

BLACKWATER AND THE PRIVATIZATON OF IMMIGRATION CONTROL

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I. INTRODUCTION

At about the same time that Iraqi Prime Minister Nouri al-Maliki announced to the world that he would expel Blackwater Inc. from Iraq after the massacre² of 17 unarmed Iraqi civilians at a western Baghdad checkpoint,³ Salon Magazine reported that Blackwater was headed for the US-Mexican border to expand its base of operations in U.S.-based immigration control.⁴ According to Salon:

Blackwater is planning to build an 824-acre military-style training complex in Potrero, Calif., a rural hamlet 45 miles east of San Diego. The company's proposal. . . will turn a former chicken ranch into "Blackwater West," the company's second largest facility in the

1. Associate Professor of Law and Society, Philadelphia University. I would like to acknowledge the following people who have influenced this work product for the better. Stephanie Flores-Koulish, Joel Grossman, Andrea Giampetro-Meyer, Jeremy Koulish, Michael Cross-Barnet, and colleagues at the Lat-Crit XII Conference, October 2007. Versions of this paper have appeared in the Journal for Migration and Refugee Issues (Vol. 4, No. 4) and MR-zine (July 22, 2007).

2. According to a report issued by the House Government Oversight Committee on October 1, 2007, this massacre is not the first time Blackwater has misused its authority. The Report found that Blackwater guards in Iraq have been involved in at least 195 escalation-of-force incidents since 2005, an average of 1.4 shootings per week; that Blackwater fired first 80 percent of the time, even though its State Department contract allows use of force for defensive purposes only; and that Blackwater has terminated 122 employees in Iraq, 28 for weapons-related incidents, 25 for drug and alcohol violations. *See* Memorandum from Majority Staff to Members of the Comm. on Oversight and Gov't Reform (Oct. 1, 2007) (on file with author).

3. On December 5, 2007, a Memorandum of Understanding was announced by the Departments of State and Defense pledging greater oversight for private contractors, in return for Blackwater staying in Iraq. *See* Press Release, Tom Casey, Deputy Spokesman, U.S. Dept. of State (Dec. 5, 2007), available at <http://www.state.gov/r/pa/prs/dpb/2007/dec/96361.htm>.

4. *See* Eilene Zimmerman, *Blackwater's Run for the Border*, SALON, Oct. 23, 2007, http://www.salon.com/news/feature/2007/10/23/blackwater_border/print.html.

country. It will include a multitude of weapons firing ranges, a tactical driving track, a helipad, a 33,000-square foot urban simulation training area, an armory for storing guns and ammunition, and dorms and classrooms. And it will be located in the heart of one of the most active regions in the United States for illegal border crossings.⁵

Blackwater is bringing its private “war on terror” home to the U.S., and intertwining it with immigration control, five years after Paul Wolfowitz first positioned the “home-front” as the first defense against terrorism.⁶

It makes sense that the private war that followed the troops to Iraq is now establishing a para-military infrastructure on domestic turf. Author Jeremy Scahill notes that Blackwater is “looking for a lucrative domestic opportunity,”⁷ and according to San Diego Congressman Bob Filner, Blackwater is positioning itself to move into the border security business. Indeed Scahill found that Blackwater made an application in early 2005 “to serve as a force to deal with immigration and border security.”⁸

In this article, I examine the significance of Blackwater’s move to the border and its recent post 9/11 involvement in immigration control. I argue that Blackwater is symbolic of a much larger immigration industrial complex, privatizing decades of border militarization and low intensity conflict that, as author Tim Dunn has documented, has been waged against border crossers and residents since the 1970s.⁹ I also argue that Blackwater is part of a post-9/11 neo-liberal regime that is designed to re-territorialize and privatize the war on terror on the domestic front. Finally, I contend that the immigration industrial complex, with Blackwater quickly taking the lead, figures prominently in what Naomi Klein refers to as neo-liberal shock therapy, which is undemocratic to its core.

In Section II, I introduce the basic argument for Naomi Klein’s Shock Doctrine. In Section III, I examine how immigration law provides a supporting infrastructure for privatization. In Section IV, I examine the immigration industrial complex in the context of Klein’s thesis.

5. *See id.*

6. “Since last September (2001), the home-front has become a battlefield every bit as real as any we’ve known before.” Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, THE NAT’L INT., Mar. 1, 2004.

7. *See generally* JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* (The Nation Books 2007).

8. *See id.*

9. *See* TIM J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* 19 (University of Texas Press 1996).

II. THE SHOCK DOCTRINE

Naomi Klein writes in her book *Shock Doctrine* that to the people in Iraq, the Blackwater logo symbolizes an undemocratic and lawless occupation.¹⁰ New Orleans residents perceived Blackwater on their streets after Katrina with a similar sense of dread.¹¹ According to Klein, Blackwater also is a leading symbol of a neo-liberal economic regime that replaces public with private resources, and ranks the value of human life so that the lives of propertied Anglo Americans have value; and impoverished people of color simply do not matter.¹² Such is the brutality behind the neo-liberal agenda that is not beholden to law, and insists that security is a commodity, and policing and controlling borders no longer count as public services.

Klein draws a close nexus between neoconservative politics and neo-liberal economics.¹³ She says, for example, that the initial shock of an occupation disorients people so as to help elite decision-makers usher in the radical privatization of public goods and services.¹⁴ She quotes Milton Friedman, the architect of this violent, neo-liberal revolution, as recognizing that in order for such policies to hold, they must be installed before people come to their senses.¹⁵

Friedman's agenda for the government is the minimal state.¹⁶ The only acceptable role for the state is to enforce contracts and protect borders. Everything else, and by this he means education, post office, national parks and so forth, should be left to the "free market."¹⁷ How to go about this? Friedman, in 1982, said of economic shock treatment:

[O]nly a crisis, actual or perceived produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That I believe, is our basic function, to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.¹⁸

10. See generally NAOMI KLEIN, *SHOCK DOCTRINE* (Metropolitan Books 2007).

11. See *id.* at 408.

12. See generally *id.*

13. *Id.* at 14-15.

14. See *id.* at 6-9.

15. See *id.*

16. See KLEIN, *supra* note 10, at 56-57.

17. *Id.* at 57.

18. *Id.* at 140.

The Bush-Rumsfeld Doctrine, announced by Rumsfeld on 9/10/01, takes Friedman's vision a step further.¹⁹ It suggests that the role of policing and border enforcement itself could be outsourced and subcontracted.²⁰ Under this scenario, the Department of Homeland Security, and Immigration and Customs Enforcement within it, functions as a high-level public relations firm. Their role is to orchestrate a branding campaign about having secured our borders and flash it upon the map, all the while out-sourcing border control to private corporations. Given the wide-open expanses along the country's southern and northern borders, potential business opportunities are expansive.

Securitization, as scholar Ole Weaver refers to this phenomenon,²¹ needs a scapegoat that can be used to help churn up fear and disorient the public. Indeed, "illegal aliens," along with post-9/11 "terrorists," have served as effective fear-mongering cries among 2008 Republican presidential candidates.²² The image that such candidates as Tom Tancredo and Duncan Hunter create is of the specter of twelve million or more potential alien-terrorists walking the streets of downtown America.²³

Ironically enough, the anti-immigrant branding campaign also demonizes the federal government. Consider more than 200 local anti-immigrant ordinance cases in 2006-07 that have condemned the federal government for its failure to protect local communities against "illegal alien" invaders.²⁴ The subtext here is that the federal government should privatize immigration control. The alternative solution, that state and local governments should assume additional immigration controls, happens to be unconstitutional and also makes little sense in terms of financing and fundamental contradictions in mission that immigration control would introduce to local service deliverers.

