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GARCIA-MIR V. MEESE: REAFFIRMING THE INDEFINITE DETENTION OF ALIENS IN THE 1980s

Randy Toledo*

INTRODUCTION

The Court of Appeals for the Eleventh Circuit once again has strengthened the authority of the federal government to detain excludable aliens¹ indefinitely for violating United States immigration laws. In *Garcia-Mir v. Meese*,² the Court of Appeals for the Eleventh Circuit reaffirmed earlier court decisions permitting the federal government to detain excludable aliens indefinitely.³ The court of appeals rejected claims asserting that excludable Cuban aliens held in detention possess a nonconstitutionally based liberty interest entitling them to parole revocation hearings.⁴ In addition, the court of appeals concluded that in

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1. See *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 n.2 (11th Cir. 1984) (distinguishing excludable from deportable aliens). The term "excludable" refers to aliens seeking admission either outside United States territory or at the border before initial entry, whereas "deportable" refers to aliens who are in the United States regardless of the legality of their entry. *Id.*; see also *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1957) (distinguishing between "expulsion" proceedings, which apply to deportable aliens, and "exclusion" proceedings). This distinction is important because immigration law confers greater rights and privileges on aliens who enter the United States irrespective of the legality of their entry. Compare 8 U.S.C. §§ 1221-1230 (1982) (describing the procedures for removing excludable aliens from United States territory) with 8 U.S.C. §§ 1251-1260 (1982) (describing the procedures for the removal of deportable aliens from United States territory); see also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (recognizing that deportable aliens have constitutional protections because they have effected an entry).

2. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied sub nom. *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

3. *Id.*; see Immigration and Nationality Act of 1952, § 212(a), 8 U.S.C. § 1182(d)(4) (1982) (enumerating the grounds of exclusion). Aliens are excludable or excluded from the United States if they fall into one of numerous categories. *Id.* Among the categories of exclusion are: aliens lacking documents or proper documentation, *id.* § 1182(a)(21), aliens having physical or mental disabilities or defects, *id.* § 1182 (a)(1)-(4), (6), (7) (defining the physical and mental disorders that the statute contemplates), and aliens who are criminals or have admitted committing a crime of moral turpitude. *Id.* § 1182(a)(9), (10) (1982).

4. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), cert. denied sub nom. *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986); see *Fernandez-Roque v. Smith*, 734 F.2d 576, 581-82 (11th Cir. 1984) (rejecting the proposition that the right to parole revocation hearings is a core value of the due process clause per se and applicable to unadmitted aliens). The Cuban aliens in this litigation sought a constitutionally based liberty interest in the hearings. *Id.* The circuit court denied the parole revocation hearings, holding that parole is part of the admission process and excludable aliens have no

light of a controlling executive act, international legal principles prohibiting prolonged arbitrary detention did not apply to the Cuban aliens.⁵

The excludable Cuban aliens in *Garcia-Mir v. Meese* have challenged the legality of their detention since their arrival in the United States during the 1980 Mariel Boatlift.⁶ The most significant outcome of the *Garcia-Mir* decision is the finding that the aliens have exhausted their claims in the federal judiciary.⁷ The court stated that these cases had reached a terminal point and would be dismissed.⁸ Consequently, these Mariel Cubans will face indefinite detention beyond the seven years some of them have already spent behind the bars of a maximum security federal penitentiary.

This Note offers alternatives for a more equitable solution to the problem of indefinitely detaining excludable aliens. Part I reviews United States immigration law and policy regarding excludable aliens. Part II chronicles the events leading to the Cuban exodus in 1980 and the arrival of the Cuban aliens who the United States government found excludable and subsequently detained. Part III summarizes the court's analysis in *Garcia-Mir v. Meese*. Part IV evaluates the legal issues the court addressed and offers alternative interpretations of the law. Part V concludes with suggested alternatives to the use of indefinite incarceration.

I. THE EXCLUDABILITY OF ALIENS UNDER UNITED STATES IMMIGRATION LAWS

A. CONGRESSIONAL POWER TO RESTRICT ENTRY OF ALIENS INTO THE UNITED STATES

The United States generally did not restrict early immigration to the United States.⁹ In the early 1800s, however, states imposed restrictions and limitations on immigrants.¹⁰ Then, in 1875, the United States Su-

constitutional right to be admitted to the United States. *Id.* at 581-82.

5. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986); see RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) comment h (Tent. Draft No. 6, 1985) (stating that prolonged arbitrary detention violates international law).

6. See *infra* note 86 (discussing the detained aliens' seven year history of judicial challenges to their continued incarceration).

7. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

8. *Id.*

9. W. BROMWELL, HISTORY OF IMMIGRATION TO THE UNITED STATES 199-205 (1856).

10. See *id.* (noting state imposed restrictions on paupers, criminals, and lunatics).

preme Court recognized the exclusive nature of congressional power to restrict immigration.¹¹ The Court viewed congressional power over immigration as an extension of the federal power over foreign commerce.¹² The plenary power of Congress over immigration became well established.¹³ Early federal restrictions on immigration included prohibitions against the admission of convicts and prostitutes.¹⁴ With the advent of the Chinese Exclusion Act,¹⁵ Congress asserted its plenary power over immigration to impose qualitative restrictions on immigrants.¹⁶ Subsequent legislation restricted the admission of lunatics, idiots, and those likely to become public charges.¹⁷

In response to the growing number of aliens entering the United States, Congress adopted additional restrictions on aliens entering the country.¹⁸ In *The Chinese Exclusion Case*,¹⁹ the Supreme Court ex-

11. *Henderson v. City of New York*, 92 U.S. 259, 274 (1875) (declaring that state restrictions on immigration are unconstitutional infringements of federal power).

12. *Id.*

13. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (recognizing that the political branches of the federal government have plenary authority to establish and implement rules governing the admission of aliens). This power arises from an accepted maxim of international law that the power to control admission of foreigners is an inherent attribute of national sovereignty. *Id.*; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (discussing congressional and executive power to exclude aliens as a "fundamental act of sovereignty"); U.S. CONST. art. I, § 8 (granting Congress the power to regulate commerce with foreign nations). The Constitution also expressly conveys to Congress the power to legislate in the area of naturalization. U.S. CONST. art. I, § 8 (allowing Congress to "establish a uniform rule of naturalization"). The Constitution, however, does not directly address the subject of immigration.

14. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477, 477-78 (current version at 8 U.S.C. § 1182(a)(9), (10), (12) (1982)) (barring convicts and prostitutes from admission).

15. Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 58-59 (suspending the immigration of Chinese laborers for 10 years and prohibiting the Chinese from becoming United States citizens), *repealed by Chinese Exclusion Repeal Act*, ch. 344, § 1, 57 Stat. 600, 600-01 (1943).

16. 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.2b (1986). Restrictions focused on the quality of the immigrant, including health and morals. *Id.* Later, political philosophy became a qualitative restriction. *See Act of March 3, 1903*, ch. 1012, § 38, 32 Stat. 1213, 1221 (current version at 8 U.S.C. § 1182(a)(28)(A) (1982)) (excluding anarchists).

17. Act of February 5, 1917, ch. 29, § 2, 39 Stat. 874, 875-76 (current version at 8 U.S.C. § 1182 (a)(2), (3), (9), (12), (15) (1982)) (excluding idiots, lunatics, convicts, prostitutes, and people likely to become public charges).

18. *See, e.g., Act of February 5, 1917*, ch. 29, § 3, 39 Stat. 874, 877 (current version at 8 U.S.C. § 1182 (a)(25) (1982)) (imposing a literacy requirement for admission); Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (current version at 8 U.S.C. § 1182 (a)(6), (8), (9), (11) (1982)) (excluding persons suffering from dangerous contagious diseases, paupers, polygamists, and those individuals convicted of criminal offenses involving moral turpitude); Act of August 3, 1882, ch. 376, § 1, 22 Stat. 214, 214 (imposing a head tax on immigrants) (repealed 1966); *see also Head Money Cases*, 112 U.S. 580, 591-95 (1884) (upholding taxation of immigrants as a valid exer-

panded the federal power in immigration beyond regulation of foreign commerce and recognized the power to exclude aliens as an incident of sovereignty.²⁰ Congress later codified restrictions on entry into the United States in the Immigration and Nationality Act of 1952 (INA).²¹

B. THE IMMIGRATION AND NATIONALITY ACT OF 1952: EXCLUSION AND PAROLE

The INA and its subsequent amendments codify United States immigration law.²² The INA delineates several categories for exclusion: 1) improper application for entry; 2) personal qualifications; and 3) misconduct.²³ These exclusion categories bar aliens from entry into the United States.²⁴ The INA grants the executive branch the power to impose additional entry restrictions on classes of aliens when the Immigration and Naturalization Service (INS) deems their entry detrimental to the United States.²⁵ The Act also permits the INS to waive grounds for exclusion in the case of refugees.²⁶ The INA, however, limits this exception to waivers related to labor certificates, public charges, documents, literacy, and graduates of foreign medical schools.²⁷

The INA provides that the United States government should immediately deport an excludable alien arriving in United States territory to the country from where he or she came and on the vessel or aircraft on which he or she arrived.²⁸ The INA only tangentially mentions detaining excludable aliens in a provision requiring that the government charge the owner of the vessel or aircraft that transported the alien to

cise of congressional power to regulate commerce with foreign nations).

19. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

20. *Id.* at 606-09 (holding that the power to exclude aliens is a sovereign power under the Constitution and observing that legislative action binds the judiciary); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (dictum) (stating that the inherent power of a sovereign nation to exclude aliens is essential to self-preservation).

21. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1982).

22. *See* 1 C. GORDON & H. ROSENFELD, *supra* note 16, § 1.3a (stating that although repeatedly amended, the INA remains the basic immigration and nationality law).

23. *See* 8 U.S.C. § 1182(a) (1982) (detailing the categories for excluding aliens).

24. *See* C. GORDON & E.G. GORDON, *IMMIGRATION AND NATIONALITY LAW* § 2.27 (1985) (stating that some exclusions bar the alien's entry to the United States permanently).

25. Immigration and Nationality Act of 1952, § 212(f), 8 U.S.C. § 1182(f) (1982).

26. C. GORDON & E.G. GORDON, *supra* note 24, § 2.22A.

27. Immigration and Nationality Act of 1952, § 212(f), 8 U.S.C. § 1182(f) (1982).

28. *Id.* § 1227(a)(1).

the United States for detention expenses.²⁹ Before the INS deports the excludable alien, the INS must provide an exclusion proceeding to determine the alien's admissibility.³⁰ An immigration judge presides over the exclusion proceeding and the judge's decision is final, unless the alien appeals to the Board of Immigration Appeals (BIA).³¹ The BIA determination of excludability results in an exclusion order.³²

The excludable alien may delay deportation in two ways. First, the alien may seek a stay of deportation by either appealing the immigration judge's decision and order,³³ or requesting a stay from the INS district director who has the discretion to grant such requests.³⁴ Second, the alien may challenge the exclusion order through habeas corpus proceedings,³⁵ the sole means of challenging an exclusion order.³⁶ To bring a challenge against an exclusion order, an alien does not have to show that he or she was restrained physically.³⁷ Although the tradi-

29. *Id.*

30. *Id.* § 1226(a) (1982); see 8 C.F.R. § 236.2 (1986) (explaining the exclusion proceeding); see also C. GORDON & E.G. GORDON, *supra* note 24, §§ 3.15-3.17(f) (explaining the procedures involved in exclusion hearings). Unless otherwise requested, the exclusion proceeding is closed to the public. 8 U.S.C. § 1226(a) (1982); 8 C.F.R. § 236.2(a) (1986). The alien has the right to representation by counsel. *Id.* At the exclusion hearing, the immigration judge will review evidence and rule on objections. *Id.* § 236.2(b). The hearing is recorded. *Id.* § 236.2(e). The immigration judge determines whether the alien should enter the United States or be excluded and deported. 8 U.S.C. § 1226(a) (1982).

