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## RETHINKING IMMIGRATION'S MANDATORY DETENTION REGIME: POLITICS, PROFIT, AND THE MEANING OF "CUSTODY"

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Philip L. Torrey\*

### INTRODUCTION

Immigration detention in the United States is a crisis that needs immediate attention. U.S. immigration detention facilities hold a staggering number of persons. Widely believed to have the largest immigration detention population in the world, the United States detained approximately 478,000 foreign nationals in Fiscal Year 2012.<sup>1</sup> U.S. Immigration and Customs Enforcement (ICE), the agency responsible for immigration enforcement, boasts that the figure is "an all-time high."<sup>2</sup>

In some ways, these numbers are unsurprising, considering that the United States incarcerates approximately one in every one hundred adults within its borders—a rate five to ten times higher than any other Westernized country.<sup>3</sup> An immigration law, known as the mandatory detention statute, is partially to blame for this record-breaking immigration detention population. Under this law, facilities may hold noncitizens without providing them an opportunity to ask for release.

As currently interpreted by DHS, the mandatory detention statute requires the detention of any noncitizen in removal proceedings who falls into any of the broad categories listed in the

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1. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT 1 (Dec. 2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf); see Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. ON MIGRATION AND HUMAN SEC. 97, 101 n.11 (2013) (noting that over 429,000 immigrants were detained in 2012).

2. See *id.*

3. NAT'L ACADS. PRESS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis & Bruce Western eds., 2014). The United States holds nearly twenty-five percent of the world's prisoners despite having only five percent of the global population. *Id.*

statute. The mandatory detention statute states that DHS “shall take into custody” any noncitizen:

- Who committed a “crime involving moral turpitude”;
- Who has two or more criminal convictions;
- Whom DHS believes is a drug trafficker;
- Who committed any prostitution-related offense;
- Who committed any money laundering-related offense;
- Who committed an “aggravated felony”;
- Who committed any drug-related offense;
- Who committed any firearms-related offense; or
- Whom DHS believes has engaged in any terrorist-related activities.<sup>4</sup>

The statute has been interpreted as stripping DHS and Immigration Judges of their discretion to release an individual who falls into one of the broad categories listed above. Ultimately, this consistently funnels noncitizens into the immigration detention system—a system that is costly, harsh, and virtually immune from constitutional oversight.

Essentially, immigration detention is criminal detention but without the constitutional protections. Courts do not regard immigration detention and deportation as punishment; therefore, immigration law is considered civil law.<sup>5</sup> Consequently, individuals

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4. See 8 U.S.C. § 1227(a) (2012). Application of the mandatory detention statute depends on whether a noncitizen is considered to be inadmissible or deportable, and may depend on the length of a criminal sentence. See *id.* But, for the purposes of this Article, the distinctions are inconsequential. A crime that involves “moral turpitude” is one that includes “an act of baseness, vileness, or depravity in the private and social duties which a man owes his fellow men, or to society in general.” See BOUVIER’S LAW DICTIONARY 2247 (3d ed. 1914). “Aggravated felonies” are statutorily defined and include a wide range of offenses from murder to bribery of a witness. See 8 U.S.C. § 1101(43)(A)–(U) (2008). A more complete discussion of “crimes involving moral turpitude” and “aggravated felonies” can be found in DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES §§ 6:1–6:6, 7:22–7:46 (2014). Other bases for mandatorily detaining a noncitizen, including those subject to administrative removal, expedited removal, and reinstatement, are beyond the scope of this article.

5. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“The [removal] proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.”); *Carlson v. Landon*, 342 U.S. 524, 537–38 (1952) (noting that “[d]eportation is not a criminal proceeding and has never been held to be punishment” and that “[d]etention is necessarily a part of this deportation procedure”); see also Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 141–42 (2009) (“The well-known constitutional maxim that deportation (now “removal”) is not punishment provides long-standing precedent for important legal distinctions between civil immigration proceedings and criminal proceedings.” (internal citations omitted)); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (“[D]espite

facing immigration detention and deportation do not have the same constitutional protections as defendants facing criminal incarceration.<sup>6</sup> Some of the traditional constitutional protections inapplicable in the immigration context include the privilege against self-incrimination, the right to trial by jury, the prohibition on ex post facto laws, the right to appointed counsel, and the ban on cruel and unusual punishment.<sup>7</sup> The Fifth Amendment requires immigration proceedings to be “fundamentally fair.” But statutes and regulations—not the Constitution—provide specific due process protections because Congress has plenary power concerning federal immigration policy.<sup>8</sup>

Despite its characterization as *civil* confinement, a closer look at immigration detention reveals that is often harsher than criminal detention. Immigration detainees are held in roughly 257 detention facilities around the country, which are either operated by state and local law enforcement agencies or by for-profit corporations.<sup>9</sup> Immigration detainees are often held in the same units as criminal detainees, with conditions that include shackling, solitary confinement, and lack access to proper nutrition, exercise, and basic healthcare.<sup>10</sup> In fact, there have been 111 reported deaths in immigration detention largely due to improper medical attention and suicide.<sup>11</sup> Some of the worst conditions are found in privately

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immigration detention’s legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement.”).

6. See, e.g., Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675 (2015) (analyzing noncitizens’ inability to cross-examine police officers in immigration proceedings because the Sixth Amendment’s Confrontation Clause does not apply); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012) (analyzing the lack of appointed counsel for noncitizens using the Sixth Amendment of the U.S. Constitution).

7. Many scholars have written on the lack of constitutional protections in immigration proceedings. See, e.g., Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

8. See, e.g., 8 U.S.C. § 1229a(b)(4)(A) (2012) (“[T]he alien shall have the privilege of being represented, at no expense to the Government by counsel of the alien’s choosing who is authorized to practice in such proceedings.”); 8 C.F.R. § 1003.16(b) (2014) (“The alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice . . . at no expense to the government.”).

9. NAT’L IMMIGRATION FORUM, *THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES* 2, 4 (2013), available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf> [hereinafter MATH OF IMMIGRATION DETENTION].

10. See *Conditions in Immigration Detention*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2383> (last visited Mar. 22, 2015).

11. *Id.* (highlighting that 111 deaths have been reported since 2003, “many . . . by a lack of timely and thorough medical care and nearly one fifth of them have been suicides.”).

owned prisons, which in 2011 held roughly half of the U.S. immigrant detention population.<sup>12</sup>

Immigration detention is unnecessarily costly. The U.S. Department of Homeland Security (DHS) has a \$2 billion budget devoted to detention operations—much of which goes to private prison companies that contract with DHS to provide detention beds.<sup>13</sup> Congress has committed so much funding to the detention and deportation of noncitizens that DHS's overall budget is now larger than the budgets of all other federal law enforcement agencies combined.<sup>14</sup> Estimates indicate that it costs roughly \$166 per day to keep a person in immigration detention, but alternatives to detention, such as electronic monitoring, DHS check-ins, and curfews, can cost as little as 70 cents per day.<sup>15</sup>

Many claim that although immigration detention is expensive, it is necessary to prevent noncitizens from skipping out on immigration orders and to stop violent noncitizens from committing serious crimes in the future.<sup>16</sup> But the statistics show otherwise. In a 2009 snapshot of the immigration detention system, DHS admitted that the 30,000 detainees held on that day had “a low propensity for violence” and only eleven percent had previously been convicted of a violent offense.<sup>17</sup> Furthermore, “[b]etween 2009 and 2011, over half of all immigrant detainees had no criminal records. Of those with any criminal history, nearly 20 percent were merely for traffic

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12. MATH OF IMMIGRATION DETENTION, *supra* note 9, at 7–8; see Michael McLaughlin, *10 Worst Immigrant Detention Centers Should be Closed, Detention Watch Network Report Says*, HUFFINGTON POST (Nov. 16, 2012, 11:29 AM), [http://www.huffingtonpost.com/2012/11/16/worst-detention-centers-detention-watch-network\\_n\\_2138999.html](http://www.huffingtonpost.com/2012/11/16/worst-detention-centers-detention-watch-network_n_2138999.html) (“Private companies operate some of the prisons and jails on the list . . .”).

13. See MATH OF IMMIGRATION DETENTION, *supra* note 9, at 2–4.

14. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES 20–21 (2013), available at <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

15. See MATH OF IMMIGRATION DETENTION, *supra* note 9, at 1, 9; Garance Burke & Laura Wides-Munoz, *Immigrants prove big business for prison companies*, MSNBC (Aug. 22, 2013), <http://www.msnbc.com/msnbc/immigrants-prove-big-business-prison?lite=>.

16. See, e.g., Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 140 (“Stated simply, the first-order policy goals of immigration detention are to ensure that the federal government may effectuate its decisions to exclude or deport noncitizens from the United States and to protect the public from any danger that may be posed by noncitizens pending this process.”); Jessica Vaughan, *DHS Sec. Johnson Disputes Detention Bed Mandate*, CTR. FOR IMMIGRATION STUDIES (Mar. 14, 2014), <http://cis.org/vaughan/dhs-sec-johnson-disputes-detention-bed-mandate> (opining that it is necessary to spend billions of dollars to detain noncitizens with criminal convictions to ensure their removal and protect the public).

17. See DR. DORA SCHIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

offenses.”<sup>18</sup> Additionally, studies show that alternative-to-detention programs are highly effective in ensuring appearances at future removal hearings.<sup>19</sup>

This Article proposes a solution to the unnecessarily costly and overly broad immigration detention regime. It argues that the mandatory detention statute can be interpreted to afford DHS and Immigration Judges discretion to make custody determinations that utilize alternatives to detention that are less costly and more humane. First, the term “custody” in the mandatory detention statute should be interpreted broadly to include alternatives to detention. Alternatively, if the term “custody” continues to be narrowly interpreted to require physical confinement, DHS should utilize detention alternatives as “terms of confinement.” Part III further explains these hypotheses.

Part I of this Article discusses the history of mandatory detention in the United States. Part II examines how the rise of the private prison industry, which spends millions of dollars lobbying Congress and contributing to Congressional campaigns, significantly influenced the continued use of immigration detention. Part II, Section A provides a brief overview of the private prison industry, including its history and the current conditions in some private prison facilities. Part II, Section B examines the industry’s rise in political power. This Section also details how increased lobbying efforts correspond to increased profits for the industry despite its claim that it does not lobby on issues pertaining to immigration policy. Finally, Part III discusses two ways in which immigration officials can interpret the mandatory detention statute to regain discretion in making custody determinations.

