II, to temporary house the "Reds" pending their deportations. This abandoned medical center was not in good condition and in the case challenging the legality of the arrests and the conditions of detention,

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[63] BROWN, *supra* note 62.

the detainees testified that it fell largely to the detainees themselves to organize the detention center and to try to make it habitable.

Judge Anderson of the federal district court in Boston held a fifteen day trial and took fifteen hundred pages of testimony about the operations of the February raids.[64] In his eighty page opinion, he details some of the detention conditions:

> At Deer Island the conditions were unfit and chaotic. No adequate preparations had been made to receive and care for so large a number of people. Some of the steam pipes were burst or disconnected. The place was cold; the weather was severe. The cells were not properly equipped with sanitary appliances. There was no adequate number of guards or officials to take a census of and properly care for so many. For several days the arrested aliens were held practically incommunicado. There was dire confusion of authority as between the immigration forces and the Department of Justice forces, and the city officials who had charge of the prison. Most of this confusion and the resultant hardship to the arrested aliens were probably unintentional; it is now material only as it bears upon the question of due process of law, shortly to be discussed. Undoubtedly it did have some additional terrorizing effect upon the aliens. Inevitably the atmosphere of lawless disregard of the rights and feelings of these aliens as human beings affected, consciously or unconsciously, the inspectors who shortly began at Deer Island the hearings, the basis of the records involving the determination of their right to remain in this country.
>
> In the early days at Deer Island one alien committed suicide by throwing himself from the fifth floor and dashing his brains out in the corridor below in the presence of other horrified aliens. One was committed as insane; others were driven nearly, if not quite, to the verge of insanity.
>
> After many days of confusion, the aliens themselves, under

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[64] *See* Colyer v. Skeffington, 265 F. 17 (D. Ma. 1920).

> the leadership of one or two of the most intelligent and most conversant with English, constituted a committee, and represented to Assistant Commissioner Sullivan, that, if given an opportunity, they would themselves clean up the quarters and arrange for the orderly service of food and the distribution of mail. This offer was wisely accepted, and thereupon the prisoners created a government of their own, called, ironically, I suppose, "The Soviet Republic of Deer Island." Through the assistance of this so-called Soviet government, conditions orderly, tolerable, not inhumane, were created after perhaps 10 days or 2 weeks of filth, confusion, and unnecessary suffering. It is not without significance that these aliens, thus arrested under charges of conspiracy to overthrow our government by force and violence, were, while under arrest, many of them illegally, found to be capable of organizing amongst themselves, with the consent of and in amicable co-operation with their keepers, an effective and democratic form of local government.[65]

Despite the concerns over the ill-prepared detention centers and the findings by Judge Anderson that some of the arrests were made in violation of the Department of Labor rules and that techniques used in invading people's homes and offices without specific warrants violated their Fourth Amendment rights, the constitutional and administrative law standards of the day largely immunized the actions of the executive branch from scrutiny. Although Judge Colyer did find that some of the aliens detained could be eligible for bail, he also concluded that, as a general proposition, the Department of Labor should have time to complete its administrative hearings. Ultimately, on appeal to the First Circuit Court of Appeals, that court concluded that the District Court should not have ordered the release on bail of any of the aliens as the government had substantial evidence that membership in the Communist party and its general tenets made these men and women inherently dangerous aliens who could be subjected to removal.[66]

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[65] Colyer, 265 F. 17. at 45.

[66] *See* Skeffington v. Katzeff, 277 F. 129 (1st Cir. 1922).

Historian Lucy Salyer reports that while these "Red" Scare Raids did lead to some criticism of the methods of the federal government, studies conducted a decade later found that most of the tactics and practices remained largely unchanged and that judicial oversight remained quite minimal.[67] In particular, she writes that bail "remained out of reach of the vast majority of aliens," and therefore aliens remained in detention at "immigration stations or more commonly, at local jails for weeks or even months."[68]

We do tend to think of the Palmer Raids as a shameful moment in our nation's history, but reading the history of the period and comparing it to the detention practices of today, it is possible that the reader will conclude that we have, if anything, made detention and large scale raids an essential feature of our immigration laws. The key distinction perhaps should be that those raids were believed necessary and justifiable because of specific concerns for a national security and yet, even that argument seems weak in light of the historical record. Of all these dangerous radicals, few were actually deported and most were ordinary immigrant working men and women committed to a new political ideal and not actively engaged in acts of violence or revolution.

