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From Camp Krome to the CCA: The Long-Term Effects of the Haitian Program

On February 10, 1977, a group of forty-three Haitian asylum seekers wrote a letter from the El Paso immigration detention center.¹ The migrants had been detained while fleeing the oppressive regime of Jean Claude (“Baby Doc”) Duvalier. One, named Thelimaque, told his story as an example. He explained that his father once headed a political organization in Haiti that opposed then-president Francois (“Papa Doc”) Duvalier. The Tonton Macoute, a paramilitary force created during the first Duvalier regime, raided one of the organization’s meetings and shot many of its members, forcing Thelimaque and his father into hiding outside of Port-au-Prince. Eventually, when the Tonton Macoute killed his father and kept looking for him, Thelimaque escaped to the United States on his friend’s boat.² Thelimaque and his compatriots were immediately sent to immigration detention. “When [our boat] got close to the land in Florida,” they wrote “we ... stop the boat and call the police because we knew that we was illegal. The Immigration [Service] came and take us to the federal building in Florida, asked us some questions and put us in jail.”³ The letter writers were then transferred to a federal facility in El Paso. When they wrote the letter, they had been detained for fifteen months.

In the early 1980s, the government was presented with a rapid and unexpected increase in immigration from Haiti.⁴ Between 1972 and 1980, 32,367 Haitians arrived in the United States, many in makeshift boats like Thelimaque’s.⁵ The great majority of these “boat people” arrived

¹ Letter from “The Haitian Prisoners in El Paso Camp,” Feb. 10, 1977, Folder 4-15 (“Detention at El Paso, 1977”), Ira Gollobin Papers/Haitian Refugee collection, Sc MG 315, Schomburg Center for Research in Black Culture, The New York Public Library [Hereinafter *HRC*].

² *Id.* at 3.

³ *Id.* at 1.

⁴ Silverman, 11

⁵ Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L. J.* 398, 492-93 (2009); Stephanie Silverman, *Immigration detention in America*, Center on Migration, Policy and Society, Working Paper No. 80, 2010.

in 1980 and 1981.⁶ Federal officials, concerned with rising unemployment and growing anti-immigrant sentiment, concluded that most Haitian migrants “left Haiti for economic rather than political reasons” and were skeptical about granting them refugee protections.⁷ During the same period, over 100,000 Cubans came to the United States from Cuba’s Mariel Harbor between the April and October of 1980, after a group of Cuban-Americans arranged for their departure. When President Fidel Castro refused to repatriate the “Marielitos,” most remained in the United States. While many Cuban refugees were welcomed as survivors of Communism, Marielitos—who were often branded as paupers, deviants or criminals—faced a harsher reception in 1980.

Immigration officials responded to the perceived immigration crisis with harsh measures designed to deter Haitian migration and contain the Mariel Cubans. Officials relied increasingly on their ability to detain incoming migrants. In the mid-1970s, the INS began to detain Haitians who could not post bond, stating that “any relaxation of the rules could produce a flood of economic refugees from all over the Caribbean.”⁸ In February 1974 the Service was holding 90 Haitians in custody in Miami, and another fifty at the INS’s detention facility in Port Isabel, TX.⁹ Many Haitians applied for asylum and then sought to be released on bond or to local sponsors, who pledged to support them after their release. In early cases, the requests were often granted. But even after release on bond, Haitian migrants faced an uphill battle in their quest for asylum status. In 1978, the INS, facing a backlog of asylum claims, instituted what came to be called its

⁶ *Id.*

⁷ Sue Sullivan, National Council of the Churches of Christ, Letter to Commissioner Castillo (Sept. 29, 1977) (writing that Castillo was planning a visit to Haiti), Folder 31-5 (“1977 Correspondence”), *HRC*. (Reporting that Castillo planned a trip to Haiti in 1977, and that Ambassador Andrew Young had also travelled there); Frank L. Kellogg, Special Assistant to the Secretary for Refugee and Migration Affairs, Letter to Sterling Cary, National Council of the Churches of Christ (July 29, 1974) in Folder 31-2 (“1974 Correspondence”), *HRC*. (“I have personally been to Haiti, specifically to discuss the refugee situation with our Embassy, voluntary agencies and the President of Haiti himself.”)

⁸ *N.Y. Times* (Oct. 17, 1976), 56.

⁹ Letter to Claire Randall, General Secretary, National Council of Churches (Mar. 12, 1974), Folder 31-2 (“1974 Correspondence”), *HRC*.

“Haitian Program.” The agency multiplied the number of required daily asylum hearings without hiring more Immigration Judges, so that officials dispensed each asylum claim in minutes.¹⁰ The result, in the words of one scholar, was “swift deportation.”¹¹

Scholars of the Cuban and Haitian diasporas have written about these migrations and the subsequent detention of many of the resulting migrants. Federal officials housed Marielitos in federal penitentiaries, military bases across the country, and in tents on the outskirts of a decommissioned Naval missile site in the swamps outside Miami, a facility that would eventually be called “Camp Krome.”¹² The INS detained early Haitian arrivals like Thelimaque, as well, in Camp Krome and, later, in prisons and jails around the country. By 1981, the federal government would insist that detention was mandatory, announcing a detention policy that, in the eyes of immigration advocates, represented the government’s particular targeting of Haitian migrants. Federal officials responded that the blanket detention policy was not only nondiscriminatory but also was a necessary component of the government’s reinvigorated focus on achieving immigration control through deterrence.

Scholars have charted the growing “criminalization” of immigration law and have noted the rise of immigration detention in the 1980s, pointing to concurrent developments in drug criminalization and mandatory sentencing guidelines. Other scholars have described the effect of detention on diasporic communities of Haitians and Cubans, illustrating the claims that many advocates made in *Nelson* in powerful detail. Some, like Jana Lipman, suggest the connection between the two, indicating that the government’s detention of Haitians and Mariel Cubans “morphed and multiplied into an immigration regime that criminalizes undocumented migrants

¹⁰ Id at 156 (noting that 100-150 cases were heard daily).

¹¹ Zucker 159.

¹² Lipman, 117.

and asylum seekers.”¹³ In this article, I aim to illustrate Lipman’s suggestion by examining the long-term goals that underlay the government’s treatment of Haitian detainees in the 1980s. Immigration officials initially used detention to host particular populations of undesirable refugees—implying, perhaps, that they desired a short-term solution to an unexpected problem. But the Immigration Service’s detention of Haitian refugees reveals that establishing permanent detention facilities was a component of an immigration enforcement strategy that would reach far beyond the Haitian and Cuban migrants of the 1980s. The government’s detention of these populations underlay a broader desire to institutionalize and professionalize its immigration detention practice by cooperating with the Bureau of Prisons and private detention contractors.