Considering that free market ideologies germinate in spaces that are inhospitable to democracy, there is no better place for the neo-cons to experiment with privatizing federal policy than with immigration – a policy that historically has been an anathema to America's democratic spirit and

19. See generally KLEIN, *supra* note 10.

20. *Id.*

21. See BARRY BUZAN, ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS 17 (Lynne Rienner Press 1998).

22. See generally BUZAN, ET AL., *supra* note 21.

23. *Id.*

24. It is important to note that there is nothing new about the demonization of immigrants. In fact, the first United States Supreme Court cases on Chinese exclusion labeled immigrants as inferior. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

commitment to due process. Historically, immigration has been one of the most racist and least democratic federal policies. It is one of the few public policies in which stakeholders (immigrants) are disenfranchised and have no voice in the political process.

Immigration is one of the very few policies that are governed by the doctrine of sovereignty rather than the constitution.²⁵ Sovereignty gives plenary powers to the political branches, which allow them to reign over immigrants with near impunity.²⁶ The immigration bureaucracy has also been one of the most neglected and least desirable bureaucracies in the federal government, a bottom dweller agency in whatever department it has resided since the late 19th century.²⁷ Finally, it is important to consider the geography of immigration control. Immigration enforcement ostensibly occurs in areas thousands of miles away from Washington DC, which makes difficult for the government to engage in effective oversight of the behavior of individual agents.

Immigration control was renowned for its generous use and abuse of discretion before privatization, which now makes it particularly susceptible to profiteering. Martha Minow notes, “War profiteering is a serious problem not only because it diverts public monies—the money of citizens—to private hands through overcharging and fraud, but also because it can jeopardize peacemaking and broader confidence in government.”²⁸ Journalist Deepa Fernandes refocuses concern over profiteering to the border, where, she says, “(t)here is big money to be made as the government dramatically increases its reliance on the private sector to help carry out its war on terror. On the home front, the prime targets of this war are immigrants.”²⁹

25. See *infra* note 26.

26. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 854 (1987); see also Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for Ongoing Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003).

27. Historically, the administration of immigration policy has been the unwanted stepchild in the Departments of Treasury, Commerce, Labor and Commerce, Labor, Justice and since 2003 in Homeland Security. See *Oversight Hearing on “Funding for Immigration in the President’s 2005 Budget”*: Hearing Before the Subcomm. on Immigr., Border Security and Claims of the H. Comm. on the Judiciary, 108th Cong. 4-5 (2004) (statement of Dr. Demetrios G. Papademetriou, President, Migration Policy Institute), available at http://www.migrationpolicy.org/research/papademetriou_031104.pdf (last visited Apr. 8, 2008).

28. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B. C. L. REV. 989, 1022 (2005).

29. See DEEPA FERNANDES, *TARGETED: HOMELAND SECURITY AND THE BUSINESS OF IMMIGRATION* 170 (Seven Stories Press 2007).

III. THE SHOCK DOCTRINE INFRASTRUCTURE: PLENARY POWERS AND PRIVATIZATION

The evolving status of “aliens” as a commodity for military and detention contractors diminishes the likelihood immigrants will ever be treated with human dignity under the constitution. Privatization creates huge incentives for employees to ensure arrests are high, detention centers are full, and the revolving door of deportations keeps spinning, regardless of discrete facts.³⁰ Under these conditions, the struggle for rights gets buried beneath the fact that undocumented immigrants are the meal ticket for this burgeoning control industry.

Blackwater and its cadre of profiteers at the border benefit from the happenstance that immigration control finds legitimacy in the doctrine of sovereignty rather than the Constitution. Sovereignty removes recognition that immigrants are persons under the constitution. So what is it? Sovereignty is a nation’s self-proclaimed, absolute right over its own membership, a right believed to inhere in the nation-state’s very existence, in its right to self preservation. It precedes the Constitution and transcends it in authority.³¹ It also reserves for the political branches of government virtually unfettered or plenary powers of policy making and enforcement.

Plenary powers are the means with which the federal government implements the promise of sovereignty to secure national borders and the nation’s self defense.³² According to *Chinese Exclusion Act* case precedent, congress and/or the executive have the power to decide who can come, how long they can stay, and when they must leave.³³ According to the plenary powers doctrine, the courts have little to say about the use of federal powers and the alien receives only the process that is posited by the

30. For example, according to a new policy issued by the United States Immigration and Customs Enforcement (I.C.E.) on November 6, 2007, people seeking asylum in the U.S. could be detained and then jailed for longer periods of time. Julie Myers, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE NO. 7-1.0, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A “CREDIBLE FEAR” OF PERSECUTION OR TORTURE, (2006), available at <http://www.garmo.com/pdf/ice-parole-memo.pdf>. Such policies serve the profit interests of private detention centers, not concerns for public safety, or justice for asylum seekers. See Meredith Kolodner, *Private Prisons Smiling over Illegal Immigration*, INT’L HERALD TRIB., July 20, 2006, at 12 (discussing private prison’s financial increase associated with immigration reform).

31. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 206 cmt. b (1987); see also Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver” – Revolutionary International Legal Theory or Return to Rule by the Great Power?*, 10 UCLA J. INT’L & FOREIGN AFF. 361, 369-70 (2005).

32. See Saito, *supra* note 26, at 15-16.

33. *Id.* at 20.

political branches.³⁴ While the doctrine of plenary powers has prescribed huge amounts of power and discretion in a litany of cases,³⁵ it fails to delineate responsibilities that ought to coincide with state power.

In 1996, following the Oklahoma City bombing, Congress permitted the use of secret evidence without final charges in deportations, called for expedited removals and mandatory detention of asylum seekers, mandated the detention and deportation of non-citizens with even very old, minor criminal convictions (misdemeanors), restricted access to counsel, and also restricted judicial review of immigration matters.³⁶ The executive detention provisions of the 1996 Act built upon the *Mezei*³⁷ and *Knauff*³⁸ precedents for plenary power, and codified the executive's authority to detain without charge or trial for an indefinite period of time.

Once again, immigration was the catalyst for expanding executive powers and diminishing judicial review.³⁹ As one scholar put it, "Just like executive detention powers in general, so has the more specific power to preventively detain suspected terrorists normally been targeted at groups viewed as alien."⁴⁰ The rise in executive power coincides with a diminishing role for courts. Court stripping removes jurisdiction from the courts to review acts of congress or the executive. Court stripping also intimidates courts into abiding executive powers, reversing their own decisions, punishing judges and avoiding future rulings regarding the preservation of individual rights.⁴¹

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") eliminated judicial review of non-final orders or rulings primarily involving aliens in removal proceedings, and retroactively rendered permanent residents deportable based on prior criminal

34. *See id.*

35. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura v. United States, 142 U.S. 651 (1892).

36. *See* CHERYL LITTLE & KATHIE KLARREICH, SECURING OUR BORDERS: POST 9/11 SCAPEGOATING OF IMMIGRANTS 3 (2005), <http://www.fiacfla.org/reports/securingborders.pdf>; *see also* Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); *see also* Anti Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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

38. *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

39. *See generally* Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495 (2006).

40. *Id.* at 497.