Still the fundamental link in the public mind of immigration and fear of an internal attack on national security, a revolution is solidified with these raids and is not questioned seriously by judicial action or legislative reform. The exceptionalism that surrounds much of immigration law doctrine that began with the Chinese Exclusion law and solidified in the Palmer Raids, unfortunately, has yet to be dismantled. If anything, in the second half of the 20th Century plenary control over immigrants was reinforced while civil liberties and improvements in administrative law procedure were generally being strengthened and expanded.

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[67] SALYER, *supra* note 35, at 242-44.

[68] *Id.* at 243 (citing William C. Van Vleck, an individual who conducted an independent investigation of the now called Bureau of Immigration).

VIII. Detention in the Cold War

Similar to the prior periods of fear, the government again reacted to fear of revolution, attack or ideology in the period during World War II, and the beginning of the Cold War.[69] Of course, we all know of the wholesale internment and detention of the Japanese, both citizens and legal resident aliens, during World War II; and the Supreme Court's refusal to interfere with the executive power to detain during the War Period.[70] Yet, for far too many of us, we assumed that civil detentions were limited to the Japanese or to the war period. In fact, immigration detention had continued unabated and was dramatically expanded following World War II as the Cold War with Communist forces began.

While the Supreme Court had unequivocally ruled that aliens could not be detained without judicial trial as a means of punishment, the case had allowed that some civil detention might be permissible when necessary as a form of preventative detention adjunct to the deportation process. In 1951, the Supreme Court majority forcefully authorized the use of detention of non-citizens facing removal based on active membership in the Communist Party.[71] The arrested non-citizens had argued that the government could not detain them pending removal absent specific evidence that they were likely to flee. The Immigration and Naturalization Service, now a division of the Department of Justice, had made no such finding, but ruled that the agency had the authority to detain on a general theory of national security. The Supreme Court affirmed that agency's determination, finding that the philosophy of violence against the Government was sufficient to authorize the detention. This decision ushered in a new period of isolation and immunity for the agency's detention determinations.[72]

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[69] Detentions were also used during World War I. *See* HIGHAM, *supra* note 23 (account of the detention of Germans as "enemy aliens" during World War I as well as an excellent history of the use of national security rationales against immigration populations).

[70] Korematsu v. United States, 323 U.S. 214, 225 (1944).

[71] Carlson v. Landon, 342 U.S. 524, 541 (1952).

[72] *See* Cole, *supra* note 7, at 1016-17 (discussing *Landon*, 342 U.S. at 542).

Whether arriving at the border[73] or facing removal after a long residence, the non-citizen could face lengthy immigration detention. And once entrenched, the authority to detain grew to be a tool used by the government in cases beyond those involving risk of flight or fears for national security.

A. Removal of Migrant Workers

The beginning of what many people today associate with "border control" and the use of immigration detention as a way to demonstrate control over the border began with the removal of migrant workers. Notably different from detention efforts in the past, this movement no longer relied exclusively on the justification of security. Even as detention was being used a means of controlling non-citizens removable as members of the Communist Party, the immigration service also used large scale raids and detention as part of the sweeps relating to the removal of Mexican people.[74] Dean Kevin Johnson writes that in a program more than ten times the size of the Japanese internment, people of Mexican ancestry were "repatriated" through forced removal. Nearly 60% of those removed were U.S. citizens.[75] During the massive sweeps during the depression, state and local government and even private organizations were the primary agents of deportation.[76] In the

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[73] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1952) (holding that a detention of a new immigrant is authorized and summary secret exclusion proceeding sufficient as a matter of due process); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212-16 (1953) (holding that twenty-five year resident returning after lengthy absence could also be subject to detention and summary secret exclusion process, detention authorized despite no immediate prospects of deportation). *See also* Charles Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mesei,* 143 U. PA. L. REV. 935, 954 (1995) (stating that both Knauff and Mesei were both released as a matter of agency discretion).

[74] Kevin Johnson, *Fifteenth Annual Dyson Distinguished Lecture: The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 2-3 (2005), *reprinted in* 11-13 BENDER'S IMMIGR. BULL. 1 (2006) (discussing the forced repatriations of people of Mexican descent and linking the patterns of control to the expansion of racial profiling and detention today).