If the immigration official orders deportation, the alien may appeal to the Attorney General. *Id.* § 1226(b). An appeal serves as a stay of any final order until the Attorney General renders his or her decision. *Id.* The Attorney General bases his or her decision on the recorded evidence produced at the exclusion hearing. *Id.* Unless the Attorney General reverses the immigration official's decision, the exclusion order is final. *Id.* § 1226(c).

31. Immigration and Nationality Act of 1952, § 236(a)-(c), 8 U.S.C. § 1226(a)-(c) (1982).

32. See C. GORDON & E.G. GORDON, *supra* note 24, § 3.18(b) (stating that the immigration judge issues the exclusion order with the decision of inadmissibility).

33. Immigration and Nationality Act of 1952, § 236(b), 8 U.S.C. § 1226(b) (1982).

34. 8 C.F.R. § 237.1 (1986) (providing that the district director has the discretion to grant stays of deportation).

35. Immigration and Naturalization Act of 1952, § 106(b), 8 U.S.C. § 1105(b) (1982).

36. *Id.* (stating that a habeas corpus proceeding is the only way for an alien to challenge an exclusion order).

37. See *Jones v. Cunningham*, 371 U.S. 236, 236-44 (1963) (holding that habeas corpus is available after release on parole). The Court suggests that petitioners may use the writ of habeas corpus to test the legality of a given restraint on liberty. *Id.* at 238-44. Courts need not restrict such restraint to situations in which the applicant is in actual, physical custody. *Id.* at 239. The Court concluded that the writ applies to situations of constructive restraint after examining the common law usages of the writ. *Id.* at 238-39. The Court illustrates constructive restraint through the case of *Rex v. Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763), where a master assigned an inden-

tional rule of habeas corpus requires a showing of physical restraint, the United States Supreme Court has expanded the application of habeas corpus proceedings to incorporate constructive restraint.³⁸

As an alternative to detention pending deportation, the Attorney General has the sole authority to grant parole³⁹ when the circumstances dictate its use.⁴⁰ Conversely, the Attorney General may revoke parole if he or she determines that the circumstances no longer warrant its use.⁴¹ Parole allows aliens to enter the United States temporarily until the INS determines whether the alien may remain in the country.⁴² The parole itself does not alter the alien's legal status.⁴³ Parole status merely permits the alien to remain at liberty as long as possible.⁴⁴ The alien may seek judicial review of a parole decision solely for abuse of discretion.⁴⁵

tured 18 year old girl to another man "for bad purposes." *Id.* at 239.

38. *Jones v. Cunningham*, 371 U.S. 236, 239 (1963). Further extension of the constructive restraint doctrine could include the situation of paroled excludable aliens.

39. Immigration and Nationality Act of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5), as amended by Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

40. *Id.* § 1182(d)(5) (1982) (codifying the Attorney General's authority to parole). This section provides:

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

Id.; see 8 C.F.R. § 212 (1986) (defining circumstances for implementing parole). This parole authority allows the alien to join society temporarily while his or her legal status remains at the border. *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 n.2 (11th Cir. 1984) (referring to this outcome as the "entry fiction"); see also C. GORDON & E.G. GORDON, *supra* note 24, § 2.48 (stating that in cases of delayed admissibility determinations, the Attorney General has used parole as an alternative to detention).

41. Immigration and Nationality Act of 1952, § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B) (1982).

42. See 1 C. GORDON & H. ROSENFELD, *supra* note 16, § 2.54 (defining parole as a discretionary authority that allows unadmitted aliens temporary harborage in this country for reasons of public interest or humanity). Government authorities also have used parole in lieu of detention while authorities review the admissibility of the alien. *Id.* Parole authority is also an alternative to detention pending deportation. *Id.*

43. See *Leng May Ma v. Barber*, 357 U.S. 185, 186 (1957) (concluding that an alien's parole does not alter his or her status as an excludable alien or bring him or her "within the United States" in the legal sense); see also Immigration and Nationality Act of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5)(A) (1982) (providing in pertinent part that "such parole of such alien shall not be regarded as an admission of the alien . . .").

44. *Leng May Ma v. Barber*, 357 U.S. 185, 186 (1957).

45. C. GORDON & E.G. GORDON, *supra* note 24, § 2.48.

The INA, therefore, provides for the exclusion, deportation, and parole of an alien.⁴⁶ The alien may delay deportation through a stay of deportation or a judicial challenge to the exclusion order.⁴⁷ If the INS paroles the alien, the alien may challenge the subsequent revocation of parole only on a claim of abuse of discretion.⁴⁸ Consequently, the INA fails to expand the rights of excludable aliens beyond relief from detention through discretionary parole.

C. THE RIGHTS OF EXCLUDABLE ALIENS

Unadmitted, excludable aliens have considerably fewer rights than deportable or resident aliens.⁴⁹ As early as 1896, in *Wong Wing v. United States*,⁵⁰ the United States Supreme Court prevented Congress from subjecting excludable aliens to punishment at hard labor or from confiscating their property absent a judicial determination of guilt.⁵¹ The Court protected the property rights of excludable aliens and granted them protection against harsh treatment in *Wong Wing*, but the due process rights accorded aliens remained uncertain.⁵²

Subsequent cases have illustrated the unwillingness of the Supreme Court to extend the scope of due process rights to excludable aliens.⁵³

46. See *supra* notes 30-43 and accompanying text (discussing exclusion, deportation, and parole).

47. *Supra* notes 33-38 and accompanying text.

48. *Supra* note 45 and accompanying text.

49. See *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 790 (D. Kan. 1980) (noting that excludable aliens unlawfully entering the United States enjoy fewer constitutional rights than other aliens), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

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

51. *Id.* at 237. In *Wong Wing*, the Supreme Court declared that to make unlawful residence in this country an infamous crime punishable by incarceration and deprivation of property, was to legislate outside the sphere of the Constitution. *Id.* At the same time, the Court reaffirmed the power of Congress to detain or temporarily confine an alien as a means to effect his or her exclusion or expulsion. *Id.* at 235. The Court also recognized the power of Congress to declare an alien's illegal presence in the United States an offense punishable by fine or imprisonment. *Id.*

52. See *Cohen, Exclusion Vis-a-Vis Deportation Proceedings*, 246 PRAC. LAW INST. (Advanced Immigration Workshop) 347, 351 (1984) (concluding that the Supreme Court has not determined the due process rights of excludable aliens). The due process rights accorded aliens remain uncertain because the amount and scope of the protection depends on the manner of entry. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (finding that although aliens who have entered the United States are entitled to traditional standards of due process, those who are on the threshold of entry are in a different position).

53. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (refusing to grant parole to an excludable alien despite the resulting indefinite detention); see also *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982) (recognizing the Attorney General's authority to detain an alien indefinitely and to deny parole without determining the time for release).

The Supreme Court decision in *Yick Wo v. Hopkins* found that an alien is a person under the United States Constitution.⁵⁴ The Constitution, however, does not protect all aliens in the United States.⁵⁵ Courts have distinguished between excludable aliens, who have not effected an entry into United States territory, and deportable aliens, who have actually entered the United States legally or otherwise.⁵⁶ The Supreme Court pronouncement in *Shaughnessy v. United States ex rel. Mezei* illustrates this legal fiction, known as the "entry fiction."⁵⁷ In *Mezei*, the Court stated that, "[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . [b]ut an alien on the threshold of initial entry stands on a different footing."⁵⁸

Although the courts have expanded the rights of aliens in the United States since the early cases, excludable aliens have made little progress.⁵⁹ Neither the legislature nor the courts have extended the protections the Supreme Court recognized in *Wong Wing*. In fact, these branches of the federal government have prevented the expansion of the rights of excludable aliens.⁶⁰ This is evident in the Court decision in *Mezei*.⁶¹ The INS classification of the Mariel Cubans as excludable aliens placed them in this problematic category.

II. THE PLIGHT OF THE MARIEL CUBANS

A. EVENTS LEADING TO THE DETENTION OF THE ALIENS

Approximately 125,000 Cuban nationals⁶² arrived on United States territory in a mass exodus from Mariel Harbor in Cuba during 1980.⁶³

54. *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886).

55. See generally Lopez & Lopez, *The Rights of Aliens in Deportation and Exclusion*, 20 IDAHO L. REV. 731 (1984) (discussing the legal status and diminished constitutional protections afforded excludable and deportable aliens).

56. See Cohen, *supra* note 52, at 349 (reviewing the major decisions distinguishing exclusion and deportation and noting Supreme Court decisions interpreting "entry"); see also Immigration and Nationality Act of 1952, § 101(a)(B), 8 U.S.C. § 101(a)(13) (1982) (defining "entry").

57. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

58. *Id.*

59. See *supra* notes 49-58 and accompanying text (discussing the rights of excludable aliens).

60. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953) (upholding the indefinite detention of an excludable alien on Ellis Island).

61. *Id.*

62. See *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 928 n.4 (N.D. Ga. 1982) (using the figure "approximately 125,000 Cubans"). The courts consistently use the figure of 125,000 Cubans throughout the litigation in *Garcia-Mir v. Meese*.

63. Early in April of 1980, over 10,000 Cubans seeking refuge took over the Peru-

The Cubans entered the United States without proper documentation.⁶⁴ The United States excluded most of the aliens because they lacked documentation.⁶⁵ The United States also excluded other aliens because they had criminal backgrounds or mental illness.⁶⁶

Immigration officials classified all the aliens as Cuban/Haitian entrants⁶⁷ and detained them on arrival.⁶⁸ The Attorney General, pursu-

vian Embassy in Havana, Cuba. Hovey, *U.S. Agrees To Admit Up To 3,500 Cubans From Peru Embassy*, N.Y. Times, Apr. 15, 1980, at A1, col. 6. Western European and Latin American countries agreed to accept these refugees and established quotas. *Id.* The United States agreed to take 3,500 refugees. New York City Bar Association Comm. on Immigration and Nationality Law, *The Propriety of Detaining Asylum-Seekers* 5 (April 23, 1985) (unpublished manuscript) [hereinafter New York City Bar Association Report] (stating that the United States accepted the Cuban refugees pursuant to the newly enacted Refugee Act of 1980). After allowing some refugees from the Peruvian Embassy to leave for Costa Rica, the Cuban government canceled the flights. *Cuba Bars Refugee Flights to Costa Rican Staging Area*, N.Y. Times, Apr. 19, 1980, at A6, col. 1. Fidel Castro subsequently announced that any individual wishing to leave Cuba could do so through the port of Mariel. *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983).

The mass exodus began when United States citizens traveled to Mariel Harbor with boats to bring the refugees to the United States. *Id.* The Cuban government referred to Cubans who wished to leave as "antisocial elements." N.Y. Times, Apr. 5, 1980, at A2, col. 4. Subsequently, the Cuban government began issuing travel documents to Cubans who had not sought asylum in the Peruvian Embassy. Crendson, *Cubans Arrive in Key West; U.S. to Penalize the Flotilla*, N.Y. Times, Apr. 24, 1980, at A1, col. 2. In what has been referred to as a presidential invitation, President Carter stated in a speech before the League of Women Voters that the United States would "provide an open heart and open arms" for the refugees. Weisman, *President Says U.S. Offers 'Open Arms' To Cuban Refugees*, N.Y. Times, May 6, 1980, at A1, col. 1. The Cuban government took advantage of the invitation and gave criminals the option of leaving for the United States or remaining in prison. *Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). When United States citizens arrived at Mariel Harbor, Cuban authorities forced them to take aboard criminals and mentally ill individuals, in addition to, or in place of, the relatives they sought. *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983); see Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925, 927-30 (1984) (detailing the chronological events surrounding the Freedom Flotilla).

64. See Boswell, *supra* note 63, at 934 (noting that lack of proper documentation was the primary legal problem common to all the Cuban refugees). To gain entry, the alien immigrant must present a passport, along with a valid immigrant visa stating that the United States has admitted him or her. C. GORDON & E.G. GORDON, *supra* note 24, § 2.25a.