## I. THE HISTORY OF MANDATORY IMMIGRATION DETENTION

Since the late 19th century, laws fueled by concerns about race, political ideologies, the economy, crime, and terrorism have shaped the mandatory detention regime. To understand why the problem

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18. MATH OF IMMIGRATION DETENTION, *supra* note 9, at 5.

19. See, e.g., LUTHERAN IMMIGRATION & REFUGEE SERV., ALTERNATIVES TO DETENTION (ATD): HISTORY AND RECOMMENDATIONS 2 (2013), available at <http://lirs.org/wp-content/uploads/2013/04/LIRS-Backgrounder-on-Alternatives-to-Detention-3-12-13.pdf> (showing a compliance rate of at least ninety percent in three separate studies); DETENTION WATCH NETWORK & MILLS LEGAL CLINIC, STANFORD L. SCH., IMMIGRANTS’ RIGHTS CLINIC, POLICY BRIEF: COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION (2010), available at [https://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/DWN\\_ATD\\_Report\\_FINAL.pdf](https://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/DWN_ATD_Report_FINAL.pdf) (discussing the effectiveness of community-based alternatives to detention).

of mandatory detention continues to exist and how to fix it, a review of the history of mandatory detention in the United States is necessary. Section A describes the first one hundred years of federal immigration detention. It focuses on how U.S. immigration detention policies were used to simultaneously facilitate the entry of European migrants to the East Coast of the U.S. and to preclude Asian migrants from entering the West Coast. This Part then discusses how the government used detention to neutralize perceived political enemies of the United States before and during the Cold War. Section B examines the political climate of the 1980s, which immediately preceded the creation of today's mandatory detention statute.

#### A. Early Immigration Detention Policies and Practices

Federal immigration detention policies began with the creation of a federal immigration inspection system in 1882.<sup>20</sup> Previously, states used their police power to develop and enforce their own immigration policies concerning detention of noncitizens.<sup>21</sup> Those policies were largely based on fears about both the spread of communicable diseases brought by new entrants and the entry of persons who would drain state-funded services.<sup>22</sup> Early federal immigration policies were influenced by the same concerns.<sup>23</sup> But immigration detention was used sparingly on the East Coast, mostly to ensure the orderly entry of European migrants after inspection.<sup>24</sup> Immigration detention policies on the West Coast, however, were fueled by racial discrimination.<sup>25</sup> Over time, discrimination based on political opinion became an additional influence on detention policies and practices.

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20. See Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 21–22 (2010).

21. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 19–20 (1996).

22. See *id.* at 23–34.

23. See *id.*

24. See DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 11 (2012).

25. See *infra* Part I.A.2, and accompanying notes; see also Office of the Historian, *Milestones: 1866-1898: Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited May 7, 2015) (“American objections to Chinese immigration took many forms, and generally stemmed from economic and cultural tensions, as well as ethnic discrimination.”).



### 1. The East Coast Model: Detention as a Tool to Facilitate Admission

Despite the shift from multiple state immigration systems to a unified federal immigration system, no legal statutory basis existed for detaining a migrant seeking entry until the Immigration Act of 1891.<sup>26</sup> On the East Coast, immigration detention was effectively a tool to guarantee a thorough inspection before entry: “[I]nspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made.”<sup>27</sup> Although the 1891 Act provided no statutory basis for releasing a new arrival from detention prior to inspection, the informal practice of releasing a detainee on bond quickly developed in the East Coast’s main port of New York City.<sup>28</sup>

Congress quickly condemned these new release practices because they circumvented the inspection process.<sup>29</sup> In an 1892 report, Congress suggested that detention was mandatory prior to inspection for those seeking entry into the United States. Admonishing immigration authorities, Congress wrote that it could “fill the statute book with laws, but without faithful, competent, impartial, and intelligent interpretation and administration of them, they are worthless paper.”<sup>30</sup>

In 1893, Congress passed the first law requiring the detention of certain immigrants.<sup>31</sup> The new law ordered, “every inspector of arriving alien immigrants to detain for a special inquiry . . . every person who may not appear to him to be clearly and beyond doubt entitled to admission.”<sup>32</sup> Immigration officers were precluded from exercising their discretion in making custody determinations, unless it was obvious that the new arrival was entitled to entry.<sup>33</sup> According to one commentator, the new law “reflected the view,

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26. WILSHER, *supra* note 24 at 11.

27. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1085.

28. See WILSHER, *supra* note 24, at 14.

29. For example, an 1892 Congressional report cited numerous examples of charitable organizations paying for the release of new immigrants who would have otherwise been detained as paupers likely to become public charges. See *id.*

30. *Id.* (citing H.R. COMM. ON IMMIGRATION & NATURALIZATION, IMMIGRATION INVESTIGATION, H.R. REP. NO. 2090, at 12 (1892) (giving examples of Hebrew charities using their own assets to secure bond for paupers and others)).

31. *Id.* at 15.

32. Act of Mar. 3, 1893, ch. 26, 27, Stat. 569 (providing for enforcement of the immigration and contract-labor laws of the United States).

33. See WILSHER, *supra* note 24, at 15.



confirmed by judicial doctrine of the time, that migrants were essentially beyond constitutional protection until authorized to be admitted.”<sup>34</sup>

Immigration officers often defied the new law and continued to release new arrivals on bond.<sup>35</sup> At the time, bond was usually used as insurance against the noncitizen becoming a public charge.<sup>36</sup> If the bonded out immigrant became destitute after release, then bond was revoked and he or she was re-detained.<sup>37</sup> The practice allowed new arrivals the chance to prove that they could survive in U.S. society without relying on public coffers, and it reflected immigration officials’ “desire for flexibility and pragmatism over the use of detention.”<sup>38</sup>

Most immigrants arriving in New York during the late 19th and early 20th centuries were from Europe and were usually allowed entry after a brief inspection. According to the Commissioner of Immigration in New York at the time, eighty or eighty-five percent of migrants seeking entry through New York were allowed to enter without being detained.<sup>39</sup> The remaining fifteen to twenty percent of new arrivals were detained for short periods of time due to minor illness or until they could prove they were not destitute.<sup>40</sup> The Commissioner claimed that he ultimately excluded less than one percent of all migrants arriving in New York.<sup>41</sup>

## 2. The West Coast Model: Detention as a Tool for Racial Discrimination

Unlike the European arrivals in New York, the arrival of Asian migrants on the West Coast during the mid to late 19th century triggered racist immigration detention practices.<sup>42</sup> A rising anti-Chinese movement caused the same detention policies to be enforced disproportionately on Asian entrants on the West Coast.<sup>43</sup> Officials subjected Asian immigrants to lengthy detention simply because of

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34. *Id.* at 15; *see infra* Part I.A.2 for a discussion of the judicial doctrine concerning the constitutional rights afforded migrants seeking entry.

35. *See* WILSHER, *supra* note 24, at 15–16.

36. *See* H.R. REP. NO. 3021, at 20 (1906).

37. WILSHER, *supra* note 24, at 17.

38. *See id.*

39. S. COMM. ON IMMIGRATION, FOREIGN IMMIGRATION, S. REP. 3119 (1902).

40. *Id.*

41. *Id.*

42. Office of the Historian, *supra* note 25.

43. *See* Benson, *supra* note 20, at 21–25; Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1711–13 (2009).

their race; many immigrants challenged their detention in federal courts.<sup>44</sup>

In a series of striking judicial decisions that upheld the racist policies, the U.S. Supreme Court punted immigration policy-making authority to Congress, offering little oversight from the judiciary.<sup>45</sup> Congress's new plenary power gave it the ability to pass racially-motivated immigration laws while courts sat by idly.<sup>46</sup>

Executive branch immigration officers then interpreted and enforced those laws with equal impunity. In numerous cases filed by petitioners of Asian descent, the U.S. Supreme Court held that individual custody determinations by immigration officials were largely unreviewable. In 1892, the U.S. Supreme Court first considered the issue of immigration detention in *Nishimura Ekiu v. United States*.<sup>47</sup> Interpreting the Immigration Act of 1891, the Court found that "it is impossible to construe [the Act] as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers."<sup>48</sup> Four years later, the Court held that immigration detainees had no right to due process protections because immigration detention was simply "temporary confinement as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens."<sup>49</sup>

### 3. Detention of Political Dissidents under the Guise of National Security

In the early 1900s, the target of immigration detention policies turned to perceived political enemies. Interior immigration enforcement and detention increased dramatically. National security

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44. See WILSHER, *supra* note 24, at 22; Benson, *supra* note 20, at 21–25 (discussing the use of immigration detention in the late 1800s).

45. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); see also NEUMAN, *supra* note 21, at 14 ("In the late nineteenth century, the Supreme Court transformed this characterization of international law into a constitutional doctrine of Congress's 'plenary power' to exclude or expel aliens, unconstrained by any judicially enforceable constitutional limits"). The U.S. Supreme Court's reluctance to strike down federal immigration policy rooted in racism set immigration law down a peculiar and unique constitutional path. See generally Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 ("Immigration law is constitutionally distinct."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (comparing immigration law and mainstream constitutional law).

46. *Chae Chan Ping*, 130 U.S. at 606.

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

48. *Id.* at 664.

49. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

concerns prompted immigration officials to use immigration detention as a tool to detain suspected Bolsheviks, anarchists, and labor organizers.<sup>50</sup> Similar to bond practices in the late 19th century, some detainees were released from detention and afforded the opportunity to show that they would discontinue their politically subversive behavior.<sup>51</sup>

During the Cold War, officials generally discontinued the practice of discretionary release in cases of suspected Communists.<sup>52</sup> Like the cases filed by Asian migrants in the late 19th century, similar claims filed by political dissidents held in prolonged detention allowed courts to further limit the constitutional protections afforded to immigrant detainees. In the 1952 case *Carlson v. Landon*, the Supreme Court held that immigration authorities could detain noncitizens suspected of belonging to the Communist Party without a hearing because the detention was sufficiently related to national security.<sup>53</sup>

In his dissent, Justice Black wrote that detention without the opportunity to request release on bond was a violation of the “Eighth Amendment’s ban against excessive bail; First Amendment’s ban against abridgement of thought, speech and press; Fifth Amendment’s ban against depriving a person of liberty without due process of law.”<sup>54</sup> Justice Black explained that immigration custody determinations, which are largely unreviewable and not subject to due process protections, must be related to the enforcement of immigration policies:

[I]t is not necessary to keep [Communists] in jail to assure their compliance with a deportation order, their imprisonment cannot possibly be intended as an aid to deportation. They are kept in jail solely because a bureau agent thinks that is where Communists should be. A power to put in jail because dangerous cannot be derived from a power to deport. . . . I think that condemning people to jail is a job for the judiciary in accordance with procedural “due process of law.”<sup>55</sup>

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50. See WILSHER, *supra* note 24, at 30.

51. See *id.* at 31.

52. *Id.* at 62.

53. *Carlson v. Landon*, 342 U.S. 524, 535–37 (1952) (reasoning that the Communist Party promoted violent activities related to overthrowing the U.S. government).

54. *Id.* at 548 (Black, J., dissenting).

55. *Id.* at 551–55.

The omnibus Immigration and Nationality Act of 1952 (INA), enacted shortly after *Carlson*, echoed Justice Black's dissent. According to one commentator, "[t]he 1952 Act was an important first expression by Congress of the need for alternative arrangements to separate out detention from deportation issues."<sup>56</sup> Under the INA, authorities could grant a noncitizen release from detention on bond, pending a final determination of removability.<sup>57</sup> Detention rates subsequently fell as immigration authorities exercised their discretion by releasing noncitizens who were neither a flight risk nor a danger to the community.<sup>58</sup>

Although the INA also gave federal courts jurisdiction to review custody determinations, the 1953 case *Shaughnessy v. United States ex rel. Mezei* demonstrated the Court's continued reluctance to review such determinations—especially those involving alleged political dissidents.<sup>59</sup> In *Mezei*, a petitioner returning from a trip "behind the Iron Curtain" was detained at Ellis Island for three years based on secret information the U.S. government refused to disclose.<sup>60</sup> Relying on previous cases, such as *Nishimura Ekiu*, the Court reasoned that due process rights afforded to immigrants in prolonged detention were governed solely by acts of Congress and were not meant for judicial oversight.<sup>61</sup> In reaching its decision the Court compared the petitioner's detention to humanitarian relief; his stay at Ellis Island was considered a "temporary haven" afforded to him by "an act of legislative grace."<sup>62</sup>

Justice Jackson penned a passionate dissent in *Mezei*. Recognizing the majority's illogical characterization of the returning immigrant's detention, he wrote:

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56. WILSHER, *supra* note 24, at 65.

57. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 242(a), 66 Stat. 163, 208–09 (1952) ("Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, be continued in custody . . . or be released under bond.").

58. See WILSHER, *supra* note 24, at 64 ("In 1955, of 200,000 arrivals at the port of New York, astonishingly only sixteen were detained."); see also MARK DOW, AMERICAN GULAG: INSIDE IMMIGRATION PRISONS 6–7 (2004) ("The Immigration and Naturalization Service announced in 1954 that it was 'abandoning the policy of detention,' according to refugee expert Arthur Helton, except in rare cases when an alien was considered likely to 'abscond' or to pose a danger to the nation or community.").

59. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

60. See *id.* at 208, 214.

61. See *id.* at 212 ("[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'").

62. *Id.* at 207, 215.

Realistically, this man is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. . . . We must regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law.<sup>63</sup>

Like Justice Black's dissent in *Carlson*, Justice Jackson believed that the noncitizen should be afforded due process, including the opportunity for a fair hearing on the merits of his detention.<sup>64</sup> He wrote, "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone."<sup>65</sup>

### B. *The Abrupt Arrival of Today's Mandatory Detention Statute*

Shifting attitudes about noncitizens continued to shape immigration detention policies and practices in the 1980s and 1990s. Like the 1890s, Congress questioned immigration authorities' ability to make sound custody determinations in the 1980s. Consequently, in 1988, Congress enacted the current mandatory detention statute, which was subsequently broadened in the 1990s. As discussed below, the law and its expansion was essentially a product of Congress conflating immigration with a slumping economy, rising crime, and terrorism.

#### I. "Economic Migrants" Precipitate a Shift in Immigration Detention Practices

Other than the recent 2008 recession, the recession during the early 1980s was the worst post-World War II economic crisis to hit the United States.<sup>66</sup> Immigration enforcement priorities reflected worries about the economy. Immigration officials stated that enforcement recourses would be used on border security and the deportation of immigrants who were in "lucrative jobs at the expense of citizens and lawful aliens."<sup>67</sup>

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63. *Id.* at 220–21 (Jackson, J., dissenting).

64. *See id.* at 228.

65. *Id.*

66. Richard C. Auxier, *Reagan's Recession*, PEW RES. CTR. (Dec. 14, 2010), <http://www.pewresearch.org/2010/12/14/reagans-recession/>.

67. Dow, *supra* note 58, at 7.

The mass arrival of Cuban refugees and so-called “economic migrants” from Haiti in the 1970s and early 1980s also influenced immigration detention practices.<sup>68</sup> In April 1980, nearly 125,000 Cubans left the port of Mariel, Cuba for the United States.<sup>69</sup> President Carter welcomed the refugees from America’s most prominent foe in the Western Hemisphere. The Cubans were initially detained in Miami but then processed and quickly released.<sup>70</sup>

Flotillas of Haitians seeking refuge in the United States around the same time prompted a much different response from the new Reagan Administration. The Administration stopped Haitians from entering the United States because they were considered economic migrants who did not qualify as asylees under new U.S. refugee law.<sup>71</sup> In 1981, Reagan brokered an agreement with Haitian dictator Jean-Claude “Baby Doc” Duvalier to allow the U.S. Coast Guard to interdict Haitian boats in open waters, preventing them from landing on U.S. soil and requesting asylum.<sup>72</sup> The Haitians who did make it to the United States were immediately put into detention facilities and held for lengthy periods of time.<sup>73</sup>

In addition to the Haitian refugee crisis, the Reagan Administration’s support of politically conservative Central American guerrilla groups at war against leftist governments triggered a further rise in

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68. See generally Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39 (1999) (discussing the history of U.S. and Cuban relations and documenting U.S. immigration policy of Cubans and Haitians in the late twentieth century); Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747 (1993) (arguing that Haitian entrants in the 1970s were improperly categorized as economic migrants rather than refugees); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power*, 22 HASTINGS CONST. L.Q. 1087, 1100–02 (1995) (analyzing the shift in U.S. detention policies with the incarceration of Marielito Cubans and Haitians in the 1980s).

69. Carl Hulse, *Echoes of Past Battles on Immigration Ring Through Current Debate*, N.Y. TIMES (July 26, 2014), <http://nyti.ms/1t9u9Nv>; see Dow, *supra* note 58, at 7.

70. Dow, *supra* note 58, at 7 (noting that the Cuban immigrants, left Cuba and were admitted into the U.S. in just six months). The policy is reminiscent of early detention policies to facilitate entry discussed *supra* Part I.A.1.

71. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 2 (2005), available at <http://trac.syr.edu/immigration/library/P960.pdf>.

72. See *id.* at 2–3.

73. See Dow, *supra* note 58, at 7. In a lawsuit filed by a class of Haitians challenging the shift in U.S. immigration policy, the U.S. Supreme Court held that a decision to detain based purely race or nationality was unlawful because it was inconsistent with in the INA and federal regulations. See *Jean v. Nelson*, 472 U.S. 846, 857 (1985). The Court did not address the issue of whether a noncitizen was constitutionally entitled to an individualized determination of detention. In his dissent, Justice Marshall argued that determinations of admissibility, which are largely beyond judicial review, are separate and distinct from custody determinations, which should be subject to judicial review and supported by evidence. See *id.* at 874–75 (Marshall, J., dissenting) (“Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.”).

immigration detainees. The violence in Central America, partly fueled by U.S. foreign policy initiatives that included the establishment and exploitation of capitalist markets in countries like El Salvador and Guatemala, forced thousands of Central Americans to flee their countries.<sup>74</sup> The Central American refugees made their way to the U.S.-Mexico border where they were apprehended and detained by immigration officials.<sup>75</sup> The massive influx of Central American migrants overwhelmed immigration officials who consequently asked Congress for funds to create more detention space.<sup>76</sup> This demand for detention beds and Reagan's privatization initiatives helped the private prison industry grow.<sup>77</sup>

## 2. Escalation of the Drug Wars and Immigration Detention

Although Reagan's wars in Central America influenced immigration officials' enforcement practices, the Reagan Administration's escalation of President Nixon's "war on drugs" ultimately pushed Congress to pass mandatory detention legislation.<sup>78</sup> The deportation of noncitizens with drug-related convictions, and other criminal offenses, became increasingly popular.

Congress moved quickly to pass legislation allowing immigration officials to detain and deport all noncitizens with a criminal offense—especially a drug-related offense.<sup>79</sup> On March 12, 1987, Congress held a public hearing on immigration officials' inability to effectively deport noncitizens with felony convictions.<sup>80</sup> Testimony from state and local law enforcement officers supported a "no-

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74. See Dow, *supra* note 58, at 8; Kevin Sullivan & Mary Jordan, *In Central America, Reagan Remains a Polarizing Figure*, WASH. POST, June 10, 2014, at A08 ("Admirers credit Reagan with changing the course of Central America and helping to nurture democratic governments and free-market systems across the region. Many said Reagan's advocacy of open markets and U.S.-style capitalism sowed the earliest seeds of El Salvador's adoption of the U.S. dollar as its official currency.").

75. See Dow, *supra* note 58, at 8; see also Taylor, *supra* note 68, at 1100 (1995); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 159–160 (1990).