41. *See* Memorandum from Donald Dopkin, Esquire, Johns Hopkins University (2006) (on file with author).

convictions.⁴² It also contained provisions expediting the removal of prospective asylum seekers without affording them the opportunity for judicial review.⁴³ According to the IIRIRA, only final removal orders directed at aliens were reviewable.⁴⁴ Further, Section 1252(a)(s)(B)(ii), entitled “Judicial Review of Orders of Removal,” provided:

Notwithstanding any provision of law, no court shall have jurisdiction to review. . . (ii) any other decision or action of the Attorney general the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.⁴⁵

Court stripping adheres to the anti-immigrant values established in *Chae Chan Ping*⁴⁶ and strengthened in *Mezei*.⁴⁷ Of importance here is that Congress effectively (and once again) asserted plenary powers for the Attorney General in immigration removal or deportation matters, in effect codifying some of history’s most egregious immigration decisions resting on plenary powers.⁴⁸

In addition to the IIRIRA, in 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) pared down the government’s commitment to due process for aliens, by eliminating judicial review for criminal aliens.⁴⁹ According to the AEDPA, “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against any alien who is removable by reason of having committed a criminal offense. . .”⁵⁰ The Act also deleted the prior provision in law that permitted habeas corpus review of claims by aliens who were held in custody pursuant to deportation orders.⁵¹

In 1997, the Supreme Court reviewed IIRIRA provisions. In *Reno v*

42. See 8 U.S.C. §1252(a)(2)(A)(i) (2005); see also Amy Langenfeld, *Living in Limbo: Mandatory Detention of Immigrants under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1048-49 (1999).

43. See 8 U.S.C. § 1225 (b)(1)(A)(i) (2005); see also Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 567-68 (2007).

44. See 8 U.S.C. § 1252(d) (2005).

45. 8 U.S.C. § 1252(a)(2)(B)(ii) (2005).

46. See *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889).

47. See *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 210 (1953).

48. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950).

49. See Antiterrorism and Effective Death Penalty Act of 1996, PUB. L. NO. 104-132, § 423, 110 Stat. 1271, 1272 (1996).

50. Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 JUST. SYS. J. 104, 104 (2007).

51. *Id.*

AADC, the Immigration and Naturalization Service attempted to deport eight non-citizens on account of their affiliation with the Popular Front for the Liberation of Palestine (“PFLP”), which the government described as a terrorist organization.⁵² Speaking for the Court, Justice Scalia upheld Sec. 1252(g), which prohibited the courts from reviewing decisions by the Attorney General to “commence proceedings, adjudicate cases, or execute removal orders against aliens under this Act.” Further the Court noted:

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.⁵³

According to the Court, “Congress has the power to determine the terms and conditions of a non-citizens presence in the United States and has vested in the Attorney General the power to enforce such provisions; therefore it is not for the Court to second guess the other branches’ actions in the typical deportation case. . . .”⁵⁴ Thus, the plenary powers doctrine underlies the Court’s reasoning.⁵⁵

Following 9/11, The Patriot Act invoked plenary powers to give the Attorney General broad authority to detain immigrants who endanger national security.⁵⁶ Title IV of the Patriot Act introduced several amendments tightening the Immigration and Nationality Act.⁵⁷ Section 412 of the Act authorizes the Attorney General to certify and detain non-citizens if he has “reasonable grounds to believe” that they are engaging, or have engaged, in a terrorist activity or otherwise endanger national security.⁵⁸ The Act allows for detention for a period of seven days, after

52. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 471 (1999).

53. *Id.* at 491.

54. Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 343, 360 (2000-01).

55. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 329 (2002); see also Romero, *supra* note 54, at 360.

56. See Justice Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 231 (2004).

57. See Heather Jacobson, *Refugees and Humanitarian Emergencies*, 17 GEO. IMMIGR. L.J. 667, 671 (2003).

58. See USA Patriot Act, H.R. 3162, 107th Cong. § 412 (2001).

which the Attorney General must commence deportation proceedings, bring criminal charges, or release the detainees.⁵⁹

Even more severe provisions originating in the executive branch make use of exceptional powers over internment. Department of Justice regulations issued September 20, 2001, extend detention powers of immigration authorities,⁶⁰ and illustrate dangers associated with privatizing screening and detention. The regulations allow immigration authorities to detain non-citizens suspected of being in violation of an immigration law without charge for up to forty-eight hours and for an “additional reasonable period of time” in the event of an “emergency or other extraordinary circumstance.”⁶¹ The regulations fail to define the terms, “reasonable period of time,” “emergency” or “extraordinary circumstance.”⁶² “No link with alleged terrorism need be made.”⁶³ As Daniel Moeckli adeptly summarizes:

The immigration authorities may even indefinitely detain individuals who are not charged with any crime or immigration law violation and against whom no deportation proceedings have been initiated. The detainees do not have to be informed of the reasons for their detention and are not guaranteed a right to contest it.⁶⁴

As out of step as plenary powers have been in terms of constitutional norms, there remain several forms of redress that are available to the immigrant who finds herself having been victimized by federal officials.

The privatization of immigration control removes many remaining forms of oversight and redress. Many constitutional norms are not applicable to private contractors.⁶⁵ The due process safeguard, for example, which prohibits prosecutions based on “outrageous investigative techniques, applies only to the government.”⁶⁶ Thus, any procedures attached to the processing of potential guest workers in “Ellis Island Centers,” for example, or to the street questioning of a Hispanic resident walking into a Circle K grocery store to buy milk or cigarettes without a

59. *Id.*

60. Moeckli, *supra* note 39, at 508.

61. *Id.* at 510.

62. *See id.*

63. *Id.*

64. *Id.*

65. See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 384 (2006).

66. David A. Slansky, *The Private Police*, 46 UCLA L. REV. 1165, 1233 (1999).

wallet, would not necessarily be prohibited from “outrageous investigative techniques.”⁶⁷

According to *Burdeau v McDowell*, “(the fourth amendment). . . was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.”⁶⁸ Since *Burdeau*, the Court has never held that private searches implicate a fourth amendment interest, unless the private actor is regarded as having acted as an “instrument” or agent of the state.⁶⁹

Private contractors are not considered state actors for purposes of Bivens or 42 U.S.C. 1983 “under color of law” liability.⁷⁰ According to the Court, there is no basis for filing a federal civil rights lawsuit under 42 U.S.C. 1983 against an individual who is not a “state actor.”⁷¹ For example, according to the Court in *National Collegiate Athletic Association v Tarkanian*, the only proper defendants in a Section 1983 claim represent the state in some capacity, whether they act in accordance with their authority or misuse it.⁷²

Tarkanian raises serious questions about accountability and liability issues related to conditions of confinement within private facilities.⁷³ The Office of Inspector General Report in 2003 reported on serious infractions against private immigrant detention facilities, including routine abuse of basic prisoner rights, denial of attorney access, mental and physical abuse, denial of health and medical treatment, prison overcrowding, and a lack of showers and toilets.⁷⁴ Inmates in public facilities have channels for redressing grievances through the Office of Inspector General (“OIG”) and litigation, but similarly aggrieved counterparts in private facilities are additionally impaired by the lack of such redress.⁷⁵ As an outcome,

67. See Austin T. Fragomen, Jr. et al., *Employment-Based Immigration: Legislation and Administrative Update*, 1566 PRACTICING L. INST. 9, 25 (2006); Slansky, *supra* note 66, at 1233.

68. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

69. John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1130 (1997).

70. See *Richardson v. McKnight*, 521 U.S. 399, 403 (1997). Section 1983 is the dominant Act by which inmates or victims of mistreatment seek legal redress for a wide variety of constitutional violations. *Id.* at 405.

71. See generally *id.*

72. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988).

73. See *id.*

74. William Fisher, *Immigrants in Detention*, February 8, 2007, http://www.atlanticfreepress.com/index.php?option=com_content&task=view&id=914&Itemid=81 (last visited Apr. 6, 2008).

