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THROWING AWAY THE KEY: LIMITS ON THE PLENARY POWER?


Reviewed by Richard A. Boswell*

CUBAN MIGRATION: EXAMINING THE LANDSCAPE

In the spring of 1980, at the same time that the United States Congress enacted the Refugee Act of 1980,1 the Carter Administration began admitting a large number of refugees from Cuba under its parole authority.2 This occurred despite the fact that Congress, by enacting the Refugee Act, expected to both change the way that refugees were admitted into the country and limit the role of politics in their admission.3 The arrival and subsequent treatment of these Cuban refugees in America highlight the consequences of allowing politics to dominate what essentially must be a humanitarian act.4

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2. The statute in existence at the time provided as follows:

   The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.


3. One of the stated intentions of the Refugee Act was to limit the use of parole as a way of dealing with refugee admissions as it had been used in past cases such as the admission of Hungarians in 1956 and Cubans in 1959. Instead of invoking the Refugee Act of 1980, the President used the parole power which had specifically been criticized when Congress enacted the Refugee Act. See Pub. L. No. 96-212, 93 Stat. 102 (1980). Ultimately, the President created a separate status termed “Cuban-Haitian Status” to deal with the admission of the refugees. See Exec. Order No. 12,341, 3 C.F.R. 127 (1983).

4. At its core, refugee and asylum law are governed by humanitarian principles which extend far back in history. See KAREN MUSALO, ET AL., REFUGEE LAW AND POLICY: CASES AND MATERIALS 1–56 (1997). Indeed, one of the stated purposes in enacting the Refugee Act of 1980 was to divorce asylum decisions from politics. See I.N.S. v. Stevic, 467 U.S. 407
Two important books by scholars from different disciplines chronicle the plight of the Cuban refugees who came to the United States in the spring of 1980 in what has become variously known as the "Freedom Flotilla" or "Mariel Boatlift." From Welcomed Exiles to Illegal Immigrants: Cuban Migration to the U.S., 1959-1995 by Felix Masud-Piloto and The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People, by Mark S. Hamm, attempt to tell the untold stories of the Cubans who came to the United States in the Freedom Flotilla. They are accounts of the complex forces which propelled the Cubans to come to the United States in the first place and how a small number of the original group of 117,000 came to face indefinite detention in U.S. prisons, which led many of them to riot out of frustration with the conditions of their confinement. From Welcomed Exiles to Illegal Immigrants: Cuban Migration to the U.S., 1959-1995 provides a historical background of the Freedom Flotilla; The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People describes in a very graphic and personal way the plight of the Cuban refugees who ended up languishing in U.S. prisons because of their unique status under U.S. immigration law.

While the takeover of the Peruvian Embassy in Havana precipitated the Freedom Flotilla, Professor Masud-Piloto makes it clear that the initial groundwork for this exodus was laid as far back as the last century and was exacerbated in modern times by U.S.-Cuban relations. Although the precise details which led to the takeover of the Peruvian Embassy in Havana by nearly ten thousand refugees may never be fully documented, the political and legal drama which unfolded has had repercussions for nearly two decades. For some, the event underscored the perception that the United States had lost control of its borders. For others, it highlighted the problems of vesting unlimited powers in the political branches. For still others, it was a reminder of the need for a humane asylum system in which the role of politics would be minimized.

The takeover of the Peruvian Embassy took some time before it reached a type of critical mass. In the early 1980s, there had been numerous incidents where Cubans sought asylum by entering the

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7. As discussed infra at notes 15, 32-51 and accompanying text, the Cubans face the prospect of being forever incarcerated because they remain unadmitted aliens in exclusion; there is no place for them to be deported as Cuba will not accept their return.
The incident at the Peruvian Embassy began when six Cubans who had crashed through the gates of the Peruvian Embassy and killed a Cuban guard were granted asylum. Cuban authorities requested that the Peruvian government turn the six Cubans over for prosecution, but the request was refused. In response, the Cuban government announced that anyone who wanted to leave Cuba could go to the Peruvian Embassy. As a result of the announcement, nearly ten thousand people overran the embassy grounds within a three day period.  

The incident at the Peruvian Embassy was born out of the frustration experienced by many Cuban citizens in attempting to take to the sea in makeshift vessels or being arrested in the process of attempting to find a way off of their island nation. Indeed, throughout Latin America this form of protection, known as “diplomatic asylum,” has been frequently

8. For a more extensive discussion of the events leading up to the takeover of the Peruvian and other embassies, see MASUD-PILOTO, supra note 5, at 78–83. Seeking protection by entering the grounds of a foreign embassy is known as “diplomatic asylum” and is common in Latin America. See infra note 11 and accompanying text.


10. It should be pointed out that the issue of whether the Cubans were legitimate refugees is not without controversy. While Professor Masud-Piloto does not directly deny their refugee status, he points out that the Cubans were merely fleeing from the economic dislocation brought about by the economic boycott and conflicts with the United States. See MASUD-PILOTO, supra note 5, at 92–100. I believe that it is a mistake to paint the Cubans with such a broad brush. Clearly, with any group of refugees, there will be some who do not have meritorious claims. At the same time, however, the Cuban government under Fidel Castro was not without its share of human rights abuses. Those who did not go along with the economic and political policies or who engaged in activities such as private enterprise were treated as anti-revolutionary. Moreover, in defense of the revolution, “Block” committees monitored these so-called “anti-revolutionary” activities to ensure that they did not go unpunished.

While the level of discontent in Cuba may have subsided from where it was in 1980, efforts by Cubans to leave the country have not ended. Some examples are the steady flow of boats of asylum seekers landing in Florida and efforts to gain entry into the U.S. military base at Guantanamo Bay, located on the eastern side of the island. See, e.g., *Cuban Refugees Rescued off Florida Sent Home*, ORLANDO SENTINEL, Sept. 3, 1997, at A8; *Coast Guard Returns Cuban Rafters*, THE MIAMI HERALD, July 24, 1997, at B2; *Generous Partyers on Ship Pick Up Cuban Refugees*, ORLANDO SENTINEL, July 22, 1997, at A6; *10 Cuban Refugees Picked Up on Grassy Key*, THE MIAMI HERALD, July 3, 1997, at B6.