[75] Johnson, *supra* note 74, at 4.

[76] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING

1940's and early 1950's Congress created a guest workers program for Meixcan labor. These workers were called Braceros.[77] Originally, authorized to work and reside in the U.S. during the labor shortages created by World War II, in 1954, the U.S. government, in cooperation with the Mexican government, began a campaign of rounding up and removing these guest workers.[78] In the original documentation authorizing the use of detention and justifying the raids, the government asserted the need to control the Southern Border and alleged that as many as a 100 radicals a day were crossing from the South.[79] While this statement appears to have been largely propaganda, no one seriously challenged the legitimacy of the Border Patrol round ups, detentions and removals.

Thus, detention and mass raids moved from the fear of the radical to the general removal of workers who had overstayed authorized visas or who had not been able to secure permanent residence.[80] As the years passed detention became an ordinary tool

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OF MODERN AMERICA 71 (Princeton Univ. Press 2004).

[77] *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS (1992) (exploring the history of the Bracero program); *see also* JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (also exploring the history of the Bracero program).

[78] *See* Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback: 1943 to 1954*, 37 WESTERN HISTORICAL QUARTERLY 421 (2006) (Professor Hernández reports on the participation of the Mexican government that wanted to gain more control of the workers and force them to work in agriculture within Mexico as a condition of return after deportation from the United States).

[79] *See, e.g.*, Manuel Garcia y Griego, *The Importation of Mexican Contract Laborers to the United States: 1942-64: Antecedents, Operation and Legacy, Working Papers in U.S.-Mexican Studies*, U.C. SAN DIEGO 1 (1981); *see also* James F. Smith, United States Immigration Policy - A History of Prejudice and Economic Scapegoatism?: A Nation that Welcomes Immigrants?: A Historical Examination of United States Immigration Policy, 1 U.C. DAVIS J. INT'L L. & POL'Y 227 (1995). *See also* NGAI, *supra* note 76, at 274 (discussing fear of communist entry from the Southern border being part of the justification for control of Mexican workers).

[80] *See* Schriro, *supra* note 1, at 6 (the history of the treatment of Mexican people in the U.S. is very complex and this discussion necessarily truncates that complexity. Perhaps the most valid historical discussion of detention in the United States would be based on tracing the use of detention as a tool to control Mexican

used to enforce deportation. For the most part, detention was not necessarily a long period; however, there were sad and devastating exceptions.

B. Cuban and Haitian Detention

As was already introduced in the discussion of *Clark v. Martinez*,[81] an estimated 125,000 Cuban citizens arrived in the U.S. as part of a short lived release by the Cuban government in 1979. [82] While Cuban citizens have a special path to permanent residence through the Cuban Adjustment Act[83] to be eligible for adjustment, the individual had to be admitted to the U.S. and not be barred by criminal convictions or later criminal conduct in the U.S. The Cuban government had released a number of people from criminal custody as part of the general release and U.S. authorities began to detain these people while determining their eligibility for adjustment of status to permanent residence. Others committed crimes within the U.S. and became unable to acquire permanent resident status or became subject to deportation. The immigration related detained population of Cubans grew and for some individuals detention was almost unbroken for more than twenty years.

Mark Dow, an independent journalist, prepared a compelling account of the harsh realities of immigration detention in his 2004 book, *American Gulag: Inside U.S. Immigration Prisons.* His interviews with detainees and the government officials responsible for managing the detention centers reveal many of the worst problems in modern immigration detention; the fear of release and the lack of accountability for the circumstances of detention. The book relates dozens of stories from inside immigration detention centers and ends with several stories about Cuban detention. He

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migration. Today, 65% of the people held in immigration detention are from Mexico).

[81] Clark v. Martinez, 543 U.S. 371 (2005).

[82] *Id.* at 374 (citing Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982)); Benitez v. Wallis, 337 F.3d 1289, 1290 (11th Cir. 2003) (providing facts of the boatlift from Cuba).