75. *Id.*

immigrants have a hard time seeking redress from companies that employ individuals who might abuse them.

The problem is that by using private contractors, the executive branch can further limit congressional oversight on immigration policy. Although the Congress enacts the budget for Immigration and Customs Enforcement (“ICE”), the executive hires contractors and Congress’ access to these contracts are limited.⁷⁶ Further, private companies need not divulge information with Congress or the public;⁷⁷ they are less rule-bound than public entities and make decisions behind closed doors. Finally, they are not subject to the notice and comment provisions of the Administrative Procedures Act (“APA”).⁷⁸

Private contractors also are exempt from civil service rules and the constraints associated with having a unionized workforce.⁷⁹ Thus, the private security industry, for example, can pay its employees less than what it would pay unionized workers, and put them on jail blocks or the street with neither firearms training nor rigorous background checks. The lack of professionalism, high turnover rates and ad hoc decision-making that results,⁸⁰ can place immigrant populations at a great deal of risk.

Consider a field of law in which officials may gather and use secret evidence, expedited removals, no review of final orders of removal, mandatory and indefinite detention, secretive changes of venue, exorbitant bonds, restricted access to counsel and restricted judicial review. Now consider the privatization of this process where employees of Blackwater, DynCorps, and Corrections Corporation of America (“CCA”), (all discussed below) have nearly unchecked discretion to decide the fate of asylum applicants and immigrants at our borders.⁸¹ In addition, such corporations as Boeing, Anteon and Accenture, gather the evidence for these decision-makers. Now place this scenario in a democratic society and think about the potential for abuse.

76. Deborah Avant, *Think Again: Mercenaries*, 143 FOREIGN POL’Y 206 (2004).

77. See generally FERNANDES, *supra* note 29. They are free from disclosure obligations placed on the government by FOIA, and they can therefore enjoin the government from disclosing information they have shared with the government in the course of doing business together. *Id.* at 244.

78. See *id.*

79. See David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1189 (1999).

80. See Lynne Wilson, *Private Police Violence and the Scope of Section 1983*, at 1, 7-8 (2004).

81. See *infra* notes 101, 186.

According to Mark Dow, “The buck stops nowhere. While the INS (now ICE) pretends to be open to scrutiny, . . . corporate offices . . . make no secret of their antipathy to oversight, at least not in materials directed to shareholders.”⁸² Indeed, the transfer of liability (from government to private entity) provides an incentive for government to outsource in the first place. This phenomenon also provides an incredible opportunity for radical privatization, taking advantage of plenary executive powers to facilitate outsourcing beyond the review authority of the courts or Congress.

IV. THE IMMIGRATION INDUSTRIAL COMPLEX⁸³

The post-9/11 immigration securitization regime originates in 2003 when immigration control shifted from the Department of Justice (“DOJ”) to the new Department of Homeland Security (“DHS”).⁸⁴ The INS was abolished March 2003, and its functions were transferred into the DHS, in a merger of some 180,000 employees from 22 different agencies.⁸⁵ The DHS has a mission to “unite much of the federal government’s effort to secure the homeland, with the primary goal being an America that is stronger, safer and more secure.”⁸⁶ It seeks to “prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism; and minimize the damage and recover from attacks that do occur.”⁸⁷

The new Border Patrol mission prioritized efforts to prevent terrorists and terrorist weapons from entering the United States, while also reaffirming the agency’s traditional mission of preventing the entry of illegal aliens, smugglers, narcotics, and other contraband.

Immediately following 9/11, President Bush issued Homeland Security Presidential Directive 2, “Combating Terrorism through Immigration Policies,” which began the process of bureaucratically intermingling immigration and security.⁸⁸ The decision to include immigration within Homeland Security was no accident. Fernandes

82. MARK DOW, *AMERICAN GULAG: INSIDE US IMMIGRATION PRISONS* 90 (University of California Press 2004).

83. Portions of this section have been previously published. See Robert Koulish, *Privatizing the Leviathan State*, MR-ZINE, July 20, 2007, <http://www.monthlyreview.org/mrzine/koulish200707.html> (last visited Apr. 4, 2008).

84. *Id.*

85. *Id.*

86. See FERNANDES, *supra* note 29.

87. JOHN PARACHINI & LYNN DAVIS, *HOMELAND SECURITY: A COMPENDIUM OF PUBLIC AND PRIVATE ORGANIZATIONS’ POLICY RECOMMENDATIONS* 5 (RAND 2003).

88. See generally FERNANDES, *supra* note 29.

suggests that the first major step linking immigration to the war on terror occurred with the creation of DHS, which would include the Border Patrol, port of entry inspectors from Customs, INS, and the Agriculture Department's Animal and Health Inspection Service fell within the purview of the new Bureau of Customs and Border Patrol ("CBP"). Also within DHS are ICE and US Citizenship and Immigration Services ("USCIS").⁸⁹

Next, the Bush Administration issued Executive Order 13260 (March 21, 2002) to establish an advisory council, as reconstituted by statute in the Department of Homeland Security and called the *Homeland Security Advisory Council* ("HSAC").⁹⁰ It is here, in HSAC, where sub-governments formed and private actors gained direct access to the immigration control policy process.⁹¹

The HSAC has several subcommittees. The *Secure Borders and Open Doors Advisory Committee* ("SBODAC") focuses attention on border control. Its mission is "to maintain security while increasing the welcoming nature of those who visit our country."⁹² Its private culture was evident in that "notice of meetings need not be published in the federal register, nor must the meeting itself be open to the public."⁹³ The HSAC process showed little concern over potential conflict of interest. For example, a great deal of Homeland Security Information Network ("HSIN") funds has gone to Sybase, Inc., whose president, John Chen, is also co-chair of SBODAC.⁹⁴ Sybase also has close financial connections to the Republic Party, and is financially controlled by Marvin Bush, the president's brother, whose company Winston Partners owns more than \$3.5 million in shares of Sybase.⁹⁵ In sum, catching aliens has become a financially lucrative cash cow for big business, former administration officials and even members of the president's family.

Conservative academics, think tanks, and technology corporations serve on SBODAC as well as on the *Academe and Policy Research Senior Advisory Committee* ("APRSAC"), all of which comprise what is referred

89. *Id.*

90. Press Release, Office of the Press Secretary, Homeland Security Council Executive Order, Homeland Security (Mar. 21, 2002) (on file with author).

91. *Id.*

92. Koulish, *supra* note 83. See also Press Release, Dep't of State and Homeland Sec. Announce Members of the Secure Borders and Open Doors Advisory Comm., U.S. Dep't of State (Dec. 6, 2006) (on file with author).