11. These refugees were asserting a right long recognized by many Latin American nations as “diplomatic asylum,” which is defined as the assertion of protection of another nation by entering its diplomatic mission. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 173 (2d ed. 1996). This assertion of protection, while never having been formally accepted by the United States, has been honored in isolated cases such as those involving the Soviet “refuseniks” who were granted temporary refuge at the U.S. Embassy in Moscow in the early 1980s. See Convention of the American States on Diplomatic Asylum, Mar. 28, 1954, 5 Pan Am. Union Conferences & Org. S. 39, 53; Major John Embry
used. On entering the grounds of the Peruvian Embassy in Havana, these refugees captured the world’s attention with their simple plea to be allowed to leave their island nation. Some of these refugees were former political prisoners, others were dissidents and others were branded as anti-socials because they had found ways to resist the rigidity of the Castro.\(^2\)

Unbeknownst to the people who entered the Peruvian Embassy, as well as to anyone at the time, their effort to leave Cuba would be transformed into what would later be known as the “Freedom Flotilla” or the Mariel Boatlift. In the days and months that followed, thousands of refugees would leave Cuba, with some traveling to countries as far away as Spain and Peru but the largest portion of them coming to the United States.\(^3\) In the earliest stages of the boatlift, there was much elation

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12. While it is difficult to put a precise label on all of the people who were part of the takeover of the Peruvian Embassy, it is safe to say that the problems encountered by Cubans at the time were well-known and documented by human rights groups. The United States had often cited the Cuban government as a violator of the rights of its own citizens. In the period immediately preceding the occupation of the Peruvian Embassy, the U.S. had been “repatriating” Cuban political prisoners who had engaged in the Bay of Pigs invasion of 1961 or committed other acts against the Cuban government. See *Cecilia Medina Quiroga, The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* 185–220 (1988). In the annual reports of Human Rights Watch, Cuba has consistently figured as a subject for criticism. See, e.g., *Human Rights Watch World Report 1996: Events of 1995* 85–90 (1995); *Human Rights Watch, World Report 1990: An Annual Review of Developments and the Bush Administration’s Policy on Human Rights Worldwide* 140–46 (1991).

13. To this day there are no accurate accounts of the number of Cubans and Haitians who eventually came to the United States during this period. Estimates range from 117,000 to 131,000. See, e.g., H.R. REP. NO. 96-1218, 3–4 (1980). The lack of precision in ascertaining the numbers of refugees who were admitted to the U.S. is not a unique phenomenon of the 1980 Cuban migration but has been the experience in other situations as well. In the period preceding the passage of the 1986 immigration reform legislation, the Immigration & Naturalization Services (INS) provided wide ranging figures of the numbers of undocumented persons in the U.S. While providing accurate numbers is neither the focus of the books reviewed here nor of this review, the agency’s ability to deal with its mandate has been the subject of never ending consternation for a series of administrations for decades. See *Panel on Immigration Statistics, National Research Council (U.S.), Immigration Statistics: A Story of Neglect* 87 (Daniel B. Levine et al. eds., 1985); *Immigration Statistics: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 41, 44–53 (1985) (statement of Jeffrey S. Passel, Bureau of the Census, U.S. Dept. of Commerce).
within the Cuban-American community in Florida. Over time, however, as family members from the United States traveling to Cuba to bring back loved ones began encountering difficulties as they were forced to return with others besides their family members who wished to leave, they became disillusioned with the boatlift. Eventually, the mood concerning the boatlift would shift and take on a more negative tone with many characterizing members of the Freedom Flotilla as criminals or mental patients. This characterization, however, has never been substantiated.14

While most of these refugees would find their way to the United States and eventually be settled with their families or sponsors, some of them would be held and continue to be kept in "detention" facilities in various parts of the country.15 In fact, their detention continues to be upheld by the federal courts and is not subject to serious judicial scrutiny because many of these refugees are still treated as if they were seeking legal admission to the United States.16 Even those who are permanent residents can still be subject to remand to Immigration & Naturalization Services (INS) custody should they commit any of the numerous acts that might render them removable.17 In short, the Cubans face a status problem since citizenship is the only status that will protect them from

14. In fact, if one were to assume that the number of criminals represented by refugees in the boatlift was the equivalent of the number of those in jail (approximately 2,500 of the total of 117,000), this would represent a smaller proportion of criminals than exist in the general U.S. population which is 3%. See Michelle India Baird & Mina B. Samuels, Youth, Family and the Law: Defining Rights and Establishing Recognition, 5 J.L. & POL'Y 177, 195 n. 94 (1996).

15. Initially, those arriving were processed at centers in Florida, but as the numbers increased, so too did the resultant difficulties in detaining large numbers of persons in fenced-in areas. They were, therefore, moved to military bases in places such as Wisconsin, Arkansas, Pennsylvania and Puerto Rico. It became nearly impossible to determine the numbers of detained Cubans or the reasons why they were detained. Generally, the Cubans were placed in detention either because their sponsorship broke down or because they were considered to be in a category of persons who were ineligible for release because of past crimes in Cuba. Others who were in the community might again be detained by INS if they committed a crime. See HAMM, supra note 6, at 53-57 (1995); See also Richard A. Boswell, RETHINKING EXCLUSION, supra note 9, at 950-52 (1984).

16. The term "serious" judicial scrutiny is used here because the only review which the Cubans may seek on account of their confinement is habeas corpus. However, because they are deemed aliens seeking admission, the scope of judicial review is limited to whether the INS's decision to deny or revoke parole is arbitrary. See also infra note 12 and accompanying text. Since the parole decision is wholly discretionary, limited only by the INS regulations, the possibility of relief is minimal.

17. Those who have managed to become permanent residents should be able to avail themselves of greater protections as they can claim that they have entered the U.S. and are therefore protected under the Constitution. It should be pointed out, however, that the law is not clear as to whether a Cuban permanent resident who commits one of a set of so-called "aggravated felonies" may be detained without release even though there is no country to which she may be deported. See 8 U.S.C. §§ 1226c, 1251 (1994).
the possibility of detention in the future. Their plight is not generally known by the American public which is only periodically reminded of the Cubans' predicament when there is some disturbance in the form of a protest or riot which breaks out at one of the prisons where the Cubans are being kept.