76. See Dow, *supra* note 58, at 8.

77. See *infra* Part II.A.1.

78. See Cuauhtémoc García Hernández, *supra* note 5, at 1365–68.

79. See *id.* at 1361, 1367–68.

80. See *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Fed. Spending, Budget, and Accounting of the S. Comm. On Governmental Affairs*, 100th Cong. (1987); Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 345 (David A. Martin & Peter H. Schuck eds., 2005). According to Taylor, the immigration enforcement agency was largely underfunded, and simply did not have the infrastructure to detain individuals apprehended inside the United States who were fighting their deportation. *Id.* at 348.



bond” policy for convicted felons who did not have legal immigration status in order to prevent them from “buying their way out of detainment.”<sup>81</sup> The following year, the Senate amended a House bill in an informal conference and without public debate. The bill later became the Anti-Drug Abuse Act of 1988 (ADAA), which required the mandatory detention of any noncitizen convicted of an “aggravated felony.”<sup>82</sup>

The modern mandatory detention regime was thus born with the passage of the ADAA.<sup>83</sup> Despite the appearance of a thorough investigation, Congress spent little time contemplating the impact of the wide-reaching mandate.<sup>84</sup> Immigration officers were now stripped of discretionary authority concerning the custody determinations of large classes of noncitizens. Many experts, including immigration officials, considered the statute to be “unduly harsh, unrealistic, and unwise.”<sup>85</sup>

Less than a year after the ADAA’s enactment, Congress held another hearing to discuss procedures for improving the identification, detention, and deportation of noncitizens with criminal convictions.<sup>86</sup> During the hearing, the Chairman of the Subcommittee on Immigration, Refugees, and International Law remarked that “there also seems to be overly generous behavior by the immigration judges relating to the steps taken to impose bonds on individuals . . . who ought to be detained.”<sup>87</sup> Shortly thereafter, Congress expanded the aggravated felony definition.<sup>88</sup> As a result,

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81. *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Fed. Spending, Budget, and Accounting of the S. Comm. on Governmental Affairs*, 100th Cong. 9 (1987) (statement of Robert Dempsey, Comm’r, Florida Dep’t of Law Enforcement) (internal quotations omitted).

82. H.R. 5210, 100th Cong. § 7343(a)(2) (1988) (“The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction. Notwithstanding subsection (a), the Attorney General shall not release such felon from custody.”).

83. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, Sec. 7343(a)(4), 102 Stat. 4181, 4470 (amending 8 U.S.C. Sec. 1252(a)(2) to provide for mandatory detention of certain noncitizens with criminal convictions).

84. See Taylor, *supra* note 80, at 345.

85. See *id.*

86. *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. of the Judiciary*, 101st Cong. (1989).

87. *Id.* at 35.

88. See Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (expanding the definition of aggravated felony to include crimes of violence with a sentence of at least five years). The Immigration Act of 1990 did limit the mandatory detention of aggravated felons to non-lawful permanent residents. *Id.* § 504, 104 Stat. 4978, 5049–50 (providing entitlement to release on bond for lawful permanent residents who could show that they were not a flight risk or a danger to the community). The amendment to exclude lawful permanent residents from mandatory detention was a response to several district court rulings that lawful permanent residents had a significant liberty interest that was implicated

the average population of detainees increased from 4,062 in 1980 to 7,475 in 1995.<sup>89</sup>

### 3. The Conflation of Terrorism and Immigration

Congress continued its press for increased mandatory immigration detention in the wake of the World Trade Center bombing in 1993. Two years before, U.S. immigration authorities granted Sheik Rahman, one of the terrorists believed to have been responsible for the bombing, a green card.<sup>90</sup> After learning about Rahman's ties to terrorism, authorities revoked the green card and released him from custody.<sup>91</sup> Shortly after the bombing, Congress held a hearing to consider eliminating immigration officials' discretionary authority to release certain noncitizens not already subject to mandatory detention.<sup>92</sup> The U.S. Department of Justice was unequivocal in its opposition to the proposal, stating that "[immigration officials do] not have sufficient resources to detain each and every criminal alien until removal can be effected. . . . We believe that the current evaluation of 'flight risk' and 'danger to the community' when considering the release of an aggravated felon . . . is appropriate."<sup>93</sup>

Congress's fixation on immigration detention culminated three years later when it passed sweeping legislation that overhauled many sections of the INA, including the mandatory detention provision.<sup>94</sup> The Republican Party had recently won both chambers of

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when detained, and that those persons consequently had the right to a bond hearing. *See, e.g.,* *Leader v. Blackman*, 744 F. Supp. 500, 509 (S.D.N.Y. 1990) ("Notwithstanding the fact that bail is by no means an absolute right, one must be afforded an opportunity to present a case for being released on bail pending a final adjudication of deportability . . ."). Congress subsequently amended the statute to allow lawful permanent residents a bond hearing. Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049-50 (1990).

89. *See* JANE GUSKIN & DAVID L. WILSON, *THE POLITICS OF IMMIGRATION: QUESTIONS AND ANSWERS* (2007); DONALD KERWIN & SERENA YI-YING LIN, *MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES?* 6 (2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

90. *See* JULIE FARNAM, *U.S. IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM* 8 (2005).

91. *See id.* at 9-10.

92. *Criminal Aliens in the United States: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 103d Cong. (1993).

93. *Id.* at 100 (Department of Justice's written response to follow-up questions from the hearing).

94. *See* Dow, *supra* note 58, at 9. In 1994, the number of criminal offenses that qualified as aggravated felonies was further expanded to include crimes like theft, fraud, and burglary. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321-22 (1994).

Congress, and anti-immigrant rhetoric was on the rise.<sup>95</sup> Former General Counsel to the Immigration and Naturalization Service (INS), David Martin, aptly noted that “the ‘criminal alien’ slogan, for all its power on the campaign trail, embraces a vast spectrum of human character and behavior. Some such criminals are truly dangerous, but a large fraction of this class made single mistakes or had shown genuine rehabilitation and remorse.”<sup>96</sup> Eager to fill campaign promises of being tough on immigration, politicians again made the deportation of noncitizens with criminal convictions a legislative priority.<sup>97</sup> Expanding mandatory detention was one such legislative initiative.

Laws passed in 1996 expanding mandatory immigration detention surprised many immigration officials who were in the midst of pursuing methods of supervision that did not involve physical confinement. On April 11, 1996, INS officials and advocates met in Washington, DC, to discuss a new supervised release program designed by the Vera Institute of Justice.<sup>98</sup> The program was a means of humanely monitoring noncitizens released from detention to ensure compliance with immigration orders.<sup>99</sup> After spending considerable resources on the program, immigration officials hoped it would conserve sparse and expensive detention bed space.<sup>100</sup>

Less than two weeks after the April 1996 meeting, Congress pulled the rug out from under INS, using the Antiterrorism and Effective Death Penalty Act (AEDPA) as a Trojan horse for the first of two mandatory detention policy expansions. Increased anti-immigrant sentiment amongst the public fueled the law.<sup>101</sup> AEDPA stripped the INS of its discretion to release noncitizens, who had been convicted of a wide range of criminal offenses, from detention. At its signing, President Clinton noted that the “bill . . . makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.”<sup>102</sup>

The new detention mandate overwhelmed immigration authorities. They quickly lobbied Congress to revisit AEDPA’s mandatory

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95. Taylor, *supra* note 80, at 349, 351.

96. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 64 (2001).

97. *See id.* at 62–65.

98. *See* Taylor, *supra* note 80, at 351.

99. *See id.*

100. *See id.*

101. *See id.* at 349 (noting newspaper headlines in the New York Times, such as *Moves to Deport Aliens for Drugs are Not Pressed* and *Porous Deportation System Gives Criminals Little to Fear*).

102. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 721 (Apr. 24, 1996).

detention language, which the Clinton Administration also considered a “must-fix.”<sup>103</sup> Five months later, Congress responded by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which not only endorsed AEDPA’s mandatory detention provisions, but also broadened those provisions to cover more criminal offenses.<sup>104</sup> Like the passage of the ADAA, there was no public debate prior to IIRAIRA’s enactment.<sup>105</sup>

Although Congress did allow INS a two-year delay before requiring the implementation of the newly expanded mandatory detention statute, detention rates quickly rose.<sup>106</sup> For example, in 1985, the daily immigration detention capacity was approximately 2,200. In 1995 it tripled to 6,600, and six years later it more than tripled again to approximately 20,000.<sup>107</sup> As the detention population increased, INS became a “mini BOP [Bureau of Prisons],” without the infrastructure or corrections expertise.<sup>108</sup>

## II. THE PRIVATE PRISON INDUSTRY’S ROLE IN IMMIGRATION DETENTION

The private prison industry has benefited significantly from the implementation of the mandatory detention statute, which significantly increased detention numbers. As industry profits grew, private prisons funneled proceeds into lobbying efforts and congressional campaign coffers.<sup>109</sup> Today, private prisons wield a level

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103. See Taylor, *supra* note 80, at 353.

104. *Id.*

105. One U.S. Senator lamented that the process was too rushed and opaque considering the extreme repercussions on the immigration system:

[I]t was . . . essentially a closed process. Not only were many of the members of the conference committee not given the opportunity to participate, at the conclusion of the conference they were not even allowed to offer amendments to try to modify provisions which were found to be objectionable. So we have a product today which has not had the kind of thoughtful dialog and debate which we associate with a conference report which is presented to the U.S. Senate for final consideration.

142 CONG. REC. S11514 (daily ed. Sept. 27, 1996) (statement of Sen. Graham).

106. See Taylor, *supra* note 80, at 353. Taylor notes that the Vera Institute’s supervised release pilot project went forward despite the drastically new legal landscape, and the results of the project showed great promise. *Id.* at 354.

107. See *id.* at 349. Today, DHS is required to maintain a daily average detention population of 34,000. See H.R. 2217, 113th Cong. (2013) (“[F]unding made available under this heading shall maintain a level of not less than 34,000 detention beds through September 30, 2014.”).

108. Dow, *supra* note 58, at 9 (quoting former INS official George Taylor).

109. See Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP 11 (2015), [http://grassrootsleadership.org/sites/default/files/reports/quota\\_report\\_final\\_digital.pdf](http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf).

of political capital that can ensure harsh custody policies and practices.<sup>110</sup> This guarantees a large detention population and correspondingly high profits.<sup>111</sup> Mandatory detention is expensive and unwarranted, but it is particularly egregious when detainees are held in private prison facilities that employ cost-saving measures to maximize profits but sacrifice detainees' health and safety.