65. Boswell, *supra* note 63, at 934.

66. See *supra* note 3 (noting the grounds for exclusion relevant to the aliens in this case).

67. See Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(e), 94 Stat. 1799, 1810 (1980) (codified at 8 U.S.C.A. § 1522 (West Supp. 1985)) (referring to the status of an "entrant"). The statute defines a "Cuban/Haitian Entrant" as:

(1) any individual granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and (2) any other national of Cuba or Haiti (A) who (i) was paroled into the United States and has

ant to his parole authority,⁶⁹ granted parole to aliens with sponsors.⁷⁰ The parole did not constitute a formal admission into the United States nor did the parole change the aliens' unadmitted status.⁷¹ Instead, it permitted the Cuban aliens to reside temporarily in the United States until the INS effected deportation proceedings against them or adjusted their status to permanent residence.⁷²

Government officials, however, denied parole to aliens who admitted criminal backgrounds or mental illness and processed them in INS detention centers around the United States.⁷³ The INS issued final exclusion orders to nearly all the detained aliens.⁷⁴ Thereafter, INS agents moved the unparoled aliens with criminal backgrounds to a maximum security federal penitentiary in Atlanta, Georgia.⁷⁵ The INS detained the aliens diagnosed as mentally ill at the INS Public Health Service

not acquired any other status under the Immigration and Nationality Act [this chapter]; (ii) is the subject of exclusion and deportation proceedings under the Immigration and Nationality Act [this chapter]; or (iii) has an application for asylum pending with the Immigration and Naturalization Service; and (B) with respect to whom a final, nonapplicable, and legally enforceable order of deportation or exclusion has not been entered.

Id.

68. *Garcia-Mir v. Smith*, 766 F.2d 1478, 1480 (11th Cir. 1985) (stating that when the aliens arrived, the United States government, in its discretion, denied admission to a small percentage of the Cubans), *cert. denied sub nom. Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986).

69. 8 U.S.C. § 1182(d)(5)(A) (1982); *see supra* note 40 (discussing the Attorney General's parole authority).

70. *See Kneeland, U.S. Admits Problems on Refugees; 19,000 Cubans Remain in Camps*, N.Y. Times, Aug. 30, 1980, at A9, col. 1 (reporting that by the end of August 1980, most of the Mariel Cubans had found sponsors). A sponsor is an individual or organization that becomes responsible for the well being of the alien and assists the alien in finding housing, employment, and enrollment in school. Boswell, *supra* note 63, at 933 n.36. Relatives in the United States sponsored some Mariel Cubans while organizations sponsored others. *Id.*

71. *See supra* note 43 (noting that parole did not constitute an admission of the alien).

72. *Fernandez-Roque v. Smith*, 600 F. Supp. 1500, 1500 (N.D. Ga. 1985), *rev'd sub nom. Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom. Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986); *see C. GORDON & E.G. GORDON, supra* note 24, § 7.4 (stating that immigration officials will adjust an alien's status for a legitimate reason after the original purpose for his or her temporary admission ends). In the case of refugees, a special procedure, which simulates the initial entry process, allows aliens physically present in the United States for one year to acquire permanent residence status. *Id.* § 7.7a.

73. New York City Bar Association Report, *supra* note 63, at 5-6.

74. *Id.* at 6; *see Garcia-Mir v. Smith*, 766 F.2d 1478, 1480 (11th Cir. 1985) (stating that the INS has issued final exclusion orders to virtually all of the detained aliens, but Cuba has refused to allow them to return), *cert. denied sub nom. Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986).

75. New York City Bar Association Report, *supra* note 63, at 6.

(INS/PHS) facility at St. Elizabeth's Hospital in Washington, D.C.⁷⁶ Subsequently, the INS allowed the paroled alien participants in the Mariel Boatlift to adjust their status to permanent residence.⁷⁷ The detained aliens were ineligible for this adjustment of status.⁷⁸

After the boatlift, the United States government was confronted with the dilemma of coping with both the detained aliens and the aliens whose parole was revoked.⁷⁹ In 1981, the government implemented the Attorney General's Status Review Plan (Plan) to facilitate parole decisions for the aliens remaining in detention.⁸⁰ The Plan established a review panel to determine whether to grant parole to the detainees and

76. *Banos v. Crosland*, No. 80-2677 (D.D.C. Dec. 11, 1980). The facilities at Saint Elizabeth's Hospital are similar to a prison, with an orientation toward detention and away from treatment. Boswell, *supra* note 63, at 944 n.82. Although the facility employs doctors and social workers, the detainees receive only limited treatment. *Id.* While some detainees once feigned illness to get transferred to the INS/PHS facility, other detainees requested transfer to the Atlanta prison. *Id.*

77. 49 Fed. Reg. 46,212 (Nov. 23, 1984) (stating that immigration officials would adjust aliens' status pursuant to the Cuban Adjustment Act of 1966); *see also* Cuban Adjustment Act of 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, 1161 (codified at 8 U.S.C. § 1255 (1982)) (providing for the adjustment of the status of "any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States . . . and has been physically present in the United States for at least two years . . ."). Adjustment to permanent status refers to changing an alien's temporary (non-immigrant) status to that of an alien lawfully admitted for permanent residence. C. GORDON & E.G. GORDON, *supra* note 24, § 7.6a.

78. *See* Immigration and Nationality Act of 1952, § 245, 8 U.S.C. § 1255 (1982) (authorizing the Attorney General to grant permanent resident status to aliens in the United States who were permitted to enter temporarily). Note that the Attorney General may adjust the status of *admitted* aliens. The Mariel Cubans are *unadmitted* aliens.

79. *See* *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1140-41 (N.D. Ga. 1983) (outlining the parole, detention, release, and revocation procedures used after the initial arrival of the Mariel Cubans), *rev'd*, 734 F.2d 576 (11th Cir. 1984).