As Professor Masud-Piloto makes clear, the circumstances which laid the groundwork for the Freedom Flotilla were predictable. The Freedom Flotilla was not the first large-scale Cuban migration to the United States. Castro's rise to power was followed by the flight of a large number of the ruling class, and in later years, there were "airlifts" which occurred from 1965 to 1973 allowing even more Cubans to come to the United States. During the spring of 1980, there was growing unrest in Cuba due to shortages of food and consumer goods. Cuban-Americans who had regular contact with their families in Cuba often brought American dollars as well as the economic advantages of life in the U.S. during their visits. Finally, the youth who had not grown up under the Batista government were growing increasingly impatient with the revolution's promise of future prosperity.

Forces in the United States also made a large-scale migration more likely. The U.S. had long complained of the restrictionist emigration policies of Cuba and other communist countries. For many years, Cuban immigration was substantially lower than the actual number of people who were eligible to immigrate because of emigration restrictions. Cuban-Americans and Cubans who were lawful permanent residents in the U.S were anxiously hoping to bring over their family members who

18. However, it is important to note that those who are now in detention are ineligible to solve their problem and may forever be confined to this limbo status for they are both ineligible for admission and further, are ineligible for permanent residency or citizenship.

19. Indeed, Professor Hamm chronicles the unsynchronized yet nearly simultaneous takeover of prisons by Cubans in Oakdale, Louisiana and Atlanta, Georgia.

20. See MASUD-PILOTO, supra note 5, at 58–61. The airlift brought in approximately 277,000 persons over an eight year period. According to Professor Masud-Piloto, during the period from 1959 to 1960, 10,000 Cubans sought asylum; during the period from 1961 until the Cuban Missile Crisis of 1962, approximately 153,000 persons were admitted from Cuba; during the three year period from 1962 to 1965, approximately 29,000 Cubans were admitted into the United States.

21. Under the immigration quota system in existence while there was a world-wide annual quota of 270,000, no more than 20,000 could immigrate from any one country in a single year. Immigration to the United States requires a family or employment within the U.S. Generally speaking, family-based immigration requires that the person wishing to immigrate must either be the spouse, parent, child or sibling of a U.S. citizen or be the child or spouse of a lawful permanent resident. The employment-based immigrant must be sought by an employer in the U.S. for an occupation where no willing and qualified U.S. worker is available for the position. See RICHARD A. BOSWELL & GILBERT PAUL CARRASCO, IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS 325 (2d ed. 1992).
were living in Cuba. Finally, 1980 was an election year and President Carter was facing a foreign policy crisis in Iran and political opposition from within his own party as well as from the Republican front-runner, Ronald Reagan. These elements when combined created the perfect climate for events to spin out of control and eventually did cause a large-scale migration.

U.S.-CUBAN RELATIONS: AN HISTORICAL PERSPECTIVE

United States involvement in Cuba and Cuban migration to the United States can be traced back to well before Cuba’s war of independence from Spain. America’s concern for and involvement throughout the Caribbean Islands and Latin America was born out of their proximity and strategic importance. U.S. involvement in Cuba included three military interventions between 1906 and 1920 and political intervention in the period which followed until Castro’s takeover in 1959. From an immigration perspective, Cuban migrants have been coming to the United States to escape political turbulence since the 1800s.

The period following the revolution in 1959 has been extremely hostile, marked by U.S. efforts to topple the Castro government and Soviet efforts to place troops and missiles on Cuba. Immigration and particularly asylum policy were viewed as part of the overall foreign policy efforts against the Soviet Union and its sphere of influence. Emigration on one side and granting of political asylum was encouraged. Indeed, the arrival of each political refugee from the Soviet Bloc was viewed as a reaffirmation of the validity of our own system. Similarly, the Freedom Flotilla was viewed as a blight on the Cuban revolution and a validation of our foreign policy. In addition, for the Cuban refugees,

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22. Special provisions had been enacted to accommodate Cubans who managed to get to the United States. For example, the Cuban Adjustment Act provided that any Cuban who was paroled into the country could seek permanent resident status within one year of their arrival. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966). In turn, other provisions under the immigration laws allowed a permanent resident to apply for citizenship after she had resided in the U.S. for five years. 8 U.S.C. § 1427 (1994). Due to not only the fact that many Cubans had come to the U.S. in the early 1960’s and were now citizens and wanted to be reunited with their family in Cuba, but also the fact that emigration from Cuba had been restricted for so many years, established the demand for immigration.

23. See MASUD-PILOTO, supra note 5, at 7–17.

24. There is no doubt that foreign policy and political considerations were a significant force in U.S. asylum and refugee policy throughout the Cold War. Indeed, until 1965 asylum-type protection was specifically accorded to persons fleeing from communist countries. See Immigration and Nationality Act, Pub. L. No. 89-236, § 3, § 203(a)(7), 79 Stat. 911 at 913 (1965).
their journey was a logical extension of their unhappiness with the revolution.

In one sense, events surrounding Cuban migration to the United States and the history of relations between the two countries is a window into many aspects of U.S. immigration law in the twentieth century. In another sense, they reflect some of the more unfortunate trends of immigration law as we move into the next millennium. While there is a great deal that could be said about immigration through the Cuban-American experience, I will focus on but a few of these important and critical areas: the exclusion conundrum, the revival of detention as an instrument of immigration policy, and the issue of race in immigration law. I believe in the end that these issues are interrelated and connected by race and that an exploration of the racial issue is finally necessary.

Discussions about Cuban refugees, especially those who came in the period following the Cuban revolution, have always been a particularly sensitive and politically charged subject. The view from the political left has been that many of these refugees are essentially economic migrants because of their disagreement with the communist system. Moreover, these people were fleeing a government which itself had been engaged in a struggle for self-determination as well as stresses due to a prolonged boycott by the United States. At the same time, the Cuban revolution was in many ways a vast improvement over the corruption and severe inequalities of pre-revolutionary regimes. As viewed from the political right, the Cuban government was a Soviet-controlled communist dictatorship, which illegally expropriated property and engaged in extensive human rights abuses.