93. Koulish, *supra* note 83.

94. *Id.*

95. See Koulish, *supra* note 83 (citing Margie Burns, *Marvin Dips into the Security Pie, Another Fortunate Bush Brother*, COUNTER PUNCH, Dec. 5, 2002).

to as “the brain of homeland security strategy.”⁹⁶ As one might expect, policies resulting from HSAC-SBODAC meetings are replete with references to privatization and militarization: enforcement, detention, inspections and services,⁹⁷ which place immigrants in the hands of private contractors, mercenaries, and prison guards.⁹⁸

As an outcome, the Customs and Border Protection’s Expedited Removal Program has contracted with KBR, to oversee the expansion of the federal government’s capacity to detain immigrants.⁹⁹ This \$385 million KBR contract would set-up temporary processing, detention and deportation facilities.¹⁰⁰ Indeed, the KBR deal is part of an extraordinary mad rush to build new private detention sites. Private prison companies are competing for an immigrant “super jail” facility (2,800 beds) in Laredo Texas,¹⁰¹ and in December 2005, Corrections Corporation of America (“CCA”) announced a contract with ICE to hold up to 600 immigrant detainees in Tyler, Texas.¹⁰²

Privatizing immigrant detention is nothing new. During the early 1980s, the federal government began experimenting with incarcerating people for profit, using immigrant detention as its canary in the coalmine.¹⁰³ According to some, the private prison industry was born in 1983 during a fundraiser in Nashville, Tennessee for then presidential candidate Ronald Reagan.¹⁰⁴ The Chairman of the Tennessee Republican party and the Corrections Commissioner of Virginia and his counterpart in Tennessee together set up what became known as the CCA.¹⁰⁵ In 1984, the CCA, the private-incarceration leader, cut its first deal with the federal government to operate INS detention centers in Houston and Laredo, Texas.¹⁰⁶ When

96. See Koulish, *supra* note 83 (citing FERNANDES, *supra* note 29).

97. See U.S. – VISIT *infra* p. 28.

98. Koulish, *supra* note 83 (citing Parachini, *supra* note 87). See U.S. – VISIT *infra* p. 28; see also Fernandes, *supra* note 29; see also Rey Koslowski, *Border Battles: Immigration Reforms and Border Security Technologies*, U.S. IMMIGRATION DEBATES, July 31, 2006, available at <http://borderbattles.ssrc.org/Koslowski/printable.html>.

99. See Koulish, *supra* note 83 (citing Katherine Hunt, *KBR awarded Homeland Security Contract Worth Up to \$385M*, MARKET WATCH, Jan. 24, 2006).

100. *Id.*

101. See Koulish, *supra* note 83 (citing Suzanne Gamboa, *TX: Advocates Decry Detention “Gold Rush”*, ASSOCIATED PRESS, Feb. 3, 2006).

102. See *id.*

103. *Id.*

104. See Eric Schollosser, *The Prison-Industrial Complex*, No. 6, ATLANTIC MONTHLY, Dec. 1998, at 282.

105. *Id.*

106. *Id.*

asked how to sell his product—prisoners—Tom Beasley, a CCA co-founder said, “You just sell it like you were selling cars, or real estate, or hamburgers.”¹⁰⁷ Indeed, CCA was backed financially by the Massey Burch Investment Group, which funded Kentucky Fried Chicken.¹⁰⁸ Since then, private incarceration has become a boom industry as well as a lightning rod for credible human rights abuse litigation.¹⁰⁹

What is new is the expansiveness of privatization after 9/11 and its use in establishing a social control apparatus ostensibly for non-citizens but which is applicable to citizens. According to Fernandes, “In the aftermath of 9/11, the private prison industry has once again experienced a boom as national security has been involved to sweep up and jail an unprecedented number of immigrants. Immigrants are currently the fastest growing segment of the prison population in the U.S. today.”¹¹⁰ Clearly, a close nexus exists between immigrant detention policies and the new boom market in private detention. In the months following February 2006, when President Bush proposed increasing spending on immigrant detention, stock for CCA climbed 27%.¹¹¹ Of 9/11, the chairman of the Cornell Companies (one of the top four private prison companies) said:

It can only be good, with the focus on people that are illegal and also of Middle Eastern descent. . . there are over 900,000 undocumented individuals of Middle Eastern descent. That’s half our entire prison population. . . The federal business is the best business for us. . . and the events of September 11 [are] increasing that level of business.¹¹²

As an outcome, the private prison industry is increasingly in a position to direct immigration detention policy.¹¹³ The question remains whether private immigrant detention is a good thing for public law.¹¹⁴ Private detention facilities are one-stop shops for immigrant processing.¹¹⁵ The DHS contracts are to train and supply security guards and screeners and to build, manage and maintain detention facilities.¹¹⁶ Security guards and screeners make decisions related to political asylum and other forms of

107. Koulish, *supra* note 83 (quoting Eric Schlosser, *supra* note 104).

108. *See* Koulish, *supra* note 83.

109. *Id.*

110. *See* FERNANDEZ, *supra* note 29, at 192.

111. Koulish, *supra* note 83 (citing Tom Turpel, *New Detention & Deportation Laws Workshop Explores Ideas About Immigration Reform*, NEW AM. MEDIA, Nov. 16, 2006).

112. Koulish, *supra* note 83.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

relief from deportation, arrest, recommendations on relief from detention, and hold quite a lot of every day power over the conditions of confinement within the detention facility.¹¹⁷ Guards have control over access to phones, lawyers, visitors, access to food, restrooms and medical care.¹¹⁸ Given the logic of private prisons, for example, which is to keep its beds full and immigrants locked up, privatization threatens the legal integrity of immigrant processing, which until recently has been premised upon the idea that non-citizens should not be incarcerated.¹¹⁹

When private companies have control over the custodial functions of government, they assume quasi-judicial responsibilities that affect the legal status and well-being of immigrant detainees, raising important questions.¹²⁰ According to Ira Robins:

To what extent for example, should a private corporation use force—perhaps serious or deadly force—against a prisoner? It is difficult enough to control violence in the present public-correctional system. It will be much more difficult to assure that violence is administered only to the extent required by circumstances when the state relinquishes direct responsibility. Another important concern is whether a private employee should be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits towards release. By dispersing accountability, the possibility for vindictiveness increases. An employee who is now in charge of reviewing disciplinary cases at a privately run INS facility in Houston told a New York Times reporter last year: “I am the Supreme Court.”¹²¹

Private guards wear badges, uniforms, carry guns and drive cars with sirens; they make arrests and as far as the individual is concerned, represent the coercive force of the state.¹²² They wield as much power as any state actor but are not held nearly as accountable to the rule of law.¹²³

Another problem with privatizing detention is the secretiveness of the

117. Koulish, *supra* note 83.

118. *Id.*

119. *Id.*

120. *Id.*

121. Koulish, *supra* note 83 (quoting Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987)). See also Martin Tolchin, *Jails Run By Private Company Force it to Face Question of Accountability*, N.Y. TIMES, Feb. 19, 1985, at A15.

122. Koulish, *supra* note 83.

123. *Id.*

process.¹²⁴ Screeners and guards make decisions with virtually no oversight.¹²⁵ Interviews and hearings are closed to the public and family.¹²⁶ Further, non-citizens are secretly shuffled from one detention facility to another around the country, without giving notice to family or counsel.¹²⁷ This shell game has been documented and has non-citizens ending up in facilities long distances from legal counsel and family.¹²⁸ There is nothing discrete about such legislation and regulations. They are part of a larger effort to enhance executive powers and diminish judicial review of immigration.

Even more extreme are the contingency plans that could detain and deport large numbers of immigrants “at the command of the president.”¹²⁹ The plan contains echoes of Japanese internment camps during WWII, as well as contingency internment plans for middle-eastern non-citizens established during the 1980s.¹³⁰ On October 17, 2006, President Bush signed into law the John Warner Defense Authorization Act.¹³¹ It allows the President to declare a “public emergency” and station troops anywhere in America and take control of state-based National Guard units without the consent of the governor or local authorities, in order to “suppress public disorder.”¹³²

In a manner reminiscent of government raids preceding Japanese internment during WWII and other notorious raids against immigrant communities during times of national insecurity, the Warner Act would facilitate militarized police round-ups and detention of protesters, so called “illegal aliens,” “potential terrorists” and other “undesirables” for detention in facilities already contracted for and under construction by Halliburton.¹³³ In January 2006, the DHS awarded a \$385 million contingency contract to KBR, to establish temporary Detention and Removal Operation (DRO) facilities.¹³⁴ Under the cover of a trumped-up “immigration emergency”

124. *Id.*

125. *Id.*

126. *Id.*

127. Koulish, *supra* note 83.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Koulish, *supra* note 83.

133. *Id.* See also Frank Morales, *Bush Moves Toward Martial Law*, TOWARD FREEDOM, Oct. 26, 2006, <http://www.towardfreedom.com/home/content/view/911/> (last visited Apr. 4, 2008).