[83] Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified at 8 U.S.C. § 1255 (1994)).

quotes an attorney who had experience representing the long term detainees from Cuba. "If I had to tell what it was like to visit the detainees in one sentence it would be this: It is like visiting people who are buried alive."[84]

Mark Dow reports on the story of Omar Rodriguez, who due to a criminal conviction for attempted burglary after his arrival from Cuba, was subject to immigration detention. Though the criminal sentence was probation, Rodriguez violated probation by possessing two ounces of marijuana. He spent two years in jail in Texas for the criminal conviction and at the time of Dow's book, Rodriguez had been in immigration detention for twenty years.[85] While the vast majority of the Cubans who arrived in the mass exodus from Cuban were not subjected to lengthy detention, the government had confirmed that over 1,750 Mariel Cubans were detained and Dow confirmed in November, 2003 that 1,100 Cubans were in immigration detention.[86] More than one thousand people remain detained more than 25 years after the original arrival in the U.S.

The Cuban experience is exceptional for many reasons but the pattern of the government responding to the arrival of a large number of people with the tool of detention as part of the immigration process became well established. Certainly, detention was a common tool used to control the arrival of Haitians, especially after the political coup in 1990.

In their article exploring the power of the Executive branch to control immigration policy Professors Cox and Rodriguez describe the history of the arrival of Haitian people as follows:

> Though Haitian asylum seekers began arriving by boat in 1963, it was not until the 1970s that the poorest Haitians began large-scale unauthorized travel by sea in dangerously flimsy and overcrowded vessels, fleeing the merciless regime of Jean-Claude "Baby Doc" Duvalier, who became President of Haiti in 1971 after his father's

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[84] MARK DOW, AMERICAN GULAG: INSIDE IMMIGRATION PRISONS 289 (Univ. of Calif. Press 2004).

[85] *Id.* at 294.

[86] *Id.* at 370 n.10.

> death. Between 1972 and 1979, 7837 Haitians arrived in the United States by makeshift vessels. In 1980 alone, 24,530 so-called Haitian "boat people" arrived in the United States, coinciding with the Mariel exodus from nearby Cuba. An additional 28,000 Haitians were interdicted during the next decade. The 1991 military coup that ousted democratically elected President Jean Bertrand Aristide set in motion yet another major chain of boat migration. During the single month of May 1992, for example, the United States Coast Guard intercepted 10,000 Haitians as they attempted to flee lawlessness and violence in Haiti. This pattern of migration has continued into this century. Between fiscal years 1998 and 2003, the Coast Guard interdicted more than 1000 Haitians each year; in 2004, interceptions reached a peak of 3229. [footnotes omitted.][87]

Once the federal government expanded its use of detention and established facilities for immigration related detention, the pattern was set and detention expanded beyond the initial response to a sudden large influx. Detention was justified as a way of deterring Haitians from attempting to enter the U.S. without documents and as the exodus out of Haiti expanded, the U.S. began to interdict Haitians attempting to arrive at sea. In the early 1990's the U.S. government used military detention camps on Guantánamo to detain some of the Haitians who, although having been screened as having bona fide refugee claims, were otherwise inadmissible to the U.S. primarily because they were carrying the H.I.V. virus.[88]

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[87] Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L. J. 398, 492-93 (2009). (citing Ruth Ellen Wasem, Cong. Research Serv., CRS Report for Cong., U.S. Immigration Policy on Haitian Migrants 2 (2005), *available at* https://www.policyarchive.org/handle/10207/3662).

[88] *See generally* BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF LAW STUDENTS FOUGHT THE PRESIDENT AND WON (2005) (telling the story of litigation surrounding the Guantánamo detention of Haitian refugees); *see also* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (upholding the legality of interdiction at sea and finding that the Refugee Act did not prevent the United States government from returning people).

C. Delays in Adjudication and Lengthy Detention

Similar to the expansion due to sudden influxes from the Caribbean, the disruptive civil wars of the mid-1980's in Central America lead to an increase in immigrants from that region. The 1980 passage of the Refugee Act formally added a provision allowing people who entered the U.S., even without documents, to seek asylum and to receive work authorization pending the adjudication of the application. At its high water mark, the immigration agency and courts received more than 150,000 applications for asylum in one year.[89] The immigration court had been handling a case load of approximately 50,000 cases a year.[90] Within a brief period of time, the deportation process expanded to four to six years and the ability to locate people when a final order of deportation was issued became more complex.[91] The government reported that an extraordinarily high percentage of people did not respond to final orders and further, that many people apprehended in