The purpose of this review is not to engage in the political debate about the merits or demerits of the Cuban revolution, but to highlight how this ideological division contributed to the predicament of the Cuban refugees who came in the Freedom Flotilla. On one hand these refugees were fleeing a country which was known to persecute segments of its population and on the other hand the United States viewed this refugee crisis as an embarrassment which reflected on its policy towards Cuba. To be sure, immigration policy vis à vis Cuba had been

25. While it is always dangerous to reduce political characterizations to simplistic notions of "left" and "right" politics, here the labels are used in general terms to more easily present these political positions.

26. As chronicled by Professor Masud-Piloto, these earlier regimes were either established or controlled by the United States since the earliest days of Cuba's independence from Spain. See generally MASUD-PILOTO, supra note 5.

dominated by the politics of the Cold War which sought any opportunity to publicly embarrass Cuba. This meant that the United States would accord special treatment to Cuban asylum seekers. While the treatment of refugees from non-communist countries was generally worse in that the likelihood of receiving asylum was significantly lower, few of these refugees faced the prospect of indefinite detention because in most cases there were other places where they could go.

The Freedom Flotilla can be viewed from two very different perspectives. One way to look at the boatlift is to see it as a political historical event with a significant impact on U.S. immigration policy. Another way to look at the boatlift is as an event which is instructive about the complex of forces driving immigration policy as well as the deep problems to be found in it. Masud-Piloto’s book views the event from its historical perspective in order to provide insight into how the Cuban refugees could on one hand be viewed as heroes in the war against communism and on the other hand be deemed pariah and outcasts within their new country. Hamm’s book examines the refugee crisis from the point of view of the penologist concerned with the issue of incarceration of non-penal detainees. In my opinion, what appears to be missing from both Masud-Piloto’s and Hamm’s explorations is a fuller appreciation of the larger legal issues and problems of immigration law and policy.

U.S. courts have heretofore been unwilling to recognize any substantive rights to persons arriving in the United States. Rather, they are deemed to be “aliens in exclusion” and are thus permitted to be confined in detention indefinitely. Prior to the large scale migration of Cubans in 1980, detention was used almost exclusively on Haitian refugees. Beginning with the arrival of Haitians in the period preceding the 1980 Mariel Boatlift, the United States government initiated a policy


28. There have been only slight deviations from this pattern by the courts. One case in the Tenth Circuit held that customary international law required that the detained Cubans be released. _See_ Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). In another case, U.S. District Court Judge Shoob held that the detentions without hearings on parole release violated the Cubans’ rights, a decision which was later reversed by the Eleventh Circuit. _See_ Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), rev’d, 734 F.2d 576 (11th Cir. 1984). In another case, a Ninth Circuit panel in a decision by Judge Noonan held that these detentions were no longer immigration confinement but were punishment, a decision which was later reversed by the court _en banc_. _See_ Barrera–Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), rev’d _en banc_, 44 F.3d 1441, (9th Cir. 1995), and cert. denied, 116 S. Ct. 479 (1995).

of detention on an unprecedented scale which had not been seen since Ellis Island closed in 1954. This policy has continued to expand and to become formalized in the statutory framework of the immigration laws. Since the earliest days of U.S. immigration restrictions, racial exclusion and exclusionary policies have been the backdrop of nearly all immigration enactments.  

As chronicled by the authors, the story of the Cubans who sought refuge at the Peruvian Embassy and the large-scale refugee migration resulting from the takeover is not yet complete, for many of these refugees remain in INS custody in various prison facilities located throughout the United States. However, the treatment of the Cubans, the legal limbo in which many of them languish, and their incarceration has become the paradigm or model for the treatment of refugees under U.S. policy. At the same time, the experience of the Cubans remains unique; many of their Haitian brothers and sisters who fled the brutal Haitian regimes of the time have been returned to their persecutors. The Cuban refugees instead were not wanted by their own country. They were in essence like stateless persons, with the nation in which they sought refuge deciding that it was better to keep them away from the rest of society.

The problem confronting the detained Cuban refugees highlights what is wrong with general immigration law and policy. The conundrum of the absence of legal rights which the Cubans could marshal on their own behalf stretches back more than one hundred years to judicial acquiescence in matters involving persons who had managed to legally enter the country but who were deemed inadmissible. The indefinite detention faced by Cuban refugees deemed "inadmissible" has been further confounded by the dramatic shift in immigration policy which began to favor detention over release.

In an odd way, the experience of the Cuban refugees is marked by the very elements which in the past served to protect them: both politics and foreign policy, two factors which were intended to be removed from the consideration of asylum protection when Congress enacted the Refugee Act in 1980. The Cuban experience provides a commentary on who chooses to come to the United States, the circumstances under which people come, and the peculiar way in which the larger public views the new arrivals. Finally, a thorough discussion of the plight of

these refugees must address their race, a factor which has been a major force in immigration policy since the founding of the United States and continues to play a major role in the entry conundrum.

THE ENTRY CONUNDRUM

In a line of cases originating with the infamous Chinese Exclusion cases, passing through the 1953 case of Shaughnessy v. Mezei and continuing on into cases decided more recently by the Supreme Court, it has become well settled that in order for an "alien" to be accorded any modicum of constitutional protection she must first have made an entry into the United States. Not included within the ambit of constitutional protection are persons who apply for admission and are allowed into the country under what is termed "parole" status. The parolee is deemed to be a person seeking admission irrespective of his physical location as long as he has not been formally admitted to the U.S. This legal fiction which revolves around whether the person is deemed to be inside or outside of the U.S. for purposes of the Constitution raises the problems encountered by the Cuban refugees facing indefinite detention. For if these refugees had been considered "persons" within the United States, they would not face arbitrary or prolonged detention even if they had been convicted and served out a criminal sentence or if they were considered to have a psychological condition necessitating their detention. The government simply would have been required to release them after they had served their sentences because there was no prospect of their ever being deported since they could not be sent back to Cuba.