This Part will discuss the private prison industry's role in immigration detention and its immense political power. Section A will provide an overview of the private prison industry. It first examines the history of the for-profit prison industry in the United States. Next, it discusses the current confinement conditions at some private prison facilities. Section B examines the breadth of the industry's current political influence. It focuses on the industry's current lobbying efforts and campaign contributions, demonstrating how the industry played a key role in creating some of today's strictest enforcement and detention policies.

### *A. An Overview of the Private Prison Industry*

Modern for-profit immigration detention facilities were created in the mid-1980s, but private prisons have been a part of the United States penal system since the 18th century. The conditions of today's private prisons are not as egregious as the appalling conditions of their predecessors, but today's conditions reflect themes first evident in earlier private detention facilities. Cost-cutting measures and lucrative public-private partnership agreements propelled private prisons into the multi-billion dollar industry it is today.<sup>112</sup>

#### 1. The Private Prison Industry's Disturbing History

The for-profit prison model was introduced in the 18th century and became common, especially in southern states, in the 19th century. Early for-profit detention facilities were either privately owned or state-operated. Owners designed facilities to leverage prison

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110. See *infra* Part II.A.2 and accompanying notes.

111. See Adam Gopnik, *The Caging of America*, *NEW YORKER* (Jan. 30, 2012), available at <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

112. See *id.* at 97.

labor for profit.<sup>113</sup> During the post-Civil War Reconstruction Era, many southern states adopted a convict-lease program.<sup>114</sup> Freed slaves were incarcerated on trumped-up petty offense charges, incarcerated, and then leased to local businesses.<sup>115</sup> Prisons required inmates to perform hard labor on crop fields and railroads, and in mines and other industries.<sup>116</sup> The program created a source of cheap labor for industries that previously relied on slave labor. When detention populations dipped below the demand for labor, the legislature passed laws designed to incarcerate more of the black population.<sup>117</sup> Convicts were subject to abuse, poor living conditions, and were often worked to death.<sup>118</sup> One commentator noted that “[n]ot a single leased convict ever lived long enough to serve a sentence of ten years or more.”<sup>119</sup>

The conditions at Parchman Farm, one of the most infamous for-profit prisons in the South, illustrated the circumstances detainees held in early for-profit prisons endured. The state of Mississippi purchased the cotton plantation in 1904, turned it into a prison, and then used the prisoners to tend the cotton from which the state made an enormous profit.<sup>120</sup> Racial discrimination and deplorable conditions were the hallmarks of Parchman.<sup>121</sup> In 1972, a federal court held that the living conditions at Parchman were “cruel and unusual” in violation of the Eighth Amendment.<sup>122</sup> The court noted

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113. Antje Deckert & William Wood, *Prison Privatization and Contract Facilities*, in CORRECTIONS 221 (William J. Chambliss ed., 2011); see Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–51 (2005).

114. See Deckert & Wood, *supra* note 113, at 221.

115. See Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (Mar. 31, 2014), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-of-a-new-form-of-slavery/8289>.

116. See *id.*; DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 35–36 (1996).

117. See Dolovich, *supra* note 113, at 451–52. One such legislative initiative was the 1876 Mississippi “Pig Law” which significantly increased the prison sentence for stealing a farm animal or any property valued at more than ten dollars. *Id.*; OSHINSKY, *supra* note 116, at 40–41 (noting that the “Pig Law” spurred a dramatic rise in the convict population from 272 in 1874 to 1,072 in 1877).

118. Dolovich, *supra* note 113, at 452 (“Because the prisons ensured a steady supply of convicts, from the contractors’ perspective one convict was as good as another. Many contractors therefore routinely worked their charges literally to death.”). For example, a new warden of the Alabama state penitentiary described the inmates as “worn-out, battered men who lived like animals in disgusting quarters, where they breathed and drank their bodily exhalation and excrement.” OSHINSKY, *supra* note 116, at 78 (internal quotations omitted). He concluded that the convict-lease system was “a disgrace to the State [and] a reproach to the civilization.” *Id.*

119. OSHINSKY, *supra* note 116, at 46.

120. See *id.* at 109 (noting that in 1905 Parchman produced a \$185,000 profit).

121. See *id.* at 137.

122. *Gates v. Collier*, 349 F. Supp. 881, 886 (N.D. Miss. 1972).

that convicts at Parchman lived in racially segregated and overcrowded barracks called “cages,” and they frequently endured brutal lashings and solitary confinement.<sup>123</sup>

After World War I, prisons slowly became public, non-profit institutions. The late 20th century marked a period of privatization and booming prison populations.<sup>124</sup> Laws passed in the 1920s and 1930s explicitly barred prisons from engaging in profit-seeking activities.<sup>125</sup> But, a rising prison population and shrinking state revenue led to the repeal of these laws in 1979.<sup>126</sup> A new federal program that allowed prisons to sell products made by inmates for a profit replaced restrictive laws.<sup>127</sup> In the 1980s, the Reagan Administration’s push for increased privatization in formerly public sectors, including prisons, also helped reincarnate the for-profit prison industry.<sup>128</sup>

Corrections Corporation of America (CCA), a for-profit prison company incorporated in 1983, opened the first privately owned immigration detention facility in 1984.<sup>129</sup> According to a CCA founder, the company was built on the belief that selling prisons was “just like . . . selling cars, or real estate, or hamburgers.”<sup>130</sup> In 1983, CCA won the country’s first federal contract with INS to detain noncitizens.<sup>131</sup> A year later, it opened its detention facility for noncitizen detainees in Houston, Texas.<sup>132</sup> Shortly after opening, CCA received its “first day’s pay for eighty-seven undocumented aliens” on January 22, 1984, according to CCA co-founder Don Hutto, who even fingerprinted the new detainees himself.<sup>133</sup>

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123. *Id.* at 887–90.

124. *See* Deckert & Wood, *supra* note 113, at 221–22.

125. *Id.* at 222.

126. *Id.* at 222–23.

127. *Id.*

128. *Id.*

129. *The CCA Story: Our Company History*, CORRS. CORP. OF AM., <http://www.correction-scop.com/our-history> (last visited Mar. 22, 2015).

130. Matt Stroud, “Just Like Selling Hamburgers”: 30 Years of Private Prisons in the U.S., *FORBES* (June 21, 2013, 12:02 PM), <http://www.forbes.com/sites/mattstroud/2013/06/21/just-like-selling-hamburgers-30-years-of-private-prisons-in-the-u-s/> (citing GRASSROOTS LEADERSHIP, *THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA* (2013)).

131. Deckert & Wood, *supra* note 113, at 223.

132. Dow, *supra* note 58, at 97. The Houston facility was actually a motel that had been leased to CCA. *Id.* The facility was so rudimentary that some detainees escaped by pushing the air-conditioning units out of their motel rooms. *See id.*

133. Lee Fang, *How Private Prisons Game the Immigration System*, *THE NATION* (Feb. 27, 2013), <http://www.thenation.com/article/173120/how-private-prisons-game-immigration-system#>.



## 2. Conditions at Today's Private Prisons

Prior to his tenure at CCA, Hutto served as the Commissioner of the Arkansas Department of Correction,<sup>134</sup> which operated more like a private enterprise than a public, non-profit institution. Even the U.S. Supreme Court found that the system was run by officials who “evidently tried to operate their prisons at a profit.”<sup>135</sup> When Hutto was appointed to oversee the Arkansas penal system in 1971, it had been labeled by a federal court as a “dark and evil world completely alien to the free world.”<sup>136</sup>

Hutto inherited the correctional system's abhorrent prison conditions, but he dragged his feet in improving prison conditions in Arkansas despite federal court oversight. Admonishing Hutto, the Eighth Circuit Court of Appeals noted in 1974 that there was “a continuing failure by the correctional authorities to provide a constitutional and, in some respects, even a humane environment within their institutions.”<sup>137</sup> Some of the inhumane conditions were reminiscent of the conditions at early 20th century for-profit prisons like Parchman. According to the Eighth Circuit, Hutto's prisons continued to exhibit severe overcrowding; lack access to basic healthcare; employ convicts to supervise other inmates as part of a trusty program; punish inmates by forcing them to run in front of vehicles or guards on horseback; deprive prisoners of basic necessities in solitary confinement; and condone racially discriminatory practices.<sup>138</sup>

Although conditions in today's private prison facilities are better than the Arkansas prison system of the 1960s and 1970s or the for-profit prisons of the Reconstruction Era, similarities persist. Some detention facilities continue to exploit prison populations as a pool of cheap labor. A recent article in *The New York Times* noted that some immigration detention facilities pay detainees as little as 13 cents per hour to perform work that would otherwise be done by a contractor paid at the federal minimum wage rate of \$7.25 per hour.<sup>139</sup> Private prison cost-saving measures, such as inadequately

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134. See ARKANSAS DEPARTMENT OF CORRECTION, FACTS BROCHURE 30 (2004), available at [http://adc.arkansas.gov/resources/Documents/facts\\_brochure\\_2004.pdf](http://adc.arkansas.gov/resources/Documents/facts_brochure_2004.pdf).

135. *Hutto v. Finney*, 437 U.S. 678, 681 n.3 (1978).

136. *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970). The U.S. Supreme Court's detailed recounting of the prison conditions was gruesome. See, e.g., *Hutto*, 437 U.S. at 682 n.4 (“Inmates were lashed with a wooden-handled leather strap five feet long and four inches wide.”); *id.* at 682 n.5 (“The ‘Tucker telephone,’ a hand-cranked device, was used to administer electrical shocks to various sensitive parts of an inmate's body.”).

137. *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 200 (8th Cir. 1974).