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[89] David A. Martin, *Reforming Asylum Adjudication: Navigating the Coast of Bohemia,* 138 U. PA. L. REV. 1247, 1310 (1990) [hereinafter Martin, *Reforming Asylum Adjudication*] (discussing the asylum adjudication system before the reforms of 1994 and noting that, in fiscal year 1989, the district offices of INS received over 100,000 applications—a record—and many thousands more were filed before immigration judges). Table I shows the rising number asylum applications filed in INS offices between the years 1984-1999, but these numbers do not take into account applicants who apply "defensively" before immigration judges). *Id.* at 1304. Applications made before immigration judges up until 1989 are found in Table III, and the number of asylum applications peaks in 1989 at approximately 20,000. *Id.* at 1310. By 1993, the backlog in the Asylum Office was around 300,000 cases. *See* David. A Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 733 (1995) [hereinafter Martin, *Making Asylum Policy*]. *See also* David A. Martin, *The 1995 Asylum Reforms: A Historic and Global Perspective*, Center for Immigration Studies Backgrounder (May 2000), *available at*: http://www.cis.org/1995AsylumReforms (revealing the high water mark came in 1994 and 1995 when the INS received between 140,000 to 150,000 new asylum claims in one year not including those that were heard only in immigration courts).

[90] Martin, *Reforming Asylum Adjudication*, *supra* note 89, at 1310 (demonstrating in Table III, the number of cases before immigration judges between 1985-1989).

[91] Martin, *Making Asylum Policy*, *supra* note 89, at 732-38 (discussing the backlog of immigration cases which led to many individuals being released with work authorization and these people then failed to appear for scheduled hearings).

the interior of the U.S. failed to appear for their removal hearings.[92] Congress responded with a number of initiatives including reforming the asylum adjudication process, providing for in absentia removal orders, authorizing expedited removal, and increasing the resources for detention.[93] Most importantly, in Section 236 of the INA, Congress laid the groundwork for a system of mandatory detention for certain types of cases including people who voluntarily apply for asylum at the border or airports.

Again, Mark Dow shares a story of an asylum applicant who was apprehended at the border and held in immigration detention during the adjudication of her refugee claim. He listened to her story which graphically describes transfer to a prison where immigration authorities rent space:

> The young woman recalls how certain of the women prisoners were summoned by their eight-digit alien numbers. They were being transferred to a "real prison." They started to cry. They were scared. They tried to call relatives and attorneys, but the phones had been turned off. The women were shackled and put in a van for the drive. At the prison they had to bend and cough and be searched again. . . .
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> "They asked me to take off my uniform. They asked me to

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[92] Martin, *Making Asylum Policy*, *supra* note 89, at 740 (discussing the process leading to the early reforms).

[93] *See* INA § 240(b)(5) (absentia orders); *see also* INA § 235(b) (the extraordinary expedited removal procedure allows an inspector to refuse admission to people who are using false documents, lacking documents or who make a material misrepresentation or commit fraud. The decision of the inspector is only subject to the review of a supervisor and the non-citizen is removed and barred for five years. Expedited removal was expanded into the interior twice by DHS regulatory notice and now applies to people apprehended within 100 miles of an international border if the apprehension is made within two weeks of entry and to people who arrive by sea if the apprehension is made within two years. The constitutional validity of the interior expansion has not been tested and Congress has made it very difficult to seek judicial review of an order issued under the expedited removal procedures). *See also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Notice Designating Aliens Subject to Expedited Removal Under INA § 235(b)(1)(A)(iii), 67 Fed. Reg. 68924 (Nov. 13, 2002).

> take of my underwear and bra . . . No, even if you are female, I cannot do that.'" So the correctional officers undressed her. She crawled "down [under] the bed just to hide [her] body." Other officers, wearing masks, came over and watched.
>
> Later she spoke to a minister who visited the prison. "Let me go and die in my own country," she says she told her. "I can't die in America."
>
> "After going through all of that," the young woman says to us, "even after winning asylum, I lost all the joy that was in me."
>
> Then she says that she misses prison. . . . "I felt like that was my home for the rest of my life," she says, "I have dreams of my friends in detention." They used to stay up through the night with her when she couldn't sleep.
>
> She was released from detention after a year and a half. She was granted political asylum. She says, "I felt I was leaving my family." [94]

The story of this woman, held in detention for more than a year, is not isolated. The latest government report admits that many asylum seekers are held for a period in excess of four months notwithstanding procedures that try to expedite detained cases.