This "oddity" of immigration law has been universally criticized by a legion of scholars for some time. Yet at the same time, courts dealing with the issue have steadfastly refused to recognize limitations on the

plenary power doctrine or more specifically to restrict the power to indefinitely detain excludable aliens.\textsuperscript{34} In only one circuit has a court accepted the argument that indefinite detention could be restricted.\textsuperscript{35} Indeed, the only way in which unadmitted aliens have been able to gain release is to show that the INS failed to properly exercise the parole power delegated to it by Congress.\textsuperscript{36} Thus far, Cubans facing indefinite detention have been unable to successfully argue that the effort to continue their detention was not part of the immigration power. For while the power to control immigration may be plenary, when the government is not operating under this rubric, the courts have been willing to restrict its actions.

\textbf{DETENTION AND CONDITIONS OF TREATMENT}

Beginning in 1980, U.S. immigration policy took a decided shift towards detention. Indeed, recent legislation and INS practice mandate detention in more situations than at any other time in the history of this country. Detention has reached such high levels in recent years that in addition to operating its own facilities, the INS has contracted with municipal, county, state and even private corporations to operate its detention centers.\textsuperscript{37} With the increased use of detention as a way of


\textsuperscript{35} See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). In a later case, a Ninth Circuit panel held that such detention was authorized under the statute. Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), rev'd and remanded, 44 F.3d 1441 (9th Cir. 1995), and cert. denied, 116 S. Ct. 479 (1995).

\textsuperscript{36} For example, in one case, the petitioner was able to gain release upon a showing that his parole had been revoked improperly. Moret v. Karn, 746 F.2d 989 (3d Cir. 1984).

\textsuperscript{37} One example of a private facility which received attention was the Esmor Detention Facility in Elizabeth, New Jersey, which erupted in a riot in June, 1995, after detainees complained of gross abuses by the guards. See David Gonzalez, \textit{Jail Uprising Leaves Many Sad and Biter}, N.Y. TIMES, Jun. 25, 1995, at 27, 30; Elizabeth Llorente, \textit{Esmor Probe...
dealing with the "immigration problem" has come a growing number of complaints by refugees and advocates about a wide range of issues related to detention as an extension of the immigration power.38

Whether a person is detained at a location outside of the United States, in a far away place such as Guantanamo Naval Base in Cuba, or at a facility in a remote location in Pennsylvania, significant issues are raised. One of these issues is access to legal representation. When a person who has representation is moved from one facility to another, that representation may effectively be broken off because of the transfer. The rules of access and limitations on access may also vary from facility to facility with counsel finding it difficult to represent or communicate with her client. The physical conditions within the facility, the general treatment of the "detainees" and access to adequate medical care, food and other necessities have also become the subject of much controversy.

In The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People, Professor Hamm presents in graphic detail the daily life and conditions of the Cubans who were held in Atlanta, Georgia and Oakdale, Louisiana. In particular, he focuses on the conditions in Atlanta, a prison which the Bureau of Prisons had planned to demolish until space was needed to accommodate some of the members of the Freedom Flotilla. Professor Hamm describes the conditions which led to a takeover of the prison by the Cubans, ranging from overcrowding to gross physical abuse. As was noted by a congressional committee which inspected the penitentiary before the takeover of the prison:

The current living situation for Cubans in the Atlanta Federal Penitentiary is intolerable considering even the most minimal correctional standards. These detainees—who are virtually without legal rights—are worse off than virtually all other Federal sentencing inmates. They are required to live in conditions which are brutal and inhumane. They are confined without any practical hope of ever being released. These conditions . . . present a strong possibility of future violent confrontations. For these reasons alone, Congress and the Administration should be motivated to seek out a constructive solution.39

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38. For an excellent discussion of the detention issue and the law relating to the detention of foreigners who are either attempting to enter the country or are facing removal after entry, see Taylor, supra note 33.

These types of conditions have resulted in at least three major riots by detained Cuban refugees, including the simultaneous taking of a facility chronicled in The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People.40

In recent years, the INS has been confronted with serious problems not unlike the complaints lodged by Cuban detainees at the Bureau of Prison facilities. Detainees have endured abuses ranging from strip searches to beatings by guards to other violations of their basic rights. It is also not unusual for INS detainees to be moved from facility to facility where the conditions vary widely. As noted by one commentator, the law in this area is very unclear and not well-developed.41 Persons within the custody of the INS may not avail themselves of Eighth Amendment protection because the INS detention is civil not criminal.42 Although the Supreme Court has never decided the issue, those who have entered the U.S. may be able to claim protection by way of the Fifth Amendment.43 However, conditions of confinement claims by aliens who have yet to enter the U.S. are not at all clear because of the plenary power doctrine which apportions constitutional rights only to persons considered to have "entered" the country.44

The central and more important question is what can be learned from this experience. The legacy of detention as a key part of U.S. immigration policy in the past was the eventual closing down of Ellis and Angel islands. The legacy of the present, as a result of widespread use of detention as part of immigration policy, has thus far yielded complaints of abuse and other problems commonly found in prisoner rights cases. Surely, as detention is used with increasing regularity and

40. See HAMM, supra note 6, at 155–181. See also Barrera–Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), rev’d and remanded, 44 F.3d 1441 (9th Cir. 1995), and cert. denied, 116 S. Ct. 479 (1995).
41. See Taylor, supra note 33, at 1148–55.
42. See Ingraham v. Wright, 430 U.S. 651, 666–68 (1977). In Ingraham, the Court held that corporal punishment in the public schools was not protected by the Eighth Amendment "cruel and unusual punishment" prohibition, noting that the prohibition was restricted to criminal punishment. Id. Moreover, the Court specifically cited to immigration cases for the proposition that the imposition of immigration sanctions such as deportation were civil and not criminal in nature. Id. at 668, citing Fong Yue Ting v. U.S., 149 U.S. 698 (1893); Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913).
43. In Reno v. Flores, the Court side-stepped the issue, choosing to characterize the detention of unaccompanied minors as being in "[l]egal custody." 507 U.S. 292, 298 (1993). The Court held in Bell v. Wolfish, a non-immigration case, that the Due Process Clause of the Fifth Amendment was the appropriate vehicle for asserting condition of confinement claims of pre-trial detainees. 441 U.S. 520, 535–37 (1979).
44. For a more elaborate discussion of the rights of persons in exclusion as it relates to condition of confinement cases, see Taylor, supra note 33, at 1091–97.
for longer periods of time, the courts will be called upon to deal with the question of whether the detention has been transformed to a point where it is more akin to punishment than to a legitimate exercise of the immigration control power. As detention becomes more widespread, another question which will certainly arise is the minimal level of adequate treatment called for both under domestic as well as international law.