Political scientists have understood the 1980s as a pivotal moment in the growth of incarceration and—particularly—the incorporation of prison contractors in the prison industry. Marie Gottschalk describes the “strikingly punitive” turn in immigration enforcement since the Reagan Administration, and also of the “privatization of the carceral state” in the 1980s.¹⁴ She describes a relationship between these two trends, arguing that the privatization of immigration detention was the “seedbed for the contemporary prison imprisonment industry in the United States.”¹⁵ In this paper, I examine the Immigration Service’s early use of detention and provide support for the argument that immigration detention was a unique component of the private prison industry. The INS was the first federal agency to partner with private prison contractors in the early 1980s. By the end of the 1980s, private contractors would be a significant

¹³ Jana K. Lipman, *The Fish Trusts the Water, and It Is in the Water That It Is Cooked*” *The Caribbean Origins of the Krome Detention Center*, 2013 *Radical Hist. Rev.* 115, 135. See also Cesar Cuauhtemoc Garcia Hernandez, *Creating Crimmigration* 2013 *B.Y.U. L. Rev.* 1457, 1512 (2013) (Within a few years, the immigration detention practice would shift from its early focus on Central American and Caribbean refugees, frequently perceived to be involved in criminal activity, to an explicit emphasis on people suspected of having engaged in criminal activity, often drug-related activity. . . .); Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than Enemy Combatants and why they Deserve More*, 111 *Columbia L. Rev.* 1836 (2011)

¹⁴ Marie Gottschalk, *Caught* (2014) 64.

¹⁵ Gottschalk, 83 (citations omitted).

component of the federal enforcement scheme. My work connects the insights of Lipman and Gottschalk, portraying immigration detention as a product of the government’s response to refugee migration and the “punitive turn” in law enforcement practices more generally.

When immigration and civil rights lawyers challenged immigration detention, pointing to the rights of migrants to be free from detention as well as the government’s discriminatory use of the practice, they revealed a complex and fast-changing component of federal activity.

Advocates were initially successful in their attempt to challenge both the detention regime and this transfer decision in *Louis v. Nelson* (1982).¹⁶ In that case, plaintiffs used newly enacted statutes to imply rights for the state-less and right-less immigration detainees. This paper uses *Nelson* to illustrate the creativity of these refugee lawyers, the striking effects of detainee transfers and, ultimately, the limitations of the lawsuit’s goals. While the lawyers were able to translate immigration detention into a cognizable legal harm, they could not constrain the government’s use of detention more generally. In this way the policies challenged in *Nelson* would lay the groundwork for today’s immigration detention regime.

I. Mandatory Detention and Camp Krome

By 1980, the government’s effort at quick deportation of the Haitians—the “Haitian Program”—had been constrained by lawsuit, leading to the Immigration Service’s increased reliance on detention. The Haitian Program was challenged in a class action lawsuit in 1979, resulting in a temporary stay of deportations until the department could reform its asylum hearings process.¹⁷ Without the ability to deport incoming Haitians, the government was increasingly reliant on its power to detain them. In June of 1980, the government started using the southern part of Camp Krome—half a mile from Krome North, where it held Mariel

¹⁶ *Louis v. Nelson*, 544 F. Supp. 973, 993-97 (S.D. Fla. 1982), *aff’d in part sub nom. Jean v. Nelson*, 711 F. 1455 (11th Cir. 1983), *rev’d*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff’d as modified*, 472 U.S. 846 (1985).

¹⁷ Loescher & Scanlan, 177.

Cubans—to house Haitian detainees. Conditions at Krome were miserable, particularly for the Haitians at Krome South, leading many refugee lawyers to express concern about unequal treatment.¹⁸ A Miamian priest complained that the Camp lacked fire protection and sanitation facilities, and was surrounded by grasses over three feet in height.¹⁹ One detainee, a twenty-three year old Haitian carpenter, complained that snakes stalked the swampy, unlit camp at night.²⁰

As the population of incoming Haitians grew, the Immigration Service transformed Camp Krome into a permanent facility. In September 1980, the Camp, which had housed many Marielitos, was closed by Florida Health Officials, citing sanitation violations.²¹ But efforts to reform the refugee camp only led to longer lasting, more standardized detention procedures.²² Indeed, the INS dismantled the Krome facility and created a permanent immigration facility in 1981, replacing the canvas circus tents of Camp Krome with a “concoction of barbed wire and concrete blocks,” all on the same decommissioned missile site in the Everglades.²³ The new Krome, which was intended to serve as a short-term processing center for incoming immigrants, quickly became home to incoming Haitians.²⁴ Officials soon found that even the Facility was overcrowded. While the flow of Marielitos had stopped in October, the flow of Haitians had only increased.

Federal administrators eventually used their power to transfer detainees to supplement the detention policy. When Krome was overcrowded, officials of the INS and their supervisors at the Department of Justice struggled to find alternatives, eventually relying on federal prisons in far-

¹⁸ Lipman, 124.

¹⁹ U.S. Spending \$16.8 Million for Refugees in Florida, NY Times (Aug. 14, 1980), A17

²⁰ Quoted in Lipman, FN 37.

²¹ Lipman, 125 (the “cruel conditions” of the refugee camp “paved the way for its closing and reopening as a detention center.”). Lipman quotes Florida Department of Health Spokesperson Linda Berkowitz declared: “We do not consider those sites fit for human habitation and we are no longer tolerating their continued operation. Conditions are deplorable. . . . Nobody in the state of Florida should live like that. It is an intolerable situation.”

²² Liz Balmaseda. “New Krome a Sign of Growth in Alien detention” Miami Herald, Mar. 12, 1985.

²³ Mary Thornton, Haitian Refugee Dilemma, Washington Post (Oct. 19, 1981).