134. Koulish, *supra* note 83. See also Katherine Hunt, *KBR Awarded Homeland Security Contract Worth up to \$385M*, MARKET WATCH, Jan. 24, 2006,

and the frenzied militarization of the southern border, detention camps are being constructed right under our noses, camps designed for anyone who resists the foreign and domestic agenda of the Bush administration.

Indeed privatization has extended well beyond incarceration, exacerbating concerns about accountability and the rule of law throughout the immigration process. Current proposals for guest worker programs, for example, are replete with privatization references.¹³⁵ Rep. Mike Pence, an Indiana Republican, has proposed deploying private “Ellis Island Centers” in foreign countries for the purpose of recruiting and managing guest workers.¹³⁶ Such immigration control mechanisms share proprietary interests with some of the Iraq war’s more notorious privateers.

After more than a decade of border militarization with “Operation Gatekeeper” and “Operation Hold the Line,” the deployment of the National Guard and plans for 700 miles of fencing, the federal government in May 2006 solicited bids from military contractors Boeing, Lockheed Martin, Raytheon, Ericsson and Northrop Grumman, for a multibillion-dollar contract to build a “virtual fence” of unmanned aerial vehicles, ground surveillance satellites, motion-detection video equipment and databases to store information of the identity of millions of non-citizens along the border.¹³⁷

Once again, such militarization is not new. What is new is the depth and expansiveness of the current practice. During the 1970s and 80s, the militarization of the border made do with Vietnam-era technology.¹³⁸ During the Reagan-era, the INS introduced high tech air support, OH-6 spotter-observation helicopters from the US Army, night-vision and infrared scopes, and low light television surveillance systems.¹³⁹ Within short order during this time the border patrol introduced SWAT teams, military trained and armed Border Patrol officers who ride in armored personnel carriers, shoot M-16s and keep grenade launchers handy.¹⁴⁰

<http://www.marketwatch.com/News/Story/Story.aspx?guid=%7B62C8724D-AE8A-4B5C-94C7-70171315C0A0%7D&dateid=38741.5136277662-858254656&print=true&dist=printTop> (last visited April 4, 2008).

135. See Robert Koulish, *A Corporate Takeover of American Borders*, BALT. SUN, Aug. 21, 2006, at 11A.

136. *Id.*

137. See Eric Lipton, *Seeking to Control Borders, Bush Turns to Big Military Contractors*, N.Y. TIMES, May 18, 2006, at A1.

138. Robert Koulish, *Privatizing the Leviathan State*, MR-ZINE, July 20, 2007, <http://www.monthlyreview.org/mrzine/koulish200707.html> (last visited Apr. 4, 2008).

139. See Dunn, *supra* note 9, at 43-44.

140. Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878*

President George H. W. Bush intensified border militarization.¹⁴¹ Emphasis on drug enforcement at the border resulted in the purchase and deployment of more helicopters and additional electronic surveillance equipment.¹⁴² Among other things, Bush established the relationship between INS and the military.¹⁴³ This complicates the border control situation. While border patrol agents are trained to use minimum force and to protect the constitutional rights of the accused, the military ethic presumes guilt and responds to situations with overwhelming force.¹⁴⁴ According to Anthony Romero, American Civil Liberties Union Executive Director, “. . . federal law enforcement officers are the best equipped and trained to deal with these kinds of civilian law enforcement needs. . . . Soldiers are trained to kill the enemy, and they lack the training to conduct proper law enforcement.”¹⁴⁵ The military has helped with such construction projects as operation blockade and resulting in construction of seven mile steel wall of corrugated steel fence between San Diego and Tijuana.¹⁴⁶

In recent years, the military role in border security has evolved. Joint Task Force North, a military unit affiliated with U.S. Northern Command, has lent services to the Border Patrol, and state governors in Arizona and Texas have dispatched National Guard Units from their states to the border.¹⁴⁷ In all, as of summer 2006, about 6,000 National Guard Troops are assuming surveillance and infrastructure duties from the Border Patrol. According to DHS spokesperson Jarrod Agen, the National Guard is being assimilated into the border protection apparatus and may assume surveillance responsibilities and intelligence gathering for the Border Patrol.¹⁴⁸

In addition to the National Guard, in 2002, the Department of Defense agreed to deploy its initial 1,600 federal soldiers as deputized Border Patrol and Customs Service agents at our borders, bringing state of the art military

Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians, 5 CONN. PUB. INT. L.J. 233, 251 (2006).

141. See generally Dunn, *supra* note 9, at 63, 66.

142. *Id.* at 66.

143. *Id.* at 68.

144. *Id.* at 83-84.

145. Patrick Yoest, *DHS Does About-Face In Backing Use of National Guard to Seal Border*, CQ.com, May 15, 2006, http://public.cq.com/public/20060515_homeland_15nationalguard.html (last visited Apr. 4, 2008).

146. See Dunn, *supra* note 9, at 66.

147. Yoest, *supra* note 145.

148. *Id.*

technology coming via Iraq.¹⁴⁹ Indeed, the Boeing deal and deployment of the National Guard brings the war on terror home.¹⁵⁰ On September 20, 2006, Boeing, a major aerospace defense and aircraft contracting firm, was awarded a three year, \$2.5 billion contract with the Department of Homeland Security to create a virtual fence along the US-Mexico border.¹⁵¹ Described by a Secure Border Initiative Network (SBInet) subcontractor as a combination of law enforcement and surveillance systems,¹⁵² this new SBInet project includes up to 1,800 radar towers along the border; motion detectors, radar system that can transmit images to border agents; and cameras which can spot people from 14 kilometers away.¹⁵³ In addition, it will include plans to develop infrastructure and logistical support to be able to “remove all removable aliens.”¹⁵⁴ Boeing also plans to use unmanned aerial vehicles that could be launched from the backs of Border Patrol trucks.¹⁵⁵

Boeing plans to delegate some of its workload and authority to subcontractors including Unisys and a division of L-3 Communications Holdings Inc., Perot Systems, Lucent, and others.¹⁵⁶ According to Unisys Vice President of Homeland Security, Brian Seagrave, Unisys will be in charge of the SBInet systems engineering, infrastructure, and configuring and installing several key software, including the “common operating picture,” which Seagrave describes as SBInet’s brain.¹⁵⁷ Unisys’ experience in this field includes police departments systems and a range of surveillance and detection contracts.¹⁵⁸

The virtual fence gets its cache from its ability to track non-citizens long after they pass through the border. It becomes a metaphor for the

149. Joseph R. Barnes, Commentary, *Despite the Posse Comitatus Act, Are Federal Soldiers About to Deploy as Deputized Border Patrol and Customs Agents?*, J. OF HOMELAND SECURITY, Feb 2002, <http://www.homelandsecurity.org/journal/Commentary/barnes.htm> (last visited Apr. 4, 2008).