80. *See* *Fernandez-Roque v. Smith*, 734 F.2d 576, 579 (11th Cir. 1984) (stating that the Attorney General adopted the Status Review Plan). The Plan established a review panel composed of officials from different divisions of the Department of Justice. *Id.* The panel examined the files of each detainee to determine whether the alien was (1) presently a nonviolent person, (2) likely to remain nonviolent, and (3) unlikely to commit any criminal offenses after release. *Id.* If the alien met these criteria, the panel recommended parole to the INS Commissioner. *Id.* If the panel could not make a determination based solely on the records, or if the Commissioner rejected the recommendation for parole, the panel personally interviewed the detainee. *Id.* At the interview, a person of the detainee's choice could accompany the alien and examine his or her files and submit written or oral information supporting his or her release. *Id.*

After the interview, the panel made a recommendation to the Commissioner, who could grant parole and impose whatever special conditions he deemed appropriate, or deny parole. *Id.* If the Commissioner denied parole, the Plan provided for an annual review as long as the alien remained incarcerated. *Id.*; *cf.* *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 891 (N.D. Ga. 1985) (questioning the adequacy of the Plan because it established a three person panel for 1,800 detained Cubans), *rev'd sub nom.* *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom.* *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

whether to impose special conditions on that parole.⁸¹ The ultimate decision to grant parole, however, remained within the discretion of the INS Commissioner.⁸²

While paroled aliens moved in and out of United States detention centers and halfway houses, Cuba refused to take back any of the Mariel Cubans.⁸³ A breakthrough occurred on December 14, 1984, however, when the United States and Cuba reached an agreement for the return of 2,746 Mariel Cubans.⁸⁴ In July 1985, however, the Cuban government reneged on the agreement to accept the return of the detained aliens.⁸⁵

B. THE JUDICIAL CHALLENGE TO DETENTION

Despite the lengthy history of legal battles⁸⁶ challenging the author-

81. *Fernandez-Roque v. Smith*, 734 F.2d 576, 579 (11th Cir. 1984).

82. *Id.*

83. *Id.* at 578; Boswell, *supra* note 63, at 947 n.95.

84. *Fernandez-Roque v. Smith*, 600 F. Supp. 1500, 1501 n.2 (N.D. Ga. 1985) (explaining the December 14, 1984 agreement between Cuba and the United States regarding the return of the Mariel Cubans), *rev'd sub nom. Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom. Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986).

85. See *Miami Herald*, July 12, 1985, at A5, col. 4 (reporting that Cuba backed out of the agreement for the return of 2,746 Mariel Cubans in response to the airing of Radio-Martí, a Voice of America-type radio program aimed at audiences in Cuba).

86. The procedural history of this case is long and complex. It spans a period of five years and includes several actions before the present appeal.

In January 1981, Moises Garcia-Mir, a Mariel Cuban detained at the federal penitentiary in Leavenworth, Kansas filed a class action complaint in federal court in Kansas against continued incarceration. *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1120 (N.D. Ga. 1983). Shortly thereafter, all Cubans in the Leavenworth facility were transferred to the federal penitentiary in Atlanta, Georgia. *Id.* In June of that same year, Rafael Fernandez-Roque, a Mariel Cuban detained at the Atlanta penitentiary, filed a class action in federal court in Atlanta challenging the continued incarceration of the Cubans. *Id.* The district court in Atlanta consolidated the two actions on June 14, 1981. *Id.*

On August 7, 1981, the district court certified the class action the Cubans detained at the Atlanta Federal Penitentiary had filed. *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981). The court conditionally certified 12 subclasses distinguishing the aliens on various grounds of excludability. *Id.* Three weeks later, in a post-hearing order, the district court held that the INS had abused its discretion in continuing to detain aliens who were unlikely to abscond or pose a threat to national security or the public interest, who had not committed crimes in the United States, and who the President had invited to this country. *Fernandez-Roque v. Smith*, 91 F.R.D. 239 (N.D. Ga. 1981). Consequently, the court ordered the issuance of writs of habeas corpus to 155 Cuban detainees who met these criteria. *Id.* at 241.

In August 1981, the district court entered a temporary restraining order (TRO) enjoining the government from deporting any of the detainees pending further order of the court. *Fernandez-Roque v. Smith*, 671 F.2d 426, 428 (11th Cir. 1982). The government appealed the TRO, claiming it had become a preliminary injunction. *Id.* The government also claimed that the district court lacked habeas corpus jurisdiction be-

ity of the INS to detain aliens, many Mariel Cubans remain in deten-

cause the aliens had not exhausted the administrative appeals available under immigration law. *Id.* at 428-29. The circuit court concluded that the TRO was not appealable. *Id.* at 428. The court remanded the case, ordering the district court to resolve the jurisdictional issue in cases where the aliens had not exhausted their administrative remedies. *Id.* at 431.

On remand, the district court held that it had habeas corpus jurisdiction and that the aliens had valid claims under the United Nations Convention and Protocol Relating to the Status of Refugees. *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 928-34 (N.D. Ga. 1982). The court also found that it lacked subject matter jurisdiction to review final exclusion orders the Board of Immigration Appeals (BIA) affirmed, that it lacked jurisdiction to remand to INS for a hearing based on new evidence, and that the TRO would continue pending appeal. *Id.* at 935-47.

The following year, detained Cubans who were approved for release challenged their continued detention when the policy of the Office of Refugee Resettlement (ORR) restricting the resettlement of these aliens in Florida delayed their release. *Fernandez-Roque v. Smith*, 557 F. Supp. 690, 695-96 (N.D. Ga. 1982). The court held that the Attorney General's policies restricting the resettlement of the Mariel detainees in Florida and restricting sponsorship by individual non-family members constituted unreasonable abuse of discretion. *Id.* at 696. Accordingly, the court ordered that the government cease adherence to the ORR policy restricting resettlement. *Id.*

In 1983, the detainees challenged the continued detention of Cubans who the government determined were not releasable under the Status Review Plan. *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983). The court held that the government had statutory authority to detain indefinitely when it could not deport the aliens. *Id.* at 1124. The court, however, also found that after the initial period of detention of undepotable aliens, the INS is constitutionally required to justify subsequent detention on a procedurally adequate finding of risk that the alien will abscond or pose a threat to national security or the society. *Id.* at 1133. The court held that the Attorney General's Status Review Plan did not afford adequate procedural hearings. *Id.* The court ordered the government to file a plan for providing the Cubans with the hearings to which they were entitled before the government legally could detain them. *Id.* at 1145-46.