²⁴ GAO Report, 18.

flung locales. Officials of the Carter administration attempted to create an immigration detention center in Puerto Rico, which they only rejected after pressure and a lawsuit from local politicians.²⁵ Even when Reagan officials revived the Puerto Rico option, the Krome facility grew increasingly overcrowded. Frantic, INS Officials began on July 17, 1981 to transfer the migrants to federal prisons in Big Spring, Texas, Morgantown Virginia, Lexington, Kentucky and Fort Drum in New York.²⁶ By mid-1981, 2,100 Haitian detainees had been transferred to facilities around the country.²⁷

The transfers reverberated in a community of detainees and lawyers that was, often, already engaged in acts of protest. Several months after the transfers began, Haitians in Krome threw stones at prison guards, chanting “liberty or death,” “Miami is our country,” and “set us free.”²⁸ Ninety-eight detainees managed to escape, but were quickly caught. Guards retaliated with tear gas and, the next day, transferred 120 migrants to a correctional institute in Otisville, New York.²⁹ Advocates saw the INS’s transfer of Haitians from Miami to remote federal facilities as a particularly grievous offense. In a letter to the Attorney General, the ACLU called the action a “policy of Siberian exile.” “The government obviously hopes to freeze them out and thereby convince the refugees to go home voluntarily,” said the letter, pointing out that the INS had “placed the refugees in an area where they will have almost no contact with lawyers, family and friends.”³⁰ ACLU lawyers would soon translate these concerns into legal claims, arguing

²⁵ Lipman, 129.

²⁶ *Haitians*, Undated Notes, Folder 4-18 (“List of Detention Facilities Holding Haitians, 1981”), *HRC*. Gollobin listed Brooklyn, NY (Opened July 17, 1981); Otisville, NY (Opened Sept. 1981); Ray Brook, NY (Opened “July,” likely 1981); Lexington, KY (“July”); Morgantown, WV (“July”); Alderson, WV (Oct. 31); Big Spring, TX [a “Federal Prison Camp” that held 100 Haitians in 1981] (“July,” 1981); Port Isabel, TX (undated in memo); Port Allen, Puerto Rico (“August-September”); New Orleans, LA (undated in memo)

²⁷ Zucker & Zyucker, 75.

²⁸ Gregory Jaynes, Haitian Refugees Still Languishing at Facility Near Everglades: Aliens or 'Refugees'? An Exclusion Process Used Move Planned to Cold Climate, *N.Y. Times* (Sept. 23, 1981) at A16.

²⁹ *Id.*

³⁰ (Letter to Wm. French Smith, Dec. 7, 1981, ACLU).

that the government's transfer decisions interfered with the refugees' statutory right to representation.

The 1981 transfers brought the use of detention into the public eye. Newspapers reported on the bizarre geography of Haitian detention. A reporter for the Washington Post wrote about the transfer of Haitian women to a Bureau of Prison facility in Alderson, WV. "In the lea of West Virginia's rolling hills," she noted, "the novel sound of French Creole patter rolls through 'Unit 26, the double-story, college-type dormitory where the Haitian women sleep several to a room in bunk beds and fight off the boredom of enforced confinement.'"³¹ Because officials at the Alderson facility had to separate the immigrant detainees from the facility's supposedly violent inmates, they served dinner to the Haitian women at 3:00 p.m. When a woman began taking the food from the cafeteria to eat at night, prison guards frisked her and threw her food in the garbage.³² Similarly, the forty immigration detainees in Ray Brook Prison in Lake Placid, NY were barred from leaving their living quarters, required to wear convict uniforms, and not provided with interpreters to speak with the prison staff.³³ After a clash between several migrants and prison administration, two were kept in solitary confinement.³⁴

II. The 1981 Detention Policy

The government's 1981 transfer decisions were one component of a larger campaign to restrict immigration by using detention. Official reactions to the arriving Haitians represented not only a general desire for immigration restriction, but the federal government's specific

³¹ Caryle Murphy, In Prison Without a Trial, Washington Post, May 3, 1982.

³² *Id.*

³³ Haitian Refugee Committee, *Raybrook Penitentiary Investigation* (Aug. 28, 1981), Folder 4-18 ("List of Detention Facilities"), *HRC* (the Committee reported that detention could provoke a variety of reactions including "mental breakdown," "violent outbreak" and "the appearance of homosexuality [?!] where the first victims will be the children"); *See also* Raymond Bonner, *40 Haitians are Held Upstate Under Rigid Control*, NY Times (Aug. 29, 1981); Gregory Jaynes, Haitian Refugees Still Languishing at Facility Near Everglades: Aliens or 'Refugees'? An Exclusion Process Used Move Planned to Cold Climate, N.Y. Times (Sept. 23, 1981) (reporting on protests and subsequent transfers).

³⁴ *Id.* (Bonner August 29, 1981).

ambivalence about expanding the country’s refugee policy to include arriving Haitians. The country’s refugee policy had long been rooted in Cold War interest in accommodating political refugees fleeing persecution by Communist regimes.³⁵ In 1980, Congress had enacted the Refugee Act, which explicitly removed the Communist country preference, but did not stop officials from the INS or the State Department—the federal body that made recommendations about refugee admissions to the Immigration Service—from being much more accommodating towards refugees from Communist regimes.³⁶ This fact, in combination with the perception that migrants were seeking jobs, rather than refuge, underlay anti-Haitian sentiment within the Executive Branch and within the public at large.³⁷

The government’s use of detention emerged from the Reagan administration’s efforts to restrain migration, particularly from Haiti. In September, 1981, the Department of Justice instituted the policy within weeks of Reagan’s 1981 “interdiction” campaign, which authorized the Coast Guard to interdict boats transporting Haitians en route to the United States.³⁸ In a speech before congressional subcommittees on immigration in July 1981, the Attorney General worried that the country had “lost control of our borders” and “crumbled under the burden of overwhelming numbers.”³⁹ To regain control, he insisted, the country would need to “deta[in] illegal aliens pending exclusion.”⁴⁰ The architects of the policy were clear about its deterrent

³⁵ Zucker, 153.

³⁶ *Id.* (Nothing that in 1981, the acting Commissioner of the INS directed the Service to presume that all persons from Vietnam, Laos and Cambodia were refugees). *See also* Loescher & Scanlan, 189 (Reporting that 64,000 of the 70,000 “admissions slots” for refugees in the 1984-85 fiscal year were “slotted for refugees from the Soviet Union, Eastern Europe, Communist Indochina, Cuba and Afghanistan,” and noting that “under Ronald Reagan, a Cold Warrior of the old school, vague humanitarian pieties—and the ideologically neutral language of the 1980 law—have been subordinated to strident anti-Communism.”)

³⁷ Zucker, 154; Zucker & Zucker, 74 (reporting that Haitians made up only 2% of the total undocumented immigration to the United States, citing federal officials like Assistant Secretary of State Thomas Enders reported that Haitians migrated “as a matter of choice”).