The treatment of the members of the Freedom Flotilla was only unusual because for the first time Cuban refugees were encountering some of the same problems that refugees from other countries had encountered. In the past, Cubans were rarely detained and were paroled into the community in short order, receiving lawful permanent resident status within a one year period.

It may very well be that when historians look back at this period in immigration law, they will consider it as the nadir, just as scholars described the famous exclusion cases of the 1950s as reflecting the low point in the treatment of immigrants. Ironically, while the period of the 1950s has been described by some as the low point, the decisions rendered by the Supreme Court in that period continue to provide the underpinnings for virtually every immigration policy and act put into place since the enactment of the first immigration laws. That principle is that a nation may do whatever it pleases when it comes to those seeking admission, and that in this regard there is no court which should interfere with the policies except when the agency is acting as an outlaw. Even if agency action plainly violates its statutory mandate and thus

45. In the case of the Cuban refugees, this point is particularly relevant, for the effect of a life sentence on someone who has already served out his criminal sentence can be devastating. Professor Hamm describes the many suicides which have occurred among the Cuban refugees in prison. HAMM, supra note 6, at 92.

46. The now infamous case of Shaughnessy v. Mezei, 345 U.S. 206 (1953), which upheld the permanent exclusion of an immigrant even though no country would accept his return, and the earlier case of Harisiades v. Shaughnessy, 342 U.S. 580 (1952), which upheld the retroactive application of deportation grounds to persons who had already been admitted, relied upon the previously established plenary power doctrine. In the Mezei case, the Court repeated the famous pronouncement that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Mezei, 345 U.S. at 212, quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). The foundation for the plenary power doctrine was established in an earlier decision by the Court in Chae Chan Ping v. U.S., 130 U.S. 581 (1889) (Chinese Exclusion Case), where the Court upheld the exclusion of Chinese laborers from the United States. These cases in turn provided the underpinning for the Court's recent decision in Sale v. Haitian Centers Council, permitting the forcible return of Haitian asylum seekers, notwithstanding the Refugee Act's prohibition of returning persons to countries where their life or freedom would be threatened. See Sale v. Haitian Centers Council, 509 U.S. 155, 175 (1993); 8 U.S.C. § 1253(h) (1994).
opens itself to judicial review, the 1996 amendments to the Immigration and Nationality Act preclude judicial review. Oddly, the notion that a country can do whatever it pleases out of the reach of the judicial branch is an idea which in most of the world has fallen into disrepute. In Europe, for example, the European Human Rights Convention has been interpreted as prohibiting both the forcible return of persons to countries where they might be persecuted as well as the long term detention of persons who could not be deported. European courts have thus interpreted international law as providing some restrictions on state power. Moreover the recognition of this limitation on state power has not been viewed as a terribly frightening prospect portending the end of their notions of sovereignty.

In a recent Supreme Court decision involving Haitian asylum seekers, where U.S. officials were forcibly returning the refugees to their persecutors without hearings, the Court held that the Refugee Act neither applied to persons outside of the United States nor did it control the actions of U.S. officials outside of the country.

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47. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a), 110 Stat. 3009, 607–12 (1996), (amending 8 U.S.C. § 1252) (provides for limited review of agency decisions). Indeed, in other areas such as when persons are denied admission because they are believed to be in possession of false documents or fraudulently obtained documents, they are entitled to neither a hearing nor any judicial review. See 8 U.S.C. § 1225(b) (1994).

48. See Chahal v. United Kingdom, App. No. 22414/93, 23 E.H.H.R. 413, 414 (1997). Specifically, Article 5 para. 1(f) of the European Convention on Human Rights prohibits the deprivation of a person’s liberty unless the person has been convicted of a criminal offense. Such a deprivation is only warranted to the extent that it is necessary to effect the removal of an “unauthorized” foreigner who is seeking admission or has entered the country. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, para. 1(f), 213 U.N.T.S. 221 (entered into force Sep. 3, 1953).


50. There have been some concerns regarding the abrogation of state sovereignty but this has revolved around questions on trade and monetary controls, not issues involving immigration. To be sure, the European nations are concerned about immigration, however, this has not yet devolved into a demand that individual nations can ignore principles of international law in their immigration policy.

51. For a more detailed discussion of this case, see Kevin R. Johnson, Judicial Acquiescence to the Executive Branch’s Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers, 7 GEO. IMMIGR. L.J. 1 (1993).
Perhaps it can be said that the two driving forces of U.S.
immigration policy since the founding of the nation have been race and politics. These two forces, when coupled with the unique judicial
deference accorded in immigration matters to the legislative and executive branches of government, have allowed for a largely unfettered and politicized immigration legal scheme. It is not surprising, therefore, that Cubans would be admitted in large numbers during the period between 1959 and 1965 and greeted with greater hostility in 1980. Cuban migration in the earlier period was comprised mostly of professional and white or lighter skinned immigrants, while more of those who came in the latter period were mulatto and fewer of an identifiable professional class.  

Immigration questions are inextricably bound up with notions of identity. This is no less true when one is discussing family, employment or refugee-based migration. For inevitably when we think about immigration issues, we are contemplating whom we will welcome as part of our community. In the United States, the question of

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52. It is interesting to note that the author did not comment on the racial breakdown of the Cuban members of the Freedom Flotilla. Although there seems to be little information with a precise breakdown of the Cubans who came in the boatlift, according to one source Cuba is 51% mulatto, 37% white, 11% black and 1% Chinese. See CUBAN AMERICAN NATIONAL FOUNDATION, CUBA: PAST, PRESENT AND FUTURE, IN CUBA'S TRANSITION 145 (1992). One commentator, in discussing some of the problems in a post-Castro Cuba, emphasizes that the Cuban exile community in the United States is "overwhelmingly white and represented the professional class in pre-Castro Cuba." Stuart Grider, A Proposal for the Marketization of Housing in Cuba: the Limited Equity Housing Corporation—A New Form of Property, 27 U. MIAMI INTER-AM. L. REV. 453, 465 (1996). Recent news stories have revealed the racial tensions within the Cuban-American community. See Alfonso Chardy, "Invisible exiles": Black Cubans Don't Find Their Niche in Miami, HOUST. CHRON., Sept. 12, 1993, at A24; Mireya Navarro, Black and Cuban-American: Bias in 2 Worlds, N.Y. TIMES, Sept. 13, 1997, at A7 ("Sociologists here say one reason that whites have overwhelmingly predominated in the exodus from revolutionary Cuba in the last 38 years is that the first waves of immigrants consisted mainly of the white elite who then sponsored relatives into the United States. And many blacks stayed behind longer because they had supported a revolution that provided social gains, opening educational and professional opportunities previously denied them, even if it had not extended equally to leadership positions in government.").  