D. The Increase in Detention Following September 11, 2001

While we might think that the historical lessons about detention are all in our distant past, the truth is that the greatest increase in the use of detention occurred within the last decade. After the attacks of September 11, 1991, the Department of Justice began several programs that were aimed at arresting people with outstanding orders of removal, primarily those of South Asian origin and at the same time, many arrests of people and lengthy detention for people with ordinary status violation such as the overstay of a tourist visa. In her article examining the growing use of criminal sanctions and approaches in immigration enforcement, Professor

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[94] DOW, *supra* note 84, at x-xiii.

Teresa Miller documents some of the mass arrests of this period:

> Immediately after the terrorist attacks, the Department of Justice detained noncitizens who were either suspected of having connections to the attacks or ties to terrorism pursuant to the FBI's investigation of the attacks. Rather than arrest Arab and Muslim men as criminal suspects, law enforcement agents utilized the greater latitude and reduced accountability under federal immigration law to immobilize Arab and Muslim communities. Once individuals were detained, federal law enforcement officials could interrogate them as part of a criminal investigation, while checking their compliance with immigration regulations. In the eleven months after the attacks, 762 aliens were detained pursuant to the FBI terrorism investigation for various immigration offenses, including overstaying of visas and illegally entering the country. The government claimed that further acts of terrorism could be prevented if terrorists and terrorist sympathizers were incapacitated, which rationalized the massive round-up of Arab and Muslim foreign nationals. [footnotes omitted][95]

The total number of people detained after September 11, 2001 are difficult to assess because the government began to refuse to provide the statistical data. Some estimates are that more than 1,500 people were apprehended.[96] Mark Dow devotes a chapter of his book about immigration detention to the post 9/11 detentions. [97] In a government investigation of the arrests, it was noted that there were abuses of the procedures normally used for detention.[98]

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[95] Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 90 (2005).

[96] David Cole, *Operation Enduring Liberty*, THE NATION, June 3, 2002.

[97] DOW, *supra* note 84, at 19-47.

[98] U.S. Dep't of Justice, Office of the Inspector Gen., *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 148 (Apr. 2003), *available at* http://www.justice.gov/oig/special/0306/full.pdf.

Professor Margaret Taylor has also specifically examined the use of detention in this time period.[99] In her very thoughtful article she explores how the Department of Justice (then in charge of removal proceedings and detention) instituted policies, sometimes using a security rationale, to justify detention and the unlawful elimination of bond hearings. Most importantly, her article documents how the national security rationale spilled over into the wholesale detention of Haitians and to preclude bond determinations on a generalized assertion of dangerousness. She relates the history of a case involving an 18 year old man who was apprehended after he illegally entered the U.S. by sea.[100] Arrested shortly after his entry, he then sought political asylum. The government justified his detention and the detention of all Haitian asylum seekers in this manner:

> At the hearing, the INS argued that the release of Joseph or any other member of the October 29 migrant group would "threaten important national security interests." Lest you are wondering how the release of a Haitian teenager seeking asylum would threaten important security interests, the INS, Coast Guard, State Department, and Department of Defense all weighed in with the following two-part explanation.
>
> First, the government asserted that because some migrants arriving by boat from Haiti might be considered dangerous, all of them must be detained. A Coast Guard affidavit noted that Haitians previously deported from the United States for criminal activity have occasionally been found on interdicted boats attempting to return. Additionally, the State Department asserted that it had "noticed an increase in third country nations (Pakistanis, Palestinians, etc.) using Haiti as a staging point for attempted migration to the United States." The unspoken premise—made obvious in the parenthetical—is that terrorists from the Middle East might pose as Haitian boat people, boarding

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[99] Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 149-50 (2004), *reprinted in* 9 BENDER'S IMMIGR. BULL. 906, 915 nn.1-4 (2004).

[100] *In re D-J-*, 23 I. & N. Dec. 572 (Att'y Gen. 2003).