³⁸ *Id.* at 359 (referring to Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), reprinted in 8 U.S.C.A. § 1182 (West Supp. 1985)).

³⁹ Cited in *Louis* at 980.

⁴⁰ *Id.*

benefits; in a 1981 memorandum to the President describing the policy, the Attorney General wrote that “detention could deter continuing illegal immigration reducing adverse community impact.”⁴¹ In a letter reviewing the policy, the Commissioner of Immigration reiterated its deterrent purpose and noted that it had been “remarkably successful” in reducing the arrivals of Haitians to Florida.⁴²

Immigration detention thus developed part and parcel with the Reagan administration’s harsher immigration policies/ Along with interdiction, the administration embraced a mandatory detention policy in 1981, seeking to deter immigration while—at the same time—disguising their efforts as statutory interpretation. In 1981, the Justice Department articulated a new detention policy for arriving migrants.⁴³ Rather than detaining only those migrants who presented particular security risks or likelihood of absconding, the Department began to presume that every individual should go to a detention facility.⁴⁴ Migrants like Thelimaque, who requested asylum once they entered the country, would be detained until their hearing. The new policy contained

⁴¹ Robert Kastenmeier, *Detention of Aliens in Bureau of Prisons Facilities*, Memo to Members of Subcommittee on Courts, Civil Liberties and the Administration of Justice, *Detention of aliens in Bureau of Prison facilities, Detention of Aliens in BOP Facilities Hearing*, 227-28 (referencing a Sept. 14, 1981 memorandum from Associate Attorney General Guiliani “indicating that the policy of detention and speedy retain of aliens was necessary to achieve deterrence.”)

⁴² Alan C. Nelson, Letter to Hon. Robert Kastenmeier (House of Representatives), June 25, 1982, *Detention of Aliens in BOP Facilities Hearing*, 202 (“For example, in the first few months of 1981, a total of 2,839 excludable Haitians are known to have arrived in the Florida area. For this year, that same five month total has dropped to 89.”).

⁴³ Helton, 353 (“after falling into administrative disuse in the 1950s, government officials revived alien detention as a policy in the 1980s.”)

⁴⁴ See Robert Kastenmeier, *Detention of Aliens in Bureau of Prisons Facilities*, Memo to Members of Subcommittee on Courts, Civil Liberties and the Administration of Justice, *Detention of aliens in Bureau of Prison facilities*, hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, June 21, 1982, 97th Cong., 2nd Sess. (Serial No. 81), 227[Hereinafter *Detention of Aliens in BOP Facilities Hearing*]. See also *Leng May Ma v. Barber*, 357 U.S. 185, (1958) (“The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. ... Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond.... Certainly this policy reflects the humane qualities of an enlightened civilization.”)

limited opportunities for “humanitarian parole,” but generally resulted in a rapid increase in immigrant detention.⁴⁵

Federal officials, eager to de-politicize the change of program, were careful to portray it as a congressional command. Immigration Service authorities framed the detention policy as a strict enforcement of the “detention mandate” in immigration law.⁴⁶ The Justice Department pointed to a component of the Immigration and Nationality Act (INA) that said that arriving migrants “who may not appear to the examining officer to be clearly and beyond doubt entitled to land *shall* be detained for further inquiry.”⁴⁷ This provision had been on the books since 1952, but the Immigration Service had rarely detained aliens, relying instead on another provision of the law, which allowed the Attorney General to release excludable aliens on parole.⁴⁸ When it took up the 1981 policy, the Department of Justice phrased its decision as a return to the 1952 law. The Department of Justice read the detention provision of the law as a “detention mandate,” and revisited the legislative history of the parole provision to resurrect the “restrictive manner” in which it was meant to be used.⁴⁹ The image of detention as a legislative mandate was passed from William French Smith, the Attorney General, to the local staff of the INS. In a Memo to the Immigration Commissioner, Smith described the 1981 detention policy as an “administrative

⁴⁵ William F. Smith, Memorandum to Alan Nelson on Haitian Detention and Hearings (June 11, 1982) in *Detention of Aliens in BOP Facilities Hearing*, 195 (“Exceptions are made where humanitarian conditions dictate, as with minor children or persons requiring medical attention are involved.”).

⁴⁶ *Id.*

⁴⁷ Detention Policy Guidelines in Exclusion Cases, Undated Memorandum, *Detention of Aliens in BOP Facilities Hearing*, 233 [Hereinafter, *Detention Policy Guidelines*] (referencing Section 235(b) of the Act, 8 U.S.C. s 1225(b), which provides that “Every alien ... who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.”).

⁴⁸ Section 212(d)(5)(A) of the Act, 8 U.S.C. s 1182(d)(5)(A) (“The Attorney General may, in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States...”).

⁴⁹ *Detention Policy Guidelines*, 233.

step to ensure that that existing laws are firmly and fairly enforced.”⁵⁰ INS district directors were reminded in an internal memo that parole authority should be “narrowly exercised in conformity with the statutory purpose and legislative intent.”⁵¹ Immigration Service staff would insist on the statutory basis of the mandatory detention policy throughout the decade.⁵²

By highlighting the statutory basis for their policy, INS officials neutralized congressional or public complaints that it was inappropriate. Under the guidance of William French Smith’s Department of Justice, which Stephen Teles calls a “transformative bureaucracy,” INS officials reoriented immigration policy without explicit Congressional guidance.⁵³ The fact that these officials used strict statutory construction to accomplish these transformations exemplified the ideological priorities—originalism and strict Constitutional construction—of Teles’ transformative department.⁵⁴ At the same time, other scholars note, DOJ and INS officials increased the amount of money that they devoted towards immigration enforcement, particularly Border Patrol policing in the Southwest, and pursued cooperation with military officials. Together, these sources demonstrate an active change in immigration enforcement priorities in the end of the Carter administration and into the Reagan one.⁵⁵

⁵⁰ William F. Smith, Memorandum to Alan Nelson on Haitian Detention and Hearings (June 11, 1982) in *Detention of Aliens in BOP Facilities Hearing*, 195. See also Monday Morning Highlight: Attorney General Announces Parole Hearings for Haitians,” U.S. Department of Justice, Federal Prison System, June 21, 1982.

⁵¹ *Detention Policy Guidelines*, 233.