53. Indeed, the report by the President’s Commission created after the enactment of the controversial McCarran-Walter Act in 1952 was titled “Whom We Shall Welcome.” PRESIDENT’S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME: REPORT OF THE PRESIDENT’S COMMISSION ON IMMIGRATION AND NATURALIZATION 131 (1953). It might be said that we are entering a time in which many of those whom we traditionally welcomed are being shut out. Evidence of this can be seen in the efforts at drawing wider distinctions between permanent residents. These efforts intend to
immigration has at its core always been one involving race. The first and most blatant evidence of this can be seen in the discussions of the meaning of the citizenship of slaves born in the United States. Additional evidence of the racial issue can be seen in the legislation enacted during the last century which extended into the twentieth century to exclude Asians from citizenship and residency. Indeed, at the heart of the discussion of immigration creating our present immigration statute were matters of race and a concern that the identity of the nation was shifting from a Northern European stock to a Southern European stock. Curiously, while race has been a driving issue in the formulation of immigration policy, it has been the perennial unaddressed issue.

U.S. immigration law can be characterized by two levels of racial exclusion, one in which there were blatant racial exclusionary statutes and the other by more insidious policies of governmental actions and less official acts of state and federal discrimination against immigrants. An example of the official exclusions which were codified as part of the immigration statutes is the Chinese Exclusion Act. Similar insidious discriminatory policies can be found in the efforts to return Haitian refugees, or the World War II denial of admission of Jews who were fleeing persecution at the hands of Nazi Germany. On another level,
throughout our history, there have been various state and local enactments focused on various immigrant populations. In this regard, few groups have been spared victimization either by local governments or the existing population at the time.\footnote{See generally U.S. COMM’N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 7–12 (1980) (detailing historical discrimination in U.S. immigration laws).}

This reluctance to deal with the racial issues in immigration is also reflected in the treatment of the Mariel Cubans. The first major Cuban migration which came during the early years of the Castro government brought to the United States a group of people who represented for the most part the educated professionals and the ruling class and who were for the most part of European ancestry. While their coming to the United States was not totally not without controversy, they were able to blend into the majority culture and establish themselves. The members of the Freedom Flotilla, however, were of a notably different class and racial origin. In fact, these new immigrants were not the same as their fellow citizens who had come some twenty years earlier.\footnote{This phenomenon is probably not unique to Cuban immigrants. For while the new immigrants in many ways share much of the same culture and speak the same language, they are not the same as those who came at an earlier time. Surely, the earlier arrivals have become more “American” and are a little less Cuban.} This distinguishing characteristic, while obvious, has not been the subject of discussion in most of the literature relating to the plight of these people. This is ironic because one of the central complaints in litigation and scholarly discussion of Haitian refugees has been the question of racial exclusion.\footnote{See, e.g., Ellen B. Gwynn, Race and National Origin Discrimination and the Haitian Detainee, 14 FLA. ST. U. L. REV. 333 (1986); Thomas David Jones, The Haitian Refugee Crisis: A Quest for Human Rights, 15 MICH. J. INT’L L. 77 (1993); Malissia Lennox, Refugees, Racism, and Reparations: A Critique of the United States’ Haitian Immigration Policy, 45 STAN. L. REV. 687 (1993); Janice D. Villiers, Closed Borders, Closed Ports: the Plight of Haitians Seeking Political Asylum in the United States, 60 BROOK. L. REV. 841 (1994).}

One analysis of the plight that befell the Cubans who arrived as part of the Freedom Flotilla was that they were caught between the twin forces of race and politics. First, for the most part, those who arrived in the Flotilla and were subsequently incarcerated were overwhelmingly of Afro-Cuban origin, a matter that has been largely ignored by most writers on the subject of the Freedom Flotilla.\footnote{Professor Masud-Piloto spends a great deal of time discussing the economic background of these Cubans and describes them as products of the Revolution, unlike the Cubans who arrived when Castro took over who were, for the most, part professionals such as doctors and lawyers. See MASUD-PILOTO, supra note 5, at 92–100.} It had long been the
belief of refugee advocates that U.S. asylum policy was weighted against darker skinned people and in favor of persons fleeing communist regimes of eastern Europe. As mentioned above, the most notable example of this bias in policy was seen in the treatment of Haitian asylum seekers who sought refuge in the 1970s and 1980s. A lesser known example was the plight of Ethiopians and Eritreans who sought protection during the extensive civil war in that region. Perhaps it was coincidental, but it was also during this same period that the INS began shifting its policy towards one which favored detention.

CONCLUSION

For the most part, the Cuban refugee crisis of 1980 was a successful resettlement effort. The total numbers of persons who came to the U.S. from Cuba numbered approximately 117,000 and by August of 1980, slightly more than 14,000 remained in INS custody. By June of 1982, the numbers were reduced substantially to between 1,300 and 2,000 persons. However, the persons who remain in detention, even if they are not U.S. citizens, are human beings deserving of some protection. The government’s position has been that they are entitled only to be free from malicious infliction of cruel treatment or “gross physical abuse.”

Unless the legislative, executive or judicial branch deal with the remaining issue of indefinite detention, the refugee crisis will continue. There will be more riots in the prisons and more lives will be damaged.