150. See generally Griff Witte, *Boeing Wins Deal for Border Security*, WASH. POST, Sept. 20, 2006, at A01.

151. *Id.*

152. Patrick Wachter, *DHS Awards Massive Border Security Contract to Boeing*, DATAMONITOR COMPUTERWIRE, Sept. 22, 2006, <http://www.computerwire.com/industries/research/?pid=85A9C43C-83DF-4522-A22B-CCA9FF2118B3> (last visited Apr. 8, 2008).

153. See Witte, *supra* note 151.

154. *Id.*

155. *Id.*

156. See Wachter, *supra* note 153.

157. *Id.*

158. *Id.*

entire border industrial complex. This occurs in several ways, each of which helps describe how the border industrial complex functions overtly and surreptitiously.

After 9/11, the government hastened its efforts to track the entries and exit of non-citizens from particular countries. The National Security Entry-Exit Registration System (“NSEERS”) program was introduced in 2002 requiring non-citizen men age sixteen and over from twenty-five predominantly Muslim countries to register with the government.¹⁵⁹ NSEERS legitimated the use of profiling by national origin, ethnicity and religion as a tool of immigration control.¹⁶⁰ A total of 290,526 people are registered with NSEERS, including almost 86,000 United States residents.¹⁶¹ Any of them found to be out of status were subject to immediate deportation. Of the total, 13,799 were placed in deportation proceedings, and 2,870 were detained.¹⁶² The NSEERS program netted no terror related convictions but instilled a great deal of fear in immigrant communities around the country.¹⁶³

The origins of efforts to track entries and exits actually can be found in Section 110 of the US Illegal Immigration Reform and Immigration Responsibility Act of 1996, which mandated the INS to develop an automated entry-exit control system that would “collect a record of every alien departing the United States and match records of departure with the record of the alien’s arrival in the United States.”¹⁶⁴ Originally, the motivation for this provision was to track visa overstays.¹⁶⁵ After 9/11, the use of security technology was subsumed under the rationale for the war on terror, exemplified by the NSEERS program.¹⁶⁶ The Patriot Act (2001)

159. See Immigration Law Offices, *NSEERS Overview*, Immigralaw.com, Dec. 2003, <http://www.immigralaw.com/english/nseerspdfs.html> (last visited Apr. 8, 2008). The 25 countries are comprised of Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, Kuwait, Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.*

160. See U.S. Immigration and Customs Enforcement, *Changes to National Security Entry/Exit Registration System (NSEERS)*, Dec. 1, 2003, <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm> (last visited Apr. 8, 2008).

161. *Id.*

162. *Id.*

163. William Fisher, *Pentagon Backtracks as Advocacy Groups Blast Ethnic Profiling*, TRUTHOUT, Apr. 28, 2007, http://www.truthout.org/docs_2006/042807A.shtml (last visited Apr. 8, 2008).

164. Illegal Immigration Reform and Responsibility Act of 1996, PUB. L. NO. 104-208, 110 Stat. 3009 (1996) (Repealed 2001).

165. *Id.*

166. See U.S. Immigration and Customs Enforcement, *supra* note 161.

included entry-exit provisions as did the Enhanced Border Security and Visa Entry Reform Act of 2002.¹⁶⁷ Provisions accounted for the introduction of biometric technology and a combination of facial recognition and electronic fingerprint scanning. Coming as part of the post-9/11 response, the Enhanced Border Security Bill passed Congress with no opposing votes.¹⁶⁸

By January 2004, the NSEER Program morphed into the US Visitor and Immigrant Status Indicator Technology (US-VISIT). The US-VISIT program requires all foreigners entering the United States on short-term visas to be fingerprinted, photographed, and to submit biographical information.¹⁶⁹ The official purpose of US-VISIT is to “enhance national security, and “ensure the integrity of the immigration system.”¹⁷⁰ Data collection begins in consular offices with the collection of finger scans and digital photographs, which are taken again upon arrival in the U.S. for verification purposes. According to the Heritage Foundation:

When completed, it will record visitors through the use of fingerprint scanners and digital photos and will integrate existing databases to push good information across agencies. In this way, it will pick out people who are security risks, while cutting costs¹⁷¹

The Smart Border reach extends beyond the border. According to Washington Technology, “the system will create a virtual border that operates beyond U.S. boundaries to help DHS assess the security risks of all US-bound travelers and try to prevent potential threats from reaching the country’s borders.”¹⁷²

After the collection process, the data is stored in government databases in agencies throughout the federal, state, and local governments.

167. See 3 C.J.S. *Aliens* § 508 (2008).

168. GovTrack.us, *H.R. 3525-107th Congress (2001): Enhanced Border Security and Visa Entry Reform Act of 2002*, <http://www.govtrack.us/congress/bill.xpd?bill=h107-3525> (last visited Apr. 8, 2008).

169. See Department of Homeland Security, *US-VISIT Enrollment Requirements*, http://www.dhs.gov/xtrvlsec/programs/editorial_0527.shtm (last visited Apr. 8, 2008).

170. See Department of Homeland Security, *US-VISIT Program*, http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm (last visited Apr. 8, 2008).

171. Daniel J. Mitchell, Ph.D., *Protectionist Politics and Border Security*, The Heritage Foundation, Aug. 19, 2004, <http://www.heritage.org/Press/Commentary/ed081904c.cfm> (last visited Apr. 8, 2008).

172. Roseanne Gerin, *Accenture Taps Subcontractors on U.S. Visit*, WASH. TECH., Sept. 3, 2004, http://www.washingtontechnology.com/online/1_1/24422-1.html (last visited Apr. 8, 2008).

As of May 2005, about twenty-five million individuals have submitted data; 590 of whom have been denied admission for crimes and immigration violations.¹⁷³ According to DHA, “there is no evidence that US-VISIT has caught a wanted terrorist.”¹⁷⁴

The US-VISIT program is also experimenting with Radio Frequency Identification (“RFID”), miniscule microchips (half the size of a grain of sand).¹⁷⁵ The RFID tag can be read silently and invisibly by radio waves from up to a foot or more away, even through clothing. It can also link to medical records, and serve as a payment device when associated with a credit card. RFIDs provide additional capacity for tracking non-citizens already in this country.¹⁷⁶ They are being embedded in I-94 entry documents, passports and border crossing cards, which non-citizens are urged to carry with them at all times. The future use of RFIDs as an immigration control mechanism was not lost on former Secretary of Homeland Security Tom Ridge, who became head of Savi Technologies, an RFID design and manufacturing company.¹⁷⁷

It is important to note that RFIDs and other forms of technology-based monitoring systems are easily transferable from US-VISIT to other immigration programs, for example, proposed guest worker programs.¹⁷⁸ The RFID watchdog group, “Spychips.com,” reported May 18, 2006 that the Board Chairman of VeriChip Scott Silverman:

[B]andied about the idea of chipping foreigners on national television Tuesday, emboldened by the Bush Administration call to know “who is in our country and why they are here.” He told Fox & Friends that the VeriChip could be used to register guest workers, verify their identities as they cross the border, and “be used for enforcement purposes at the employer level.” He added, “We have talked to many people in

173. See US Department of State, *U.S. Entry-Exit System Hailed for “Unprecedented Results”*, USInfo, May 18, 2005, <http://usinfo.state.gov/gi/Archive/2005/May/19-588378.html> (last visited Apr. 8, 2008).

174. Electronic Privacy Information Center (EPIC), *United States Visitor and Immigrant Status Indicator Technology*, Epic.org, Dec. 2007, <http://epic.org/privacy/us-visit/> (last visited Apr. 8, 2008).

175. See Anne Broache, *Feds Test RFID Controls at U.S. Borders*, CNET.News.com, Aug. 8, 2005, <http://www.news.com/2100-7348-5823958.html> (last visited Apr. 8, 2008).