⁵² See, e.g. Statement of James L. Buck, Deputy Commissioner of INS, Subcommittee on Immigration, Refugees and International Law, House of Representatives, *Haitian Detention Hearing*, 21 (“In May 1981, administrative steps were taken to ensure that existing laws were firmly and fairly enforced. The Immigration and Naturalization Act authorizes that undocumented and otherwise excludable aliens attempting to come into the United States be detained until a hearing decides whether they legally can enter. This provision was more actively enforced after 1980.”)

⁵³ Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POLITICAL DEV.* 23, 62 (2009) (“transformative bureaucracy ... involves consciously deploying agency resources to transform the terms of political competition in the future by reshaping the agency’s external environment.”). Teles focuses on the Department of Justice under Meese, whose management style enabled more vigorous transformative bureaucratic activism and hardened shifts in judicial ideology outside the Department. *Id.* at 88.

⁵⁴ *Id.*

⁵⁵ Hernandez, *Supra* n. 5, 1509.

This use of detention caused a substantial uproar among advocates and officials alike. In September 1981, a New York City religious organization called the “Haitian Fathers,” in cooperation with a variety of religious, cultural and labor organizations, planned a demonstration to “free the jailed Haitian refugees,” distributing a pamphlet that lambasted the policy as “inhumane and against our country’s traditions.”⁵⁶ The Haitian Fathers saw the policy as a discriminatory one, and many other advocates agreed. “I don’t know of any parallel where people coming to the United States for asylum have been treated so harshly,” Ira Gollobin, a lawyer for the National Council of Churches, told the New York Times.⁵⁷

III. Challenging Immigration Detention in the Courts

The government’s treatment of Haitians attracted the attention of a network of public interest lawyers. Lawyers advocating on behalf of Haitian migrants often saw themselves as representatives of particular groups or causes in addition to individual immigrants.⁵⁸ Rebecca Hamlin and Peter Wolgin argue that the treatment of Haitian migrants attracted “norm entrepreneur lawyers,” often connected to larger civil rights organizations, who challenged conditions facing Haitians to “highlight the hypocrisies they saw in U.S. asylum policy.”⁵⁹ The National Council of Churches (NCC) sponsored much of the litigation on behalf of Haitian migrants, collaborating with the Washington Lawyer’s Committee for Civil Rights Under Law, the National Center for Immigrants’ Rights, and the National Emergency Civil Liberties

⁵⁶ Haitian Fathers, *Demonstrate to Free the Haitians* (sponsored by American Committee for Protection of Foreign Born, Hispanic Labor Committee, AFL-CIO, Congresswoman Shirley Chisholm and many others), Folder 4-18 (“Louis v. Nelson, List of Detention Facilities”), *HRC*. See also Editorial, *Why Send Haitians to Siberia?*, N.Y. Times (Nov. 15, 1981); Editorial, *Haitians at Fort Drum: An Inhumane Refugee Decision*, Phila. Inquirer (Dec. 8, 1981).

⁵⁷ Raymond Bonner, *Immigration Service Refuses to Free 83 Haitians in a former Navy Prison in Brooklyn*, NY Times (Aug. 28, 1981).

⁵⁸ Rebecca Hamlin & Philip Wolgin, “Symbolic Politics and Policy Feedback: *The United Nations Protocol Relating to the Status of Refugees* and American Refugee Policy in the Cold War,” 46Intern. Migration Rev. (2012), 586–624 (calling Haitian advocates a “new type of immigration attorney”).

⁵⁹ *Id.*

Foundation. Ira Gollobin, the General Counsel of the NCC, had founded the National Lawyers Guild, and was likely well connected to lawyers involved with the civil rights movements in the decades before. These lawyers challenged the government's use of shoddy exclusion proceedings and the denial of work permits, arguing that this type of treatment violated the migrants' rights under international conventions and the Due Process Clause, and alleging that the government's singling out of Haitian migrants for such treatment violated the Constitutional promise of equal protection.⁶⁰ These cases were successful, at least in giving the government pause: In *Egan* (1979), a District Court issued a temporary stay of deportation for the 600 Haitian class members. In another case, the same Court ordered that the asylum-seekers whose claims were processed in summary fashion should "not be deported until they are given a fair chance to present their claims for political asylum."⁶¹ Indeed, it was this hold on deportation that made detention so important in the Immigration Service's deterrence project.

Immigrant advocates challenged the government's use of transfers in *Louis v. Nelson*, introducing a geographic element to the asylum seeker's right to counsel.⁶² A coalition of advocates, including Ira Kurzban and Vera Weisz from Miami's Haitian Refugee Center, and a representative of the local ACLU, brought a class action suit representing detained Haitian asylum applicants.⁶³ Kurzban and his colleagues made a number of arguments, including a claim that the detention policy was an INS rule that should have been promulgated through the APA's Notice-and-Comment procedures. The legal team also argued that the INS's decision to transfer the Haitian detainees violated right to counsel. In the case, eventually titled *Louis v. Nelson*,

⁶⁰ Zucker, 157. See *National Council of Churches v. Egan; Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023 (11th Cir. 1982) ("The results of the accelerated program adopted by INS are revealing. None of the over 4,000 Haitians processed during this program were granted asylum.")

⁶¹ *Id.*, citing Judge James King, Final Order Granting Relief, *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

⁶² *Louis v. Nelson*, 544 F. Supp. 973, 993-97 (S.D. Fla. 1982), *aff'd in part sub nom. Jean v. Nelson*, 711 F. 1455 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985).

⁶³ Memorandum in Support of Motion for Temporary Restraining Order, *Jean v. Meissner*, 25.

Kurzban and his colleagues posited that the transfer decision left Haitian refugees without the resources and witnesses necessary to complete an application for asylum, including pro bono immigration attorneys and translators fluent in Haitian Creole. These culturally specific legal resources would be necessary, the lawyers reasoned, to hold the government to its promise to use “meaningful procedures” to admit asylum seekers.⁶⁴ Indeed, lawyers for detained asylum-seekers had argued for the importance of these procedures in *Sannon* and *Pierre* several years’ earlier, and federal courts had recognized that the “right to counsel” referenced in immigration statutes entailed some obligations on part of the federal government to help incoming migrants find legal assistance.⁶⁵ To illustrate their argument about the effect of transfer policy on detainees, the plaintiffs submitted affidavits from immigration lawyers near the new detention locations indicating that they would not have the ability to represent the incoming Haitians, and measuring the distance between the detention centers and cities with significant numbers of immigration lawyers.⁶⁶

In the end, the federal court exhibited some sympathy towards the plaintiffs’ arguments about the transfer policy. In a 1981 ruling, a federal judge agreed that the INS “subjected [Haitians] to a human shell game... scatter[ing] them to locations that are nearly all in desolate, remote, hostile areas ... containing a paucity of available legal support and few, if any, Creole interpreters.”⁶⁷ The judge did not order the INS to return the Haitian detainees to Miami because he had also enjoined Service’s entire detention policy. Because he had agreed with plaintiff’s first argument that the detention policy itself violated the Administrative Procedure Act, the

⁶⁴ 16 In Defense of the Alien 130 (1993)

United States Policy toward Haitian Refugees: Is It Only Institutionalized Racism; Kurzban, Ira J.