138. See *id.* at 200–10.

139. Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES, May 24, 2014 at A1.

trained guards, low guard to detainee ratios, food shortages, and poor sanitation compromise detainee health and safety.<sup>140</sup> For example, some accuse CCA's Stewart detention facility in Georgia, the largest immigration detention center in the country, of providing limited medical attention, inedible food, and inhumane living quarters.<sup>141</sup> In 1998, a federal court enjoined the transfer of prisoners to a CCA prison that was plagued with violence, including multiple stabbings, murder, and excessive use of tear gas on detainees.<sup>142</sup>

The private prison industry claims that its cost-savings are beneficial to the taxpayer because they allow the industry to contract for bed space with the federal government at a low rate.<sup>143</sup> Setting aside the terrible conditions that certain cost-saving measures create, it is hard to believe that savings materialize in cheaper government contracts and do not line the pockets of private prison investors. The author of a 2009 DHS-commissioned immigration detention study noted:

ICE was always relying on others for responsibilities that are fundamentally those of the government. . . . If you don't have the competency to know what is a fair price to ask and negotiate the most favorable rates for the best service, then the likelihood that you are going to overspend is greater.<sup>144</sup>

DHS admits that it spends approximately \$166 per day to detain a single adult.<sup>145</sup> Better cost-savings, humane treatment, and effective supervision can be accomplished by implementing alternatives to detention, such as electronic monitoring, telephonic check-ins,

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140. See Lucas Anderson, Note, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 125–26 (2009).

141. Sadhbh Walshe, *Expensive and Inhumane: The Shameful State of US Immigrant Detention*, THE GUARDIAN (Dec. 3, 2012), <http://www.theguardian.com/commentisfree/2012/dec/03/us-immigrant-detention-expensive-inhumane>.

142. See Cheryl W. Thompson, *D.C. Must Stop Sending Inmates to Ohio Prison; Court Says City Failed to Cull Violent Ones*, WASH. POST, Feb. 26, 1998, at A08 (noting that the prison demonstrated “a deliberate indifference to the conditions of the prisoners”); U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL INSPECTION AND REVIEW OF THE NORTHEAST OHIO CORRECTIONAL CENTER (1998), available at <http://www.justice.gov/ag/report-attorney-general-inspection-and-review-northeast-ohio-correctional-center>.

143. Burke & Wides-Munoz, *supra* note 15 (quoting a spokesman for GEO Group claiming that private prisons “have been demonstrated to achieve significant cost savings for the taxpayers”).

144. *Id.*

145. *Id.*

and DHS home visits.<sup>146</sup> A 2013 investigative report showed that alternatives to detention can cost as little as 70 cents per day.<sup>147</sup> But legislative policies and executive practices, including mandatory detention, continue to block the genuine use of alternatives to detention. The private prison industry ensures the continued existence of these laws by lobbying legislators and contributing to their political campaigns.<sup>148</sup>

### *B. The Political Power of Today's Private Prison Industry*

Legislation repealing or restricting the mandatory detention of noncitizens would undoubtedly result in diminished profits for private prisons. In a 2013 SEC filing, CCA warned investors that:

[A]ny changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentence, thereby potentially reducing demand for correctional facilities to house them. . . . Also, sentencing alternatives under consideration could put some offenders on probation with electronic monitoring who would otherwise be incarcerated.<sup>149</sup>

Another large private prison company similarly warned that “[i]mmigration reform laws which are currently a focus for legislators and politicians at the federal, state and local level also could materially adversely impact us.”<sup>150</sup> As one commentator noted, “It’s hard to imagine any greater disconnect between public good and private profit: the interest of private prisons lies not in the obvious social good of having the minimum necessary number of inmates but in having as many as possible, housed as cheaply as possible.”<sup>151</sup>

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146. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDE BAR 42, 54–55 (2010) (providing a comprehensive examination of alternatives to detention); see also Kate Linthicum, *Push for Cheaper Alternative to Immigrant Detention Grows*, L.A. TIMES (May 31, 2014), <http://www.latimes.com/nation/la-na-immigration-detention-20140601-story.html> (“According to Immigration and Customs Enforcement officials, about 90% of immigrants in [alternatives to detention programs] comply with the requirements and show up for required court hearings.”).

147. MATH OF IMMIGRATION DETENTION, *supra* note 9 (providing a detailed examination of the millions of dollars in taxpayer savings that could be achieved by using more alternatives to detention).

148. See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT’L L.J. 243, 260 (2013).

149. CORRS CORP. OF AM., ANNUAL REPORT (FORM 10-K) 27 (Feb. 27, 2013).

150. THE GEO GRP., INC., ANNUAL REPORT (FORM 10-K) 30 (Mar. 1, 2013).

151. Gopnik, *supra* note 111.

Critics raised concerns about the industry's political motives since their birth in the 1980s. A year after CCA opened its Houston facility in 1984, *The New York Times* published an article by Kenneth Schoen, former Minnesota Commissioner of Corrections, which foreshadowed the private prison industry's future political influence. Schoen wrote:

The development of a private prison lobby is a . . . concern. Private operators whose growth depends upon an expanding prison population may push for ever harsher sentences. With the public's unabating fear of crime and lawmakers shrinking from any move that appears to be soft on criminals, the developing private prison lobby will be hard to resist.<sup>152</sup>

The following year, the Nashville-based CCA used political connections and \$100,000 in lobbying services to push a prison privatization bill through the Tennessee legislature, which helped propel the company into the multi-billion dollar enterprise it is today.<sup>153</sup> CCA's leadership and lobbying staff at the time had unusually strong ties to Tennessee politicians: CCA president Tom Beasley was a former Tennessee Republican Party Chairman; a CCA lobbyist managed two of then-Governor Lamar Alexander's winning gubernatorial campaigns and served as his chief-of-staff for four years; Governor Alexander's wife owned \$5,000 of CCA stock; and then-Tennessee Speaker of House owned \$33,000 of CCA stock.<sup>154</sup>

Today, the private prison industry denies lobbying directly to influence policies that affect the number of individuals in detention.<sup>155</sup> But a close look at its lobbying expenditures and the

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152. Kenneth F. Schoen, *Private Prison Operators*, N.Y. TIMES (Mar. 28, 1985), <http://www.nytimes.com/1985/03/28/opinion/private-prison-operators.html>.

153. Fang, *supra* note 133; *see generally* Aubrey Pringle, *The Winners in Immigration Control: Private Prisons*, ATLANTIC (Aug. 28, 2013), <http://www.theatlantic.com/national/archive/2013/08/the-winners-in-immigration-control-private-prisons/279128/> (examining the correlation between private prison lobbying efforts and their financial success).

154. *See* Harmon L. Wray, Jr., *Cells for Sale*, 8 SOUTHERN CHANGES 3–4 (1986), *available at* [http://beck.library.emory.edu/southernchanges/article.php?id=sc08-3\\_011](http://beck.library.emory.edu/southernchanges/article.php?id=sc08-3_011). According to Wray, both individuals sold their shares in 1985 to avoid the appearance of impropriety. *Id.* at 4.

155. *See, e.g.*, CORR. CORP. OF AM., *supra* note 149, at 29 (“Our policy prohibits us from engaging in lobbying or advocacy efforts that would influence enforcement efforts, parole standards, criminal laws, and sentencing policies.”). CCA, and other private prison companies, repeatedly claim that they do not focus lobbying efforts on legislation designed to increase the number of immigrants detained. *See, e.g.*, Burke & Wides-Munoz, *supra* note 15 (“‘As a matter of long-standing corporate policy, CCA does not lobby on issues that would determine the basis for an individual’s detention or incarceration.’”) (quoting CCA spokesman Steve Owen).

corresponding rise in government spending on immigration detention suggests otherwise. The Associated Press recently showed that the top three private prison companies spent at least \$45 million between 2001 and 2011 on campaign contributions and lobbyist fees.<sup>156</sup> A year after those expenditures began, officials sent approximately 3,300 noncitizen detainees to CCA detention facilities pursuant to two federal contracts worth \$760 million.<sup>157</sup> In 2005, lobbying efforts peaked when the private prison industry spent roughly \$5 million dollars.<sup>158</sup> Over the next two years, ICE's budget jumped from \$3.5 billion to \$4.7 billion.<sup>159</sup> By 2011, nearly half of all immigrant detainees were held in privately-owned or privately-run detention facilities,<sup>160</sup> and in 2012 private prisons held federal contracts worth approximately \$5.1 billion.<sup>161</sup>

It is unclear exactly how private prisons influence detention policies and practices, but a look behind-the-scenes of Arizona's recent anti-immigrant law, the Support Our Law Enforcement and Safe Neighborhoods Act (Senate Bill 1070), may illuminate how the industry affects legislation. Part of Senate Bill 1070 required Arizona police officers to detain anyone they stopped who could not show legal immigration status.<sup>162</sup> The bill was initially crafted at a 2009 meeting in Washington, DC, between state legislators and private corporations.<sup>163</sup> CCA representatives and the Arizona state senator who would later introduce the bill on the statehouse floor attended the meeting and consulted with each other about the potential legislation.<sup>164</sup> When the bill was introduced at the Arizona capitol, a surprising thirty-six legislators co-sponsored the bill.<sup>165</sup> CCA quickly hired a high-powered lobbyist to work the capitol and within six months CCA and two other large private prison companies donated

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156. *Private prisons profit from illegal immigrants*, ASSOCIATED PRESS (Aug. 2, 2012), <http://www.cbsnews.com/news/ap-private-prisons-profit-from-illegal-immigrants/>.

157. *Id.*

158. Burke & Wildes-Munoz, *supra* note 15.

159. *See Associated Press*, *supra* note 156.

160. Burke & Wildes-Munoz, *supra* note 15.

161. *See ASSOCIATED PRESS*, *supra* note 156.

162. Ariz. Rev. Stat. Ann. § 11-1051(B) (Supp. 2010). Three provisions of Senate Bill 1070 were struck down by the U.S. Supreme Court on federal preemption grounds, but the Court held that section 2(B) was improperly enjoined by the court below. *See Arizona v. United States*, 135 S. Ct. 2492, 2510 (2012) ("At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.").

163. *See* Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>.