> rickety rafts to attempt one of the most dangerous and heavily guarded routes to the United States. Even if one accepts that premise, however, the INS *knew* that eighteen-year-old David Joseph was not a criminal offender or a terrorist. Nevertheless, the government argued that, rather than making an individualized risk assessment, it is safer to lock up everyone who arrives by boat from Haiti to obviate this potential threat.
>
> Second, there was concern that releasing any Haitians while their asylum claims were pending would encourage others back home to follow. According to the Coast Guard and the INS, a surge in migration from Haiti caused by the release of any member of the October 29 migrant group would ''reduc[e] responsiveness in other mission areas'' and ''injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities.' This of course suggests that any expenditure related to immigration enforcement—or perhaps *any* government expense—impacts national security since it potentially diverts resources from the war on terrorism.
>
> Both the immigration judge and the Board of Immigration Appeals rejected these arguments, with the appeals board concluding that ''the broad national interests invoked by the INS were not appropriate considerations . . .in making the bond determination.'' With remarkable dispatch, the Attorney General vacated the Board decision and issued his own opinion mandating detention without bond for Joseph and other ''similarly situated undocumented seagoing migrants.'' The Attorney General explicitly directed immigration judges not only to deny bond to all Haitian boat people, but also to give credence to any executive branch assertion of ''significant national security interests'' in future bond proceedings. [footnotes omitted][101]

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[101] Taylor, *supra* note 99, at 165-67.

This single example of the history of how detention rationales shift and morph from general control to national security should cause us all to pause and really examine the legal and policy implications of our use of immigration related detention.

And so it is difficult to be confident that another large-scale internment of Arab Americans and Muslims will not occur similar to that experienced by the Japanese during WWII. At a time when our nation is facing threats from abroad, and the usual pattern of tightening immigration controls and relying on unfounded stereotypes resurges, the urge to bring detentions like *Korematsu* back can be felt. The post-9/11 world has also shown us that our government still has the power to detain during wartime, and will use immigration and classification of "enemy alien" to prevent attacks.[102] The discrimination that Arab Americans and Muslims have experienced has not escaped comparison to the discrimination felt by the Japanese during WWII. [103] In a recent article, David Harris argues that we can be hopeful that *Korematsu* will not be extended to the war on terror, and that a large-scale internment of Arab and Muslim Americans will not occur.[104]

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[102] Hamdi v. Rumsfeld, 542 U.S. 507, 558-60 (2004).

[103] *See* David A. Harris, *On the Contemporary Meaning of Korematsu: Liberty Lies in the Hearts of Men and Women,* U. PITT. LEGAL STUD. RES. PAPER NO. 2010-03, at 19 (Feb. 2010).

[104] *Id.* at 31. Professor Harris argues that the holding in Korematsu (that internment does not violate the constitution) remains good law today, and a "loaded weapon" ready for use. *Id.* at 19. The desire of some individuals, and actions taken since September 11, such as the round-up of Muslim men, interviews of Middle Eastern Muslim nationals, categorization of individuals as "enemy combatants," and the consideration of the use of internment camps, have suggested that we are perhaps close to reaching for the "loaded weapon" of *Korematsu. Id.* at 19, 29. Despite the continuing legal validity of *Korematsu* today, Professor Harris argues that an internment similar to that of 1944 is unlikely to occur. Professor Harris relies on Learned Hand's speech where he proclaimed, "[l]iberty lies on the hearts of men and women" and that we need more than the Constitution to set us free to argue that a desire for liberty will prevent a return to *Korematsu. Id.* at 32. Because of the damage *Korematsu* caused and the lasting impact it had, the move to use *Korematsu* will face resistance. Professor Harris points to the actions of groups such as the Japanese American Citizens League, and other civic organizations, and individuals to demonstrate that American's memory of the horrible effects of the internment camps encouraged groups to voice their concerns

The main point for this essay is that once again, in a time of fear of foreign nationals, our government used detention and arrest as a primary tool to control individuals and that in the aftermath of those events, courts, scholars and government inspectors worry about the civil rights abuses. Worse still, once again Congress expanded and even mandated detention for foreign nationals accused of a link to terrorism and appropriated the funds necessary to support the expanded enforcement. Further, Congress appears to be using detention as it might in criminal prosecution but without the attendant Constitutional protections and restrictions that are inherent in the criminal adjudication system.[105] Combined with all of the early growth in the use of detention, the very existence of the mechanism for detention has taken over the rationale. Today the vast majority of people held in detention are from Mexico and represent people who have entered without documents or overstayed a temporary visa. Our rationale of detention to protect us from terror or crime has bled into our use of detention as part of the ordinary course of immigration enforcement.