⁶⁵ [GAO Report]

⁶⁶ [Florida ACLU Papers]

⁶⁷ *Louis v. Meissner*, 530 F. Supp. 924, 926-27 (S.D. Fla. 1981).

Judge did not issue a specific ruling against the transfer decision.⁶⁸ Following an extensive trial, the case was transferred to a different district judge, who was similarly critical of the government's use of transfers but thought that the transfers were necessary under the circumstances of overcrowding at Krome.⁶⁹ Eventually the Immigration Service agreed to provide interpreters and legal personnel at some of the detention sites.

IV. Institutionalizing the Detention Policy

Judicial recognition of the rights of detainees in *Nelson* might obscure the importance of the detention in immigration enforcement. The government's behind-the-scenes response to overcrowding at Camp Krome reveals its insistence on implementing the detention policy and permanently changing the face of immigration enforcement. While the Miami legal team succeeded in their efforts on behalf of the transferred detainees, their efforts only scratched the surface of the government's broader desire to enact a more punitive form of immigration control. For the defendants in *Nelson*, interfering with the right to counsel was less important than instituting a more permanent detention regime. Underlying the government's July transfer decision was an administrative scramble to search for temporary and eventually permanent facilities for short- and long-term immigration detention. These facilities would be professional, federally-administered and ultimately integrated into the Immigration Service's comprehensive deterrence-focused regime.

Months before transferring the *Nelson* plaintiffs out of the Krome facility, the Immigration Service scrambled to find federal facilities to hold immigrant detainees and, more importantly, cooperate with its blanket detention policy. In April 1981, the Immigration Service

⁶⁸ Id., see also [GAO Report].

⁶⁹ Schmidt, 318.

surveyed several sites—including former Air Force bases and a radar site in North Carolina.⁷⁰ Federal officials toured an Air Force Base in Chicopee, Massachusetts and a Naval Engineering Center in Lakehurst, NJ, for example, where their probing questions about the possibility of detaining refugees prompted concerned letters from local congress-people about the resulting “demand on the community.”⁷¹ Aware that communities would be similarly hostile to the prospect of housing Caribbean migrants for the Immigration Service, the Department of Justice created a task force to analyze various options for detention.⁷² Members of the Task Force reportedly considered abandoned colleges, Veterans Hospitals and unused public lands, commissioning a GSA survey to locate a facility to house the Haitian migrants.⁷³ In 1982, the Task Force detention reported that it had analyzed more than 15 alternative locations, but that most were rejected by the President on “political or cost grounds.”⁷⁴ Local resistance—so often a role in the placement of prisons—would bedistressing for the federal government as it implemented its detention policy.

Because federal officials wanted complete control over the detention regime, DOJ officials were quick to reject the option of housing the migrants in local prisons or jails. The Immigration Service, however, had contracted with local or state facilities in the past, usually paying per-person fees to these facilities.⁷⁵ This financial incentive could reduce the pushback from local politicians who would otherwise be reluctant to house the migrants. In a joint memorandum prepared by INS staff in collaboration with the Board of Prisons, federal officials made clear that using local jails was no longer acceptable because it would undermine the

⁷⁰ [GAO Report].

⁷¹ Giuliani Papers, p. 367 Letter from Sen. Bill Bradley (Dec. 8, 1981); Letter from Silvio O. Conte (Nov. 16, 1981).

⁷² 360 Task Force March 18 (see below).

⁷³ 360 Report.

⁷⁴ Report (March 18, 1982), p. 186.

⁷⁵ [BOP Report]

department's new punitive approach. These officials worried that "a liberal bond or recognizance posture prevail[ed]" in local jails, which were increasingly overcrowded in the 1970s and 80s. Officials feared that if a local jail allowed a migrant to leave on bond, the migrant would fail to appear for deportation and never come back.⁷⁶ In this sense, the plaintiffs' right-to-counsel claims in *Nelson* may have been misleading. Local administrators could be as threatening to the federal government as immigration lawyers were.

Indeed, the Department of Justice would only trust a facility that it could fully control. Rather than scatter migrants throughout the country, the Immigration Service wanted to house them in one "centrally located multipurpose detention facility." (Report at 2). This desire revealed the imperative behind the DOJ's search for housing for alternative facilities. The Task Force predicted that the "requirement to house long-term detainees will continue and possibly increase in the future." Indeed, during the Mariel Boatlift, FEMA—which had been, for a moment, tasked with managing the resettlement of Marielitos—had tasked various agencies of the government to provide lists of all available federally owned properties "for use in housing aliens that might arrive in large numbers," a job that was later given to the Department of Justice.⁷⁷ In the end, perhaps, the Task Force's search was bigger than the Haitian crisis.

Ultimately, federal officials saw the permanent detention option as a component of the President's anticipated immigration reform, which had been endorsed by immigration experts under Carter and eventually under Reagan.⁷⁸ One Department of Justice memorandum noted that

⁷⁶ Site Selection from the INS Detention Center, Prepared by the BOP and INS, April 1982 (p. 309)

⁷⁷ Report as to status of space for detention and prior surveys, David Miller (Spec. Assistant to the Attorney General), May 19, 1981.

⁷⁸ Aristide R. Zolberg, Review: Ronald Reagan and the Politics of Immigration Reform by Nicholas Laham, *Presidential Studies Quarterly*, Vol. 32, No. 1 (Mar., 2002), 216 ("Although Reagan established his own Immigration Task Force, it largely endorsed the "package deal" recommended by its Carter-era predecessor that became "Simpson Mazzoli" at the beginning of the 97th Congress.")

“the success of [the Reagan] Administration’s detention policy assume[d] quick passage of legislation to reform cumbersome and lengthy exclusion and asylum procedures; sufficient short term detention space to house approximately 9,000 persons while legislation is pending, a long term INS facility for 2,000, and a program of limited interdiction at sea to effect some immediate deterrence.”⁷⁹

In other words, both long- and short- term detention would be crucial to the Department’s long-term legislative goals.