164. *Id.*

165. *Id.*

to a majority of the co-sponsors' election campaigns.<sup>166</sup> Only four days after its introduction, the bill passed the legislature and was signed by Governor Janet Brewer—who at the time had two former private prison company lobbyists as her top advisors.<sup>167</sup>

Today's political landscape continues to favor the private prison industry's interest in a large detention population. A comprehensive immigration reform bill, which would have offered a pathway to citizenship for millions of noncitizens, failed to pass both chambers of Congress.<sup>168</sup> Some allege that the private prison industry had a hand in squelching the reform efforts.<sup>169</sup> Enforcement initiatives that involve expanding immigration detention capacity and increasing the number of noncitizens subject to mandatory detention have gained traction in Congress. Recently, the House Judiciary Committee passed the Strength and Fortify Enforcement Act (SAFE Act).<sup>170</sup> The bill, introduced by Chairman Bob Goodlatte and Representative Trey Gowdy, would greatly expand the definition of an aggravated felony. It also would explicitly preclude alternatives to detention, resulting in millions more noncitizens becoming subject to mandatory detention.<sup>171</sup> Campaign finance

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166. *Id.*

167. *Id.*

168. See Clarence Page, *Obama breaks through Congress' brick wall on immigration*, CHICAGO TRIBUNE (Nov. 21, 2014), <http://www.chicagotribune.com/news/opinion/page/ct-obama-congress-immigration-boehner-perspec-1123-20141121-column.html>; Rachel Weiner, *How immigration reform failed, over and over*, WASH. POST (Jan. 30, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/>.

169. See, e.g., Peter Cervantes-Gautschi, *How the For-Profit Corporate Prison Lobby Killed Immigration Reform*, ALTERNET (July 14, 2014), <http://www.alternet.org/print/immigration/how-profit-corporate-prison-lobby-killed-immigration-reform> (discussing the private prison industry's alleged role in contributing campaign finance to key senators and representatives to ensure immigration reform's demise); Fang, *supra* note 133.

170. Ed O'Keefe, *House Panel Approves Controversial Immigration Bill*, WASH. POST (June 19, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/19/house-panel-approves-controversial-immigration-bill/>.

171. See *Strengthen and Fortify Enforcement (SAFE) Act: Hearing on H.R. 2278 Before the H. Comm. on the Judiciary*, 113th Cong. 3 (2013) ("It's alarming that this bill would turn millions of undocumented immigrants into criminals overnight.") (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary); IMMIGRATION POLICY CTR., AM. IMMIGRATION CTR., CRACKING THE SAFE ACT: UNDERSTANDING THE IMPACT AND CONTEXT OF H.R. 2278, THE "STRENGTHEN AND FORTIFY ENFORCEMENT ACT" 5 (2013). Chairman Goodlatte is known for being particularly tough on immigration enforcement and detention. In a May 22, 2014 letter to DHS Secretary Jeh Johnson, Goodlatte admonished the agency for releasing too many noncitizens from detention and discouraging the use of alternatives to detention. See Letter from Bob Goodlatte, U.S. House of Representatives, Comm. on the Jud., Chairman, to Jeh Johnson, U.S. Dep't of Homeland Sec., Sec'y (May 22, 2014), available at [http://judiciary.house.gov/\\_cache/files/01950795-d8b2-456e-95a1-09fba98947f1/1370-001.pdf](http://judiciary.house.gov/_cache/files/01950795-d8b2-456e-95a1-09fba98947f1/1370-001.pdf).



records from 2013 and 2014 reveal that Goodlatte and other members of congressional leadership received significant campaign contributions from private prison political actions committees.<sup>172</sup>

### III. SUGGESTED SOLUTIONS: RETHINKING THE MANDATORY DETENTION STATUTE

Private prison's political power swayed Congress to maintain the excessive, costly, and inhumane mandatory detention regime. Repealing the mandatory detention statute and returning discretion to DHS to make its own custody determinations would be a positive step in alleviating the problems of mandatory detention. But private prisons would certainly flex their political muscle to oppose such a legislative initiative. Therefore, an immediate solution—that does not involve Congress—needs to be implemented.

The solution lies with DHS's power to interpret and execute the mandatory detention statute. DHS leadership has recently signaled that it is receptive to enforcement practices that do not unnecessarily detain noncitizens. For example, the agency released prosecutorial discretion guidelines in 2011 that suggested it would consider alternatives to detention for noncitizens who are low removal priorities.<sup>173</sup> Additionally, in May 2014, DHS Secretary Jeh Johnson testified before the House Committee on the Judiciary that the immigration bed quota required the agency to maintain a capacity of 34,000 detention beds, but did not require it to keep those beds filled.<sup>174</sup> Therefore, the atmosphere in the executive branch appears to be ripe for reforming the way DHS interprets and executes the mandatory detention statute.

The mandatory detention statute states that DHS “shall take into custody” certain noncitizens.<sup>175</sup> Currently, DHS interprets the term “custody” to require physical confinement at a detention facility.<sup>176</sup> However, DHS could either: (1) interpret “custody” to encompass

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172. See Disclosure Data Search, FED. ELECTION COMM'N, [http://www.fec.gov/finance/disclosure/disclosure\\_data\\_search.shtml](http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml) (using the search function to reveal the campaign contributors).

173. See Memorandum from John Morton, Immigration and Customs Enforcement Director to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (Jun. 17, 2011).

174. See *U.S. Dep't of Homeland Sec.: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 70 (2014) (statement of Jeh Johnson, Sec'y of U.S. Dep't of Homeland Sec.) (“The statutory requirement is beds, not people. A lot of people think it's people, but it says beds.”).

175. 8 U.S.C. § 1226(c)(1) (2014).

176. See Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.—C.L. L. REV. 601, 632 (2010) (citing Unofficial Minutes from the Chicago American Immigration Lawyers Association (AILA) Chapter ICE Liaison Meeting (Nov. 10, 2009)).



other forms of restraint, including less costly and more humane alternatives to detention; or (2) interpret the statute to allow for alternatives to detention as “terms of custody” rather than “terms of release” which would allow DHS to maintain control over the noncitizen’s supervision and thereby satisfy the mandatory detention statute.<sup>177</sup>

This Part will further explain how DHS could interpret the mandatory detention statute to prevent the needless detention of thousands of noncitizens. Part A argues that DHS should broadly interpret the term “custody” to allow for alternatives to detention. Part B asserts that DHS should, alternatively, interpret the mandatory detention statute to allow for detention alternatives as “terms of custody.”

*A. The Term “Custody” Should be Broadly Interpreted to Include Forms of Restraint Other Than Physical Confinement*

Congress has given DHS no guidance on how to interpret the term “custody” in the mandatory detention statute. But the widely-accepted tools of statutory interpretation suggest that DHS could read the term more broadly than requiring physical confinement. Several canons of statutory interpretation—to give a term its plain meaning, to mention expressly one thing excludes another, and to decipher a term’s meaning by examining the rest of the statute—suggest that a broad interpretation of the word “custody” is warranted

The plain meaning of “custody” suggests a broader definition than physical confinement. Although imprisonment is clearly a form of custody, the term “custody” is more broadly defined as the general control of something or someone. For example, *Black’s Law Dictionary* defines “custody” as “the care and control of a thing or

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(on file with author) (“DHS considers itself without legal authority to use electronic monitoring for persons who must be held in custody under the statute because it does not consider monitoring to be ‘custody.’ ”).

177. Similar recommendations have previously been suggested and explained to varying degrees by commentators and advocates. *See, e.g.*, Heeren, *supra* note 176, at 631–33 (suggesting that immigration judges be afforded more statutory discretion to review DHS custody determinations, and suggesting wider implementation of alternatives to detention); Letter from Am. Immigr. Lawyers Ass’n to David Martin, Office of Gen. Counsel, Dep’t of Homeland Sec. & Brandon Prelogar, Office of Policy, Dep’t of Homeland Sec. 10–16 (Aug. 6, 2010) (on file with author) (suggesting a broader interpretation of the term “custody” in INA section 236(c) and suggesting the use of alternatives to detention as a condition of confinement). Others have suggested a limit on the number of months an individual should be mandatorily detained. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 390–401 (2014).

person for inspection, preservation, or security.”<sup>178</sup> *Merriam-Webster’s Online Dictionary* defines “custody” as the “immediate charge and control (as over a ward or a suspect) exercised by a person or an authority.”<sup>179</sup> *MacMillan Online Dictionary’s* generic definition of “custody” is “the protection or care of someone or something.”<sup>180</sup> The *Oxford English Dictionary* defines “custody” as “[s]afe keeping, protection, defence; charge, care, guardianship.”<sup>181</sup> All of these definitions suggest an interpretation of custody that is broader than physical confinement.

Furthermore, if Congress required DHS to read “custody” as “detention,” it could easily have crafted the mandatory detention statute to define the word narrowly. An examination of the statute and other provisions within the INA demonstrate that Congress used the term “detention” and its derivations when it meant physical confinement. Section 236(a) of the INA is entitled, “Arrest, detention, and release,” is illustrative.<sup>182</sup> The provision authorizes DHS to “arrest[ ] and detain[ ] pending a decision on whether the alien is to be removed from the United States.”<sup>183</sup> The statute further permits DHS to “continue to detain the arrested alien.”<sup>184</sup> Finally, section 236(a) of the INA authorizes DHS to “at any time . . . revoke a bond or parole . . . and detain the alien.”<sup>185</sup> Conversely, the term “detention” appears only in the title of the mandatory detention provision.<sup>186</sup> Neither “detention” nor its derivations appear anywhere else in that statute.

The language of section 236A of the INA concerning the “[m]andatory detention of suspected terrorist” is similar to the language of the mandatory detention statute, but it is also explicitly requires that suspected terrorists be detained.<sup>187</sup> Although section 236A of the INA likewise uses the phrase “shall take into custody,” the remaining language of the statute makes clear that noncitizens

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178. BLACK’S LAW DICTIONARY 1161 (8th ed. 2004).

179. *Custody Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/custody> (last visited Mar. 22, 2015).

180. *Custody Definition*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/us/dictionary/american/custody> (last visited Mar. 22, 2015).

181. *Custody Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/46305?redirectedFrom=custody#eid> (last visited Mar. 22, 2015).

182. 8 U.S.C. § 1226(a) (2014).

183. *Id.*

184. *Id.* § 1226(a)(1).

185. *Id.* § 1226(b) (2014).

186. *Id.* § 1226(c) (“Detention of criminal aliens”).