176. *Id.*

177. See SAVI Technology, *Tom Ridge-First U.S. Homeland Security Secretary- Joins SAVI Technology's Board of Directors*, Apr. 5, 2005, <http://www.savi.com/news/2005/2005.04.05.shtml> (last visited Apr. 8, 2008).

178. See Press Release, *Verichip Injects Itself Into Immigration Debate*, <http://www.spychips.com/press-releases/verichip-immigration.html> (May 18, 2008) (on file with author).

Washington about using it”¹⁷⁹

The transferability of data from program to program is facilitated by post 9/11 databases that combine data from criminal and terrorist investigations at the federal, state, and local level, which are accessible in the private sector. Regrettably, data from US-VISIT and from border crossing card entries are entered into the same databases.¹⁸⁰ Further, the portability of technology is facilitated by post 9/11 business alliances that comprise important parts of the immigration control policy making and administration team. Consider the cost of the US-VISIT Program projected at over \$10 billion.¹⁸¹ Accenture Ltd. was awarded the US-VISIT prime contract on May 28, 2004, and has entered into subcontracts with Raytheon, a runner up on the virtual fence contract, SRA Intl. and the Titan Corporation.¹⁸² Together this corporate team calls itself the “Smart Border Alliance.”¹⁸³ Accenture is an offshore company headquartered in Bermuda, which allows it to avoid paying US corporate income tax. Republican strategist and Bush donor Charles Black lobbied on Accenture’s behalf to gain the US-VISIT contract.¹⁸⁴ The contract gave Accenture so much discretion with which to shape the program and avoid waste and abuse that the nonpartisan group Taxpayers for Common Sense likened it to a “blank check.”¹⁸⁵

Further, the Anteon Corp. (now owned by General Dynamics), which led an alliance that lost the US-VISIT contract, was instead awarded the contract to provide secure identification and border-control card technology for the Homeland Security Department’s Bureau of Citizenship and Immigration Services, with optical card scanners and technology to read almost 20 million border crossing cards and permanent residency cards.¹⁸⁶ In August 2004, Anteon received a \$74 million surveillance-training contract for the DHS’ Bureau of Customs and Border Protection.¹⁸⁷

179. *Id.*

180. See Jessica M. Vaughan, *Modernizing America’s Welcome Mat the Implementation of US-VISIT*, Center for Immigration Studies, Aug. 2005, <http://www.cis.org/articles/2005/back905.html> (last visited Apr. 8, 2008).

181. *Id.*

182. See Gerin, *supra* note 173.

183. *Id.*

184. See Sarah Posner, *Security for Sale*, THE AMERICAN PROSPECT, Dec. 18, 2005, available at <http://www.prospect.org/cs/articles?articleId=10750>.

185. *Id.*

186. As an example of portability, it is important to note that when Mexicans receive a border crossing card, their data is accessible by US VISIT. See Koulish, *supra* note 83.

187. Koulish, *supra* note 83.

According to Anetion president and CEO Joseph Kampf, “our focus on position in the marketplace with the DOD [Department of Defense], intelligence community and DHS has really paid off.”¹⁸⁸ Indeed over 90% of Anetion’s business comes from government contracts in these three areas, with border crossing identification a growth area.¹⁸⁹ According to Kampf:

We think border crossing security will continue to grow over the next two years, perhaps becoming one of the fastest paced markets in the federal government. . . The whole concept of validating who people are as they travel and cross land, sea and air will, I think, would [sic] be an explosive marketplace. It will be one in which we have a significant footprint.¹⁹⁰

Finally, the Homeland Security Information Network (HSIN) was designed via contract by Man-Tech International.¹⁹¹ It is worth noting that Congressman Richard Renzi (R-AR), one of House’s most vocal advocates for increased funding for the DHS is the son of the ManTech Executive Vice-President Eugene Renzi.¹⁹² ManTech was charged with developing an information sharing system which is called the US public and private partnership (US p3), which links public sector agencies and private sector to “significantly strengthen the flow of real-time threat information to state, local, and private sector partners, and provides a platform for communities through the classified SECRET level to state offices.”¹⁹³ For example, data can be shared with as many as 600 federal, state and local agencies, including police departments, fire and emergency responders, governors’ offices, and agencies within DHS.¹⁹⁴ In all, HSIN has 40,000 users, 90% of whom are from the private sector, and any of whom may add information that subsequently remains there for five years.¹⁹⁵ As Fernandes suggested, HSIN “catches immigrants in the name of protecting against foreign terrorist threats.”¹⁹⁶ Once their names are on the list, they remain on the list regardless of the reason for putting them there.¹⁹⁷ In short, catching aliens is a lucrative business made all the more so by exploiting already blurred

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Koulish, *supra* note 83.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Koulish, *supra* note 83.

distinctions between immigration and national security.¹⁹⁸

Regrettably, few people in America are aware of Accenture, Anteon, and Man-tech, let alone the power they wield to develop and implement immigration control policy.¹⁹⁹ Given the power such companies hold over individual immigrants, one would think that immigration authorities would care to see that only well trained professionals had access to HSIN and could input data, which is not the case.²⁰⁰ One of the perks of privatizing is that the masters of this virtual domain are less accountable for mistakes and outright abuse.²⁰¹ They would also be less likely to have the training required to avoid such undesirable outcomes.²⁰²

With Blackwater out front, along with Dyn Corp, which is also seeking to put “feet on the ground” along the border, you get a virtual fence that has private contractors, guns for hire, the National Guard and Border Patrol welcoming newcomers at ports of entry.²⁰³ Few are well trained; fewer are accountable to the constitution and some are not liable for the misuse of coercive force.²⁰⁴

V. CONCLUSION

In the wake of the scandal triggered by the Blackwater massacre in Iraq in September, 2007, and in the midst of congressional and grand jury investigations that have followed, Blackwater used the publicity that its missteps have generated as an opportunity to re-brand itself and expand its mission. As Jeremy Scahill reported in the December 5 issue of *The Nation*, the company removed the sniper scope from its logo, changed its name to Blackwater Worldwide, and now refers to its mercenaries as “global stabilization professionals.”²⁰⁵ Such re-branding is part and parcel of a much larger neo-liberal phenomenon that Naomi Klein refers to in *Shock Doctrine*.²⁰⁶ The phenomenon is about privatizing sovereignty. The privatization of immigration control places Blackwater, Boeing, Accenture, Anteon, CCA and others at the table when important immigration and

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Koulish, *supra* note 83.

203. *Id.*

204. *Id.*

205. Jeremy Scahill, *Blackwater's Business*, THE NATION, Dec. 24, 2007, available at <http://thenation.com/doc/20071224/scahill>.

206. See generally NAOMI KLEIN, SHOCK DOCTRINE (Metropolitan Books 2007).

security policy issues are to be made. It also places their interests above the interests of many other actors, including immigrants. Further, privatization removes the government from having to assume responsibility over the legal process that define a country's sovereignty, particularly as it pertains to how immigrants are treated as they seek to regularize their status.

With immigration powers already concentrated in the executive branch, corporations would have a tough time finding a plumper cash cow in homeland security than immigration control. Plenary powers and privatization both have been used to justify preemptive action against immigrants. Indeed, privatization reinforces the potency of plenary powers in ways that non-private post 9/11 responses could not achieve. It removes it from the arena of "state action." Regrettably, however, the privatization of immigration control also further diminishes chances for individual and social redress against an increasingly tyrannical system that is fueled by turning taxpayer revenue into corporate profits.