The Immigration Service developed new institutional partners that would further normalize its use of detention. To secure its permanent facility, the INS eventually embarked on a long-term partnership with the Bureau of Prisons. The Bureau of Prisons, an INS official wrote in a letter to Associate Attorney General Giuliani, would have the professional expertise to manage migrant populations and avoid INS mismanagement, which led to “disgraces” like Krome.⁸⁰ Transferring detainees to BOP leadership would also result in lower per-detainee costs and other standard benefits of professionalization.⁸¹ The letter also reviewed the drawbacks of the proposed transfer of power. Some were fairly straightforward: BOP facilities were also crowded, and moving long-term detainees to BOP control would only force that agency to manage the development of facilities for immigrants. Furthermore, there was always the potential for miscommunication between the two agencies. But the INS also acknowledged the intangible dangers that could result from putting asylum-seekers awaiting their trial under the purview of an office of Prisons. In a 1982 paper, the Task Force acknowledged that the “‘criminalization’ factors of Bureau of Prison management would create an aura of penal treatment of administrative detainees,” which “could create negative responses from advocate

⁷⁹ [Giuliani papers, 2].

⁸⁰ Letter to Giuliani from Renee Szabala, March 25, 1982 (163).

⁸¹ Furthering this desire to professionalize facilities, the Immigration Service in early 1983 started a “jail inspection program” to monitor conditions at cooperating facilities to make sure they “met the [agency’s] standards.” Robert Kastenmeier, *Detention of Aliens in BOP Facilities Pending Resolution of Immigration Matters*, Memo to Members of Subcommittee on Courts, Civil Liberties and Administration of Justice (June 21, 1982), in *Detention of Aliens in BOP Facilities Hearing*, 225. See also *Jail Inspection Program: New Approaches to Enforcement*, INS Reporter (Fall/Winter 1983-84), Vol. 32, No. 1-2, 13 (1983).

groups and foreign governments.”⁸² Transferring leadership of immigration detention to the BOP forced federal officials to acknowledge what legal scholars have so long suggested: that immigration detention—theoretically a civil endeavor—has an unwarranted “penal character.”

The two agencies continued to share responsibility for immigration detention, reflecting the blended administrative and punitive goals of the detention regime. In 1982, the INS requested funding for the construction of two additional facilities, which would be managed by the Bureau of Prisons.⁸³ Eventually, it received funding for the construction of a 1,000-person facility in Oakdale, LA, which opened in December 1985.⁸⁴ By 1986 the INS operated seven detention facilities—including the “Krome Service Processing Center” in Miami—with a joint capacity of over 2,000 detainees, while the BOP ran the Oakdale, LA, facility.⁸⁵

Krome would remain under INS management, but two BOP officers would function as director and assistant director of the facility for a year to “establish professional operations and train INS personnel.”⁸⁶ Indeed, the role of BOP assistance underscores the quick professionalization of INS’s detention regime. In 1984, the *Miami Herald* reported, INS officials “remodeled” the Krome facility, creating basketball courts, a library and new kitchen. Franklin Graves, former Secret Service agent and behavioral scientist, told the *Herald* he used “deliberate coloring” to create a “homey feel” and “sense of pride” in the detainees.⁸⁷

V. Privatizing Immigration Detention

⁸² March 18 Memo.

⁸³ Robert Kastenmeier, Letter to Neal Smith, Committee on Appropriations (July 14, 1982), in *Detention of Aliens in BOP Facilities Hearing*, 242 (reporting the DOJ’s request for \$35 million to build two new detention facilities that would be managed by the Bureau of Prisons).

⁸⁴ Helton, 363.

⁸⁵ Helton, 363. See Schmidt, 315.

⁸⁶ Memorandum to William French Smith, From Rudolph Giuliani (May 21, 1982) 205). See also Memorandum of Agreement between BOP and INS, approved by AG on May 25, 1982.

⁸⁷ Liz Balmaseda, *New Krome a Sign of Growth in Alien Detention*, *Miami Herald* (March 12, 1985).

In addition to modernizing the appearance of detention facilities, immigration administrators collaborated with private contractors. Then-Commissioner Alan Nelson reported that the Immigration Service was doing a “great deal more contracting” in the early 1980s, and even adding that the arrangements “had been working quite well.”⁸⁸ In 1983, the INS began contracting with Behavioral Systems Southwest, a California company that had partnered with states to provide halfway houses.⁸⁹ By 1984, the company held 350 migrants in four facilities in California, Arizona and Colorado. In March, 1984 the INS granted a contract to the Corrections Corporation of America (CCA), which opened its first facility ever, a 300-bed immigration detention facility, in Houston, TX.⁹⁰ Indeed, when the newly remodeled Krome facility was overcrowded in the spring of 1985, INS officials sent Haitians migrants to the Houston Processing Center.

Immigration detention provided important business for the country’s nascent private prison industry. The early 1980s was a key moment in the development of private prison companies like the CCA, which opened for business in June 1983. The CCA, now the largest private prison company, got involved in contracting at the state and federal levels. The CCA had unsuccessfully sought to privatize the state of Tennessee’s prisons system in the early 1980s. When this effort was unsuccessful, the company took advantage of the “emerging market in immigrant detention,” and pursued a contract with the INS.⁹¹ Thomas Beasley, a “41-year old entrepreneur who [was] involved in Republican Party politics in Tennessee” started CCA with funding from local investors, promising to offer the government effective detention at 15-25%

⁸⁸ *Id.*

⁸⁹ Kevin Krajick, *Prisons for Profit: The Private Alternative*, State Legislature (1984), 10.

⁹⁰ *Id.*

⁹¹ Gottschalk, *Caught* (2014), 66.

less per-prisoner than publicly run alternatives.⁹² Beasley hired several corrections experts, including the retired chairman of the U.S. Parole Commission and the former Commissioner of Corrections in Arkansas and Virginia.⁹³ “Government is inherently wasteful,” he told a reporter, promising to cut costs by cutting out complicated political pressures, bidding procedures or civil service rules.⁹⁴ In short, the CCA built its corporate ideology in the immigrant detention market.