187. *Id.* § 1226A (2014).

who are deemed to be suspected terrorists must be physically detained.<sup>188</sup> Most significantly, section 236A(a)(6) specifies that there is a six month limitation for those subject to prolonged mandatory detention pursuant to section 236A.<sup>189</sup> The limitation reflects the U.S. Supreme Court's decision in *Zadvydas v. Davis*. In *Zadvydas*, the Court condemned indefinite detention in situations where authorities issued a removal order but removal is not reasonably foreseeable.<sup>190</sup>

Case law also supports the proposition that the term "custody" does not require "detention." In *Reno v. Koray*, the U.S. Supreme Court noted that the Bail Reform Act of 1984 changed language in the criminal bail statute from "custody" to "official detention."<sup>191</sup> The Court reasoned that the change was made to conform more clearly to the language of other statutory amendments made by the Act.<sup>192</sup> Such an alteration presupposes that Congress thought that the terms "detention" and "custody" had different meanings.

In *Matter of Aguilar-Aquino*, the Board of Immigration Appeals (BIA) examined a nearly identical change in an immigration detention statute, but reasoned that the terms "custody" and "detention" had the same meaning.<sup>193</sup> In that case, the court examined the legislative history of section 236(a) to determine the definition of "custody" as it is used in the corresponding federal regulation.<sup>194</sup> The BIA found that when crafting the language of IIRIARA, Congress similarly substituted the term "custody" for the term "detain."<sup>195</sup> Relying on a Congressional conference committee report, the BIA reasoned that, despite the deliberate change in

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188. *Id.* Section 236A(c) notes that "provisions of this section shall not be applicable to any other provision of this Act," but the language Congress chose in crafting this section of the INA illustrates its ability to indicate clearly when mandatory detention is to be used. 8 U.S.C. § 1226A(c) (2012).

189. *Id.* at § 1226A(a)(6).

190. *Zadyvas v. U.S.*, 533 U.S. 678, 698–99 (2001). The Court decided *Zadvydas* about four months before section 236A was enacted pursuant to the USA PATRIOT Act. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 271, 350 (2001).

191. *See Reno v. Koray*, 515 U.S. 50, 59–60 (1995).

192. *See id.*

193. *In re Aguilar-Aquino*, 24 I. & N. Dec. 747, 752 (BIA 2009).

194. *Id.* at 750–52 (analyzing 8 C.F.R. § 1236.1(d)(1), which confers jurisdiction of custody issues on an immigration judge "If the alien has been released from custody, an application for amelioration of the terms of release. . . [was] filed within 7 days of release.>").

195. *Id.* at 751. As discussed by the U.S. Supreme Court in *Reno v. Koray*, the Bail Reform Act of 1984 similarly changed the language in the bail statute from "custody" to "official detention." *See Reno v. Koray*, 515 U.S. at 59–60. The Court ultimately held that detention required physical confinement, but in his dissent, Justice Stevens reasoned that "proof that confinement [at an official detention facility] constitutes official detention certainly is not proof that no other form of confinement can constitute official detention." *Id.* at 67 (Stevens, J., dissenting).

language, “Congress used the terms ‘custody’ and ‘detain’ interchangeably and did not intend for them to be afforded different meanings.”<sup>196</sup> Ultimately, the BIA held that the term “custody” requires physical confinement.<sup>197</sup>

In *Matter of Aguilar-Aquino*, the BIA also noted that the immigration judge erroneously relied on federal habeas corpus jurisprudence to determine the meaning of “custody.”<sup>198</sup> The judge’s ruling was based on cases like *Jones v. Cunningham*, in which the Supreme Court broadly interpreted “custody” to mean any restraint on personal liberty “not shared by the public generally.”<sup>199</sup> The BIA summarily disagreed with the immigration judge’s reliance on habeas corpus jurisprudence because “custody” in that context “is interpreted expansively to ensure that no person’s imprisonment or detention is illegal.”<sup>200</sup> But “custody” should similarly be interpreted broadly in the mandatory detention context to ensure that no person’s imprisonment is disproportionate to the need for confinement.

*Matter of Aguilar-Aquino* supports the argument that “custody” should be read broadly to include restraints other than detention. Most notably, the Court recognized that “a person who is in custody is not necessarily in detention [and] one who is in detention is necessarily in custody.”<sup>201</sup> The Court also reasoned “that both a person who has been released on parole and one who remains incarcerated can be considered to be in ‘custody.’”<sup>202</sup> Other courts have agreed that “custody” is not limited to confinement in a government detention facility.<sup>203</sup>

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196. *Aguilar-Aquino*, 24 I. & N. Dec. 747 at 752.

197. *Id.*

198. *Id.*

199. *Jones v. Cunningham*, 371 U.S. 236, 240–43 (1963) (holding that conditions of parole qualified as being in the “custody” of the parole board).

200. *Aguilar-Aquino*, 24 I. & N. Dec. 747 at 752. The term “custody” has been broadly interpreted by multiple courts to mean varying degrees of physical confinement and restraint, including probation, supervised release, and mandatory attendance at rehabilitative classes. *See, e.g.*, *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (conditions placed on a defendant released on recognizance while his case was on appeal); *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (mandatory attendance at a rehabilitative program). Individuals attempting to escape various types of restraints have been prosecuted pursuant to 18 USC § 751(a) for escaping federal custody. *See United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971) (escape from a pre-release guidance center); *Perez-Calo v. United States*, 757 F. Supp. 1 (D.P.R. 1991) (escape from a substance abuse program).

201. *Aguilar-Aquino*, 24 I. & N. Dec. 747 at 752.

202. *Id.*

203. *See, e.g.*, *McKenzie v. Attorney General*, 452 Fed. App’x. 88, 91 (3d Cir. 2011) (“home confinement . . . [was] a serious restriction of liberty [and] qualified as imprisonment under the INA”) (internal quotations omitted).

For all these reasons, DHS should interpret “custody” in the mandatory detention statute to include forms of restraint beyond confinement in a detention facility.

*B. Mandatory Detention Includes Alternatives to Detention as “Terms of Custody” Rather Than “Terms of Release”*

DHS could also utilize alternatives to detention if such alternatives are considered “conditions of confinement” rather than “terms of release from detention.” The distinction seems semantic, but it was critical to the BIA’s reasoning in *Matter of Aguilar*. In that case, the BIA held that “[t]he conditions placed by the DHS on the respondent’s release, including the home confinement and electronic monitoring device, constituted ‘terms of release’ and were not ‘custody’ within the meaning of section 236(a) of the [INA].”<sup>204</sup> The court concluded that the Immigration Judge did not have jurisdiction to review DHS’s terms of release because the petition for review was not filed within seven days of the respondent’s release from detention.<sup>205</sup>

The distinction between “terms of release” and “conditions of custody” was also discussed in *Koray*.<sup>206</sup> In that case, the Court held that a defendant could not be given credit for time served while he resided at a community treatment center, pursuant to a court order, because that placement was a term of release—not a condition of his confinement.<sup>207</sup> In its decision, the Court gave great weight to the Bureau of Prison’s ability to control the defendant’s confinement. According to the Court:

Unlike defendants “released” on bail, defendants who are “detained” or “sentenced” always remain subject to the control of the Bureau. This is an important distinction, as the identity of the custodian has both legal and practical significance. A defendant who is “released” is not in BOP’s custody, and he cannot be summarily reassigned to a different place of confinement unless a judicial officer revokes his release, or modifies the conditions of his release. A defendant who is “detained,” however, is completely subject to BOP’s control . . .

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204. *Aguilar-Aquino*, 24 I. & N. Dec. 747 at 753.

205. *Id.*

206. *See Reno v. Koray*, 515 U.S. 50, 64 (1995) (discussing the differences between detained and release for the purpose of sentence credit).

207. *See id.* at 64–65.

and being in the legal custody of BOP, the Bureau has full discretion to control many conditions of their confinement.<sup>208</sup>

In reaching its decision, the Court examined statutory language created by the Bail Reform Act of 1984,<sup>209</sup> which is remarkably similar to the language of the INA's discretionary immigration detention statute. Pursuant to both acts, a person may either be released from custody, or detained without bail or bond. If a person is released from custody, restrictive conditions may be imposed, but if an adjudicator "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[,] the [adjudicator] shall order the detention of the person."<sup>210</sup> The Court reasoned that "a defendant suffers 'detention' only when committed to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions . . . is 'released.'"<sup>211</sup> However, defendants are considered to be detained, or in the "custody" of BOP, when BOP authorizes a release to attend classes or work in the community.<sup>212</sup>

The Court's decision in *Koray* is consistent with the reasoning of *Matter of Aguilar-Aquino*. In both cases, the characterization of the petitioner's restrained liberty depended on whether the conditions imposed were "terms of release" or "conditions of confinement." The key was whether the federal agency retained "control" over the detainee. If less restrictive alternatives to detention are considered "conditions of confinement," then DHS retains control of the noncitizen's supervision, which should satisfy the mandatory detention statute. If alternatives to detention are administered as *conditions of custody*, instead of *conditions of release*, then authorities could monitor a noncitizen through less restrictive means than physical confinement, while still in the custody and control of DHS. Under this proposed regime, DHS would still comply with the of the mandatory detention statute.

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208. *Id.* at 63.

209. *See id.* at 57.

210. *Id.* (internal citations omitted).

211. *Id.*; *see also* Monahan v. Winn, 276 F. Supp. 2d 196, 206 (D. Mass. 2003) ("[I]t is not *place*, but *custody*, that defines imprisonment—a conceptual distinction that is consistent with long-accepted views on this subject.") (citing *Koray*, 515 U.S. at 63–65).

212. *See Reno v. Koray*, 515 U.S. at 58.

## CONCLUSION

This Article argues that DHS could greatly improve the immigration detention system by adopting new interpretations of statutory language. But this proposal is not a complete fix; even if DHS took this approach, the immigration detention system would still need large overhauls. Immigration reform is necessary to fix years of immigration detention laws, which were written by policymakers with unscrupulous motives. Despite its roots in discrimination, the mandatory detention statute has been interpreted to prevent discrimination between detainees who should be detained and those who should not be detained. The statute is too far-reaching. The individuals held pursuant to the mandatory detention statute are mothers and fathers; they are bus drivers, waiters, business owners, and lobster fishermen; they are war heroes and political activists; and they are just as human as anyone else. Congress must repeal the mandatory detention statute. But until it does, DHS must rethink its interpretation of it.