One of the more serious side-effects of the longstanding Cuban-American political conflict was its effect on U.S. asylum policy. This occurred even though one of the explicit purposes in enacting the Refugee Act of 1980 was to eliminate politics from the process. There is a danger in allowing politics to drive determinations of asylum questions. Human rights violations may be perpetrated both by a nation’s political friends as well as her foes. Who is to say that a staunch ally of the United States, Egypt for example, does not perpetrate discrimination and persecution against members of its Coptic Christian population? Is it any less likely, that a political foe such as China is not the perpetrator of human rights violations against its dissidents? It is, therefore, no less likely that Fidel Castro engaged in persecution of his own citizens, or that Baby or Papa Doc would do the same to his

62. See Taylor, supra note 33, at 1092; Medina v. O’Neill, 838 F.2d 800, 803 (5th Cir. 1988); Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990).
As has been seen throughout history, both our friends as well as our foes may be inclined to violate the human rights of their citizens. If the granting of asylum protection is treated as a humanitarian act, it might very well help to preserve its integrity. The politicization of the process invites the adjudicator to be influenced by irrelevant considerations which will result in thwarting the very purpose of the law.

The debate about whether a country may indefinitely detain an excluded individual is really about where the immigration power begins and ends. Scholars who have wrestled with this question choose to characterize the issue as a clash between the plenary power doctrine and alien rights jurisprudence. Another way to look at this issue is by adding a concept of *ultra vires* to the analysis. This explains why there are certain actions which are not permissible even though they involve aliens who have yet to enter the country.

Much of the analysis of the entry conundrum has been based on the false premise that the power to exclude extends into the indefinite future even when exclusion is not possible. There are a set of fact situations which point out the limit to the notion of the plenary nature of the exclusion power. If we were to take several examples of situations in which aliens in exclusion were subjected to the judicial process, we would readily recognize that constitutional rights existed even for the alien to be excluded. An example of this would be the alien in exclusion, who is accused of the commission of a crime in an INS detention center. The second situation is that of a Cuban refugee in parole status against whom a tort is committed or who wishes to sue for breach of contract. In each of these situations, U.S. courts would not distinguish the person because of her immigration status. In the criminal case, the defendant would be entitled to the full protection of the Constitution since the matter involves a crime and the potential deprivation of the person's liberty. In the second case, both the alien tort plaintiff or tortfeasor who alleges breach of contract would be given full access to the courts.

The important question to ask is why it is that the defendant in a criminal case or the plaintiff or defendant in a civil action is treated no differently than any U.S. citizen or resident. The answer to the question,

63. In this respect, I would disagree with the characterization by Professor Masud-Piloto that those who came in the Freedom Flotilla were economic migrants as compared to the Haitian refugees who came at the same time. While it is unfortunate that the United States politicized the situation by refusing to acknowledge that the government which it supported persecuted its own people, to do so with the Cuban refugees is equally improper. Asylum should be decided without invoking a political agenda.

64. U.S. v. Henry, 604 F.2d 908, 913 (5th Cir. 1979); United States v. Casimiro-Benitez, 533 F.2d 1121 (9th Cir. 1976); U.S. v. Moya, 74 F.3d 1117, 1119 (11th Cir. 1996).
I believe, is found in the nature of the power which is being asserted. In the criminal case, it is the power of the state acting to punish an individual and deprive her of her liberty because of a crime which may have been committed. In the civil case, it is one individual seeking redress against another with the assistance of the judicial process. These actions can be clearly distinguished from removal of the alien because they have no significant connection to the immigration power. Finally, when considering the end to be served by preserving the plenary nature of the power into the indefinite future, the interest diminishes over time. This is the type of approach taken by courts in recognizing some limit on the power to detain indefinitely. Indeed, even courts which have been unwilling to recognize these limitations agree that if the court believed that punishment was involved in the detention it could be a violation of the person's rights.65

It seems that one cannot discount the impact of race in trying to understand the enigmatic issue of the plenary power. Certainly, there are other factors such as national identity which fuel the concern for protecting the borders. While the calls for immigration controls subsided during the period before and following World War II, it was only in 1952 that the Asian exclusion provisions were finally removed.66 In 1965, Congress eliminated the national origin quota system, a system which had been designed to maintain the racial composition of the United States in existence at the turn of the century.67 The period following the end of the Vietnam War saw the first major influx of Asians to the United States. A larger number of Filipinos with post-colonial and World War II ties to the United States also began to immigrate. U.S. involvement in the Korean War also encouraged increased migration from that country. Political turmoil or civil wars in Afghanistan, Iran and Central America in later years brought additional refugees to the United States.68 The immigrant population during this period until the present was not the traditional white European migration to which the United

65. See Wong Wing v. U.S., 163 U.S. 228, 237 (1896) (finding that the punishment of aliens for their illegal immigration status was unconstitutional); Franco-de Jerez v. Burgos, 876 F.2d 1038 (1st Cir. 1989). In Cruz-Elias v. U.S. Atty. Gen., 870 F. Supp. 692, 697 (E.D. Va. 1994), a district judge, while not finding in the particular case that indefinite detention amounted to punishment, speculated that punishment would not be legal.


68. It should be pointed out that the United States had significant political and military involvement either by propping up the governments of these countries or destabilizing them. In short, U.S. foreign policy interests were involved and being furthered.
States had been accustomed. Legislation enacted in 1986, 1990 and 1996 began to place increasing restrictions on immigration, making it easier for the government to remove lawful permanent residents and restricting their access to public benefits. 69

The public mood is decidedly anti-immigrant even though immigration to the United States is less than it was at the turn of the century. This political mood is certainly not lost on the Executive or the Congress which has increased the use of detention as a part of U.S. immigration policy. This combination of the public’s anti-immigrant mood and the broad discretion accorded by the judiciary to Congress and the Executive in matters which they choose to characterize as related to immigration reinforce the continuing vitality of indefinite detention. Ultimately, the inability of the judicial branch to divorce the practice of indefinite and inhumane detention from the plenary power doctrine has resulted in the ultimate folly of the twentieth century immigration jurisprudence.

69. In fact, the immigration legislation of 1986 attempted to facilitate the increased immigration of Europeans to the United States through a program called the “diversity lottery.” BOSWELL & CARRASCO, supra note 21, at 348.