Privatization was particularly suited to immigration detention for several reasons, which explains why the CCA was able to grow so quickly as an immigration detention provider. First, immigration detention was theoretically short-term and low-security, more like “decent ‘warehousing’ or holding space” than a full-fledged prison.⁹⁵ Second, the INS’s history of contracting with local jails for small numbers of beds might have made the Service more comfortable with the privatization process. Finally, the fluctuations inherent in immigrant detention—resulting from both changes in immigration trends and changes in the Immigration Service’s detention policy—made private contractors particularly appealing. “Rather than build our own institution for something that might be a temporary phenomenon,” an executive official explained, the Immigration Service experimented with privatization.⁹⁶ As a spokesperson for the Bureau of Prisons put it in 1985, the mandatory detention policy was an “immediate need which the private sector offered to fill.”⁹⁷

Immigration advocates were not necessarily critical of the use of private facilities, because government-run facilities presented so many opportunities for critique themselves.⁹⁸

Conditions at places like Camp Krome were so severe that privatization did not necessarily

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Joan Mullen, *Corrections and the Private Sector*, National Institute of Justice: Research in Brief (Oct. 1984) 3.

⁹⁶ *Id.*

⁹⁷ Krajick, 11.

⁹⁸ *Id.* at 11 (reporting that the ACLU has no objection to “the idea of private institutions as long as contractors give prisoners adequate service and humane treatment”).

imply a reduction in services. In fact, Reverend Thomas Sheehy of the Galveston-Houston Diocese told a journalist that he “prefer[ed]” the CCA-run detention center to the INS’s facilities. “They’re much more humane,” he noted. “The guards haven’t been in the business so long so they’re not calloused.”⁹⁹ In other facilities, however, conditions were worse. In a Houston detention facility run by a private security firm called Danner, sixteen people slept in a twelve by twenty foot windowless cell designed to accommodate no more than six people overnight.¹⁰⁰ Danner’s staff were issued shotguns but not trained on their use or given a written policy on when their use was appropriate.¹⁰¹ When several Colombian stowaways who were detained at Danner’s facility attempted to escape, one of Danner’s guards used his gun, killing one Colombian and injuring another. The Immigration Service had never inspected any of Danner’s facilities or approved of the weapons.¹⁰² The Danner case revealed the dangers of the federal government’s reliance on immigration contractors.

VI. Immigration Detention and the Private Penal State

While scholars and present-day advocates have commented on the privatization of immigration detention, CCA’s story suggests that immigration detention might have heralded changes in other areas of crime control. The Immigration Service’s use of private facilities for immigration detention represented the first federal foray into a budding privatization movement. In the late 1970s, states and municipalities had started to contract with private companies to operate halfway houses, juvenile facilities and prerelease centers.¹⁰³ However, private facilities were always outside the mainstream of federal prison practice until the growth of immigration

⁹⁹ Martin Tolchin, *As Privately Owned Prisons Increase, so do their Critics*, N.Y. Times, B6 (Feb. 11, 1985). Krajick reports that most of CCA’s guards had experience in public prisons.

¹⁰⁰ *Medina v. O’Neill*, 589 F. Supp. 1028, 1041 (S.D. Tex. 1984) *judgment rev’d in part, vacated in part*, 838 F.2d 800 (5th Cir. 1988)

¹⁰¹ *Id.* at n. 8.

¹⁰² *Id.*

¹⁰³ Loretta Tofani, *More Correctional Facilities Operated by Private Firms*, Washington Post (Feb. 18. 1985); see also McDonald, et. al.

detention in the 1980s. As one scholar explains, contracts for immigration prisoners “provided the seedbed for the contemporary imprisonment industry in the United States.”¹⁰⁴ By extending contracts to companies like the CCA, the Immigration Service was the first federal institution to participate in this trend.¹⁰⁵ As the INS increased its cooperation with the Federal Bureau of Prisons, the Bureau experimented with privatization as well. In March, 1985, the Bureau engaged a private contractor to manage a 575-bed prison for migrants.¹⁰⁶ While the Bureau had used a contractor to run a juvenile institution several years before, this facility represented the “biggest private lockup so far.”¹⁰⁷ In 1985, the Bureau began to contract with private firms for non-immigrant detainees. By 1987, there would be 3,000 inmates in private facilities; by 1996, this number would increase to 85,000.¹⁰⁸

Scholars have charted the development of private prisons in the 1980s, but few have emphasized the unique role of the immigration detention policy in facilitating this transformation. Douglas McDonald Explains that private facilities emerged in the 1970s and 80s when local politicians—facing a fiscally conservative electorate and hemmed in by expenditure control measures like California’s Proposition Thirteen—were eager to cut taxes and avoid bond issues, and at the same time manage rapidly growing prison populations.¹⁰⁹ Political scientists like Marie Gottschalk describe the growth of immigration detention as a component of prison privatization. In her 2014 book *Caught*, Gottschalk makes clear that privatization did not start the prison boom, but emphasizes the way that privatization represents the changed character of

¹⁰⁴ McDonald, 3.

¹⁰⁵ See, e.g. Mullen, 3 (“the most active new market for confinement service contracting has clearly emerged at the federal level in response to growing demands for housing illegal alien populations.”).

¹⁰⁶ Krajic, 10 (“The contractor is Palo Duro private Detention Services, a Corrections consulting firm based in Amarillo TX. Leased a US air base near mineral wells, TX and expects to open for business this spring. Govt will allow them to charge up to \$45 a day per prisoner.”).

¹⁰⁷ *Id.*

¹⁰⁸ McDonald, et. al.

¹⁰⁹ McDonald, 392.

American democracy in the neoliberal age, when so many public services are privatized. Gottschalk's nuanced insight should signal to historians the importance of understanding the growth of immigration detention during the Haitian Program.

Conclusion

In the end, Ira Kurzban and the lawyers in *Nelson* were right about the July 1981 transfer decision, which did have the result of isolating Haitian detainees in far-flung locations with poorly-developed legal resources. But the transfer policy that the plaintiffs so carefully charted also revealed a moment of change in the government's immigration enforcement policy. The Immigration Service's use of transfers revealed its interest in creating long-term, professionally managed detention facilities to contain migrants and asylum-seekers and to reassert the Reagan administration's uncompromising approach to immigration control. Federal officials also sought to wrest control over immigration detainees from local facilities or immigration judges that could be tempted to release migrants to sponsors or to pay bond. In this way, the detention regime was a distinctively federal endeavor—indicating a moment of bureaucratic growth despite the administration's interest in deregulation and small government. It was no surprise, then that federal prison privatization would first develop in the context of immigration detention and then grow exponentially through the 1980s. Immigration detention and the private prison boom were tied from the start.