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and urge caution in order to prevent the government from making the same mistake again. *Id.* at 33-40. At a time when our nation is facing threats from abroad, and the usual pattern of tightening immigration controls and relying on unfounded stereotypes resurges, the urge to bring *Korematsu* back can be felt. Professor Harris makes a strong argument that while our Constitution may permit *Korematsu*, the true way our country is avoiding a return to internments, is the liberty within each person and the refusal to allow injustice from occurring. *Id.* at 40.

[105] This topic of growing "criminalization" of civil immigration enforcement is well documented in several articles. *See* Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489 (2007) (discussing preventative immigration detention); *see also* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (reiterating the significant overlap between criminal law and immigration law will affect the way decision makers view the consequences).

IX. As Old as the Hills But Why Growing Today?

As I noted at the beginning of this essay, the Supreme Court has placed some due process limits on "unlimited" detention or detention where the government has little hope of executing the removal order. However, at the same time of these judicial limits, the Supreme Court reaffirmed the power to detain during the removal hearing, even for a long term permanent resident.[106] Congress has increased the use of immigration detention by mandating detention as part of the removal process.[107] Donald Kerwin reports the following staggering increase in the budget related to detention and removal operations (DRO) and custody operations:

2005: DRO 1.22 billion, 0.86 billion custody

2006: DRO 1.65 billion, 1.16 billion custody

2007: DRO 1.98 billion, 1.38 billion custody

2008: DRO 2.38 billion, 1.65 billion custody

2009: DRO 2.48 billion, 1.72 billion custody

2010: DRO 2.54 billion, 1.77 billion custody[108]

The other speakers and authors in this symposium will provide more details about the current regime of detention, but it is obvious that detention has moved far beyond its early roots as a temporary measure used in immigrant inspections or as a tool justified by individualized decision-making to secure the nation.

Is the fact that detention is "as old as the hills" the only justification we need to continue its use? Hopefully, this brief history has illustrated that the use of civil detention as a part of immigration law needs to be seriously examined. The historical roots are weak and suspect. While most other areas of law have evolved to require the protection of individual liberty and to protect people from government control, immigration law remains a sad outlier.

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[106] *See* Demore v. Kim, 538 U.S. 510 (2003).

[107] *See* 8 C.F.R. § 236.1 (1999).

[108] *See* Kerwin & Lin, *supra* note 2, at 8.

X. The Detention Evolution

As we have seen in this essay, the government originally argued that detention was a necessary part of border inspection and the concept evolved to support detention as a necessary part of the hearing process. But, detention was not limited to the context of removal alone; instead, it has also grown to be seen as a necessary deterrent to unlawful immigration and even to authorize preventative detention used when aliens are assumed to pose a risk to security or as a part of large scale immigration law enforcement. Moreover, neither financial concerns nor human rights concerns have seemed to lessen the nation's desire to use detention as a part of the immigration enforcement model.[109] What forces might limit the growth of detention?

The best and most long lasting changes would of course, come from Congress limiting the use of detention and putting strict, clear controls on the agency authority to use detention. Congress should restore discretion in the detention decisions and allow both immigration judges and the federal courts to test and review detention decisions. Yes, this may make the use of detention less certain and perhaps administratively more costly, but these restraints are the usual ones we employ whenever our government exercises civil detention. We also have a range of options to reach some of the same goals of detention such as bond, supervised release and in some cases, if necessary, electronic monitoring, all of these options are less restrictive (and less expensive) alternatives to incarceration of non-citizens.[110]

A. What will you answer when you are asked?

What did you do? Why did you let it happen? Did you know it was happening? If you are interested in taking direct action, visit the website of the nonprofit organization Detention Network, an organization that works to monitor U.S. immigration detention and to seek legislative and administrative reforms.[111]

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[110] *See* Kerwin & Lin, *supra* note 2.

[111] Detention Watch Network, http://www.detentionwatchnetwork.org (follow "Take Action" hyperlink) (last visited Apr. 13, 2010).

At the end of his historical account of the Palmer Raids, historian James Morton Smith adopts a quote from the author John Dos Passos. It is a wise reminder that we can find hope for change in our "old as the hills" failures:

"In times of change and danger when there is a quicksand of fear under men's reasoning, a sense of continuity with generations gone before can stretch like a lifeline across the scary present."[112]

[112] SMITH, *supra* note 18, at 434.