On appeal, the circuit court consolidated the appeals of the government from the two most recent district court decisions. *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984). The circuit court agreed with the district court that in cases where the INS could not perpetuate the INA by immediately deporting excludable aliens, the government had authority to detain indefinitely. *Id.* at 580. That court held, however, that parole was part of the admissions process and that parole revocation did not rise to the level of constitutional infringement. *Id.* at 582-84. The court further held that the Attorney General did not abuse his discretion in deciding to refuse to authorize individual non-family member sponsorship, or in restricting resettlement in Florida. *Id.*

That same year, the district court reversed the decision of the BIA in two asylum test cases, stating that the BIA abused its discretion in denying requests to reopen the cases. *Fernandez-Roque v. Smith*, 599 F. Supp. 1103, 1104 (N.D. Ga. 1984). The court remanded the classwide asylum claims to the BIA for a hearing on the merits and set aside final exclusion orders pending the outcome of the hearing. *Id.* at 1109-10. In that same year, the district court denied the government motion to stay the order to reopen the asylum cases pending appeal. *Fernandez-Roque v. Smith*, 599 F. Supp. 1110, 1111 (N.D. Ga. 1984).

In 1985, 147 Cubans approved for release under the Status Review Plan challenged their continued incarceration when the government halted the release program after the agreement with Cuba for their return. *Fernandez-Roque v. Smith*, 600 F. Supp. 1500 (N.D. Ga. 1985). The court held that the Attorney General abused his discretion in refusing to release sponsored Cuban detainees approved for release. *Id.* at 1506.

The Eleventh Circuit issued a stay, refusing to delay further the deportation of cer-

tion.⁸⁷ The Cubans initiated the judicial challenge to their incarceration shortly after arriving in the United States.⁸⁸ The number of detained aliens, over 2,000, was so large that the detainees sought judicial relief as a class.⁸⁹

The Cubans brought the first challenges to the detention in two actions. Moises Garcia-Mir brought an action for Cubans detained in Leavenworth, Kansas and Rafael Fernandez-Roque represented the group detained in Atlanta, Georgia.⁹⁰ Upon consolidation of the cases, the names of the parties were interchanged. The cases appear as both

tain class members. The Cubans then sought to set aside the stay. *Garcia-Mir v. Smith*, 105 S. Ct. 948 (1985). The Supreme Court refused to modify further or set aside the stay. *Id.* at 950.

The Eleventh Circuit then consolidated the appeals from the most current district court decisions. *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom. Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986). The circuit court held that the temporary suspension of releases was a proper exercise of the Attorney General's authority in view of the agreement with Cuba. Therefore, the district court erred in ordering the release of 34 detainees. *Id.* at 1485. The court also determined that the district court lacked jurisdiction to act on the detainees' asylum claims when they had not exhausted their administrative appeals. *Id.* at 1486.

Meanwhile, the Cubans sought relief from detention in district court under the theory of a federally created liberty interest not arising under the Constitution. *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D. Ga. 1985). The district court recognized a protected liberty interest in parole for those aliens who were neither mental incompetents nor serious offenders, who had come to this country in response to a presidential invitation. *Id.* at 900. The court determined that mental incompetents and serious offenders who the INS never paroled did not have the same liberty interest. *Id.* at 904. Further, the court held that the Cubans failed to establish that customary international law applied to their case. *Id.*

In the note case, the Eleventh Circuit addressed the appeal of the government from the previous district court decision. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

87. See Boswell, *supra* note 63, at 929-30 & n.20 (discussing the difficulty in ascertaining the exact number of Cubans in detention centers). Many Cubans returned to detention centers or halfway houses when sponsor relationships broke down. *Id.* at 930 n.20. This flow of detainees in and out of detention centers makes accurate counting of detainees a difficult task. *Id.* The transfer of detainees from one facility to another also inhibits accurate counting. *Id.*

Despite attempts to parole as many detained Cubans as the government considered possible, as of 1982 approximately 1,800 aliens remained in detention. *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1120 (N.D. Ga. 1983). The most recent estimate of detained Cubans at the Atlanta penitentiary exceeds 1,800 because authorities have revoked, for varying offenses, paroles of many detainees. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 891 (N.D. Ga. 1985), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

88. See *supra* note 86 and accompanying text (explaining the lengthy and complex litigation of these cases).

89. *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981).

90. *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1120 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984).

*Fernandez-Roque v. Smith and Garcia-Mir v. Smith.*⁹¹1. *The Parties in Garcia-Mir v. Meese*

The certified class of Mariel Cubans held in detention at the Atlanta Federal Penitentiary brought the most recent challenge to INS detention authority.⁹² In *Fernandez-Roque v. Smith*,⁹³ the district court divided the alien class into two subclasses.⁹⁴ The first subclass consisted of Mariel Cubans who committed serious crimes in Cuba or who were mentally incompetent.⁹⁵ The second subclass consisted of Mariel Cubans who obtained parole on arrival in the United States, but whose parole the INS subsequently revoked.⁹⁶

After disposing of the class action issue, the district court found that detained Cubans who were neither mental incompetents nor convicted criminals came to the United States pursuant to a presidential invitation.⁹⁷ The district court held that this presidential invitation created a protected liberty interest in parole.⁹⁸ The court's recognition of this liberty interest meant that the INS could detain an alien belonging to the second subclass only if INS authorities found that the alien was likely to abscond or to pose a serious threat to persons or property within the United States.⁹⁹ Consequently, the district court ordered parole revocation hearings for the second subclass of detained aliens.¹⁰⁰ The govern-

91. See *supra* note 86 (explaining the history of these cases).

92. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1448 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

93. *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D. Ga. 1985), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

94. *Id.* at 893-95.

95. *Id.* at 893.

96. *Id.* at 895. The distinction between the subclasses is important. Although the first group never acquired an interest in parole, the second group had an interest that the government took away. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1452-53 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986) (quoting *Greenholtz v. Nebraska Penal Inmates*, 422 U.S. 1, 9 (1979) (drawing a distinction between deprivation of a possessed liberty and denial of a desired one)); see also *infra* notes 166-72 and accompanying text (discussing actionable interests deriving from liberties *had* and liberties *desired*).

97. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 896 (N.D. Ga. 1985), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

98. *Id.*

99. *Id.* at 901; see 8 C.F.R. § 212.5(a)(2) (1986) (permitting parole of aliens, provided they do not pose a security risk or a risk of absconding).

100. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 904 (N.D. Ga. 1985), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

ment immediately appealed this order.¹⁰¹

2. *The District Court Decision in Garcia-Mir v. Meese*

In an earlier challenge to their detention, the detained Mariel Cubans claimed they possessed a constitutionally protected liberty interest in parole arising directly from the Constitution.¹⁰² In rejecting this claim, the court of appeals failed to address two other issues: whether the aliens had a federally created liberty interest, and whether international law protected the aliens. The district court decision, later appealed in *Garcia-Mir v. Meese*, addressed these two issues.¹⁰³

First, the district court considered whether the detained aliens had a federally created liberty interest in parole, not arising from the Constitution.¹⁰⁴ The district court recognized that a statute, regulation, rule, practice, or policy could create a liberty interest.¹⁰⁵ The court stated that apart from demonstrating a legitimate claim of entitlement, the claimant must show that the official decision maker does not possess unlimited discretion to grant or withhold a benefit.¹⁰⁶ Statutory language that provides only procedural guidelines for conferring a benefit does not create a constitutionally protected substantive interest.¹⁰⁷ For the interest to arise, governmental action must impose substantive limitations on official discretion.¹⁰⁸ In reviewing the Attorney General's Status Review Plan,¹⁰⁹ the court recognized that the Plan contained limitations on official discretion.¹¹⁰ Nevertheless, the court followed the Eleventh Circuit determination that the Attorney General possesses

101. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

102. *See* *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984) (rejecting the aliens' claim to a constitutionally protected liberty interest).

103. *See* *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 891 (N.D. Ga. 1985) (reaching the previously unaddressed issues of a statutorily created right and protection under international law), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

104. *Id.* at 892.

105. *Id.*

106. *Id.*

107. *Id.* at 893.

108. *Id.* at 892.

109. *See supra* note 80 and accompanying text (describing the Status Review Plan).

110. *See* *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 894 (N.D. Ga. 1985) (stating that the Status Review Plan appears to place at least some substantive limitations on official discretion, but failing to state what these limitations are), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

broad discretion over parole.¹¹¹ Consequently, the district court concluded that the Status Review Plan did not create the liberty interest the aliens claimed because the agency has the discretion to dispense the benefit.¹¹²

The district court opinion differed from the court of appeals decision on the issue of the presidential invitation.¹¹³ The district court concluded that through the invitation, the United States accorded the Cubans a greater status than that conferred on other excludable aliens.¹¹⁴ Additionally, the court found that the presidential invitation created an actionable liberty interest for the Cubans who had neither committed serious crimes in Cuba nor were mentally incompetent.¹¹⁵ The government argued that a condition of the invitation was the requirement that the United States admit the Cubans according to United States immigration laws.¹¹⁶ The court rejected this proposition, stating that at the time the United States extended its invitation, it was apparent that the Cubans would enter without proper documentation.¹¹⁷

The court next inquired into what process was due the aliens. The court concluded that although there was no constitutionally based liberty interest in this case, the same due process standards must apply.¹¹⁸ To support this conclusion, the court relied on the Supreme Court's finding that "the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms."¹¹⁹

111. See *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) (making the determination of broad discretionary powers in the Attorney General's parole authority), cert. denied sub nom. *Marquez-Medina v. Meese*, 106 S. Ct. 1213 (1986).

112. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 894 (N.D. Ga. 1985), rev'd sub nom. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied sub nom. *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

113. See *id.* at 896-900 (concluding that the presidential invitation created a liberty interest). The President's statement provides in pertinent part: "we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government." *Id.* at 898 n.16.

114. *Id.* at 900.

115. *Id.*

116. *Id.* at 899.

117. See *id.* (noting that the invitation to "tens of thousands" of Cubans would exceed the numerical quotas of immigration law). At the time of the President's speech, 10,000 Cubans had already arrived in a matter of days. *Id.* at 897-98.

118. *Id.* at 901.

119. *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974). The Court has reiterated the holding that courts should apply constitutional analysis to the deprivation of statutorily created property interests. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (stating that the due process clause protects substantive rights that require

After addressing the liberty interest claim, the court considered whether international law accorded the Cuban aliens some protections against detention.¹²⁰ The court noted that international law allows detention when necessary for deportation, or the protection of society.¹²¹ The court recognized, however, that this method of detention violates customary international law when the government fails periodically to review the need for continued detention.¹²²

In the case of the detained Cubans, however, a controlling executive act precluded application of international law.¹²³ In ordering the continued detention of the aliens, the Attorney General acted pursuant to his delegated authority. The aliens failed to show that the Attorney General does not share the President's power to preempt customary international law through an executive act directing the detention of unadmitted aliens.¹²⁴ Under this analysis, relief from detention must come from the President, the Attorney General, or Congress.¹²⁵

Accordingly, the district court directed the government to provide parole hearings for the detained Cubans who neither committed serious crimes in Cuba nor were mentally incompetent.¹²⁶ The government immediately appealed the order.¹²⁷ The Court of Appeals for the Eleventh Circuit in *Garcia-Mir v. Meese* confronted the legal issue of whether excludable, unadmitted aliens have a right to a nonconstitutionally based due process liberty interest that would entitle them to parole revocation hearings.¹²⁸

constitutionally adequate procedures for their deprivation); *Vitek v. Jones*, 445 U.S. 480, 490-91 (1980) (noting that minimum due process requirements are a matter of federal law and the fact that a state may have followed its own procedures for deprivation of an interest may be inadequate).

120. See *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 901-04 (N.D. Ga. 1985) (claiming protection under the United Nations Protocol Relating to the Status of Refugees), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

121. *Id.* at 903. An expert witness for the Cubans testified that international law recognizes the need for detention in immigration cases and that arbitrary detention is determined according to what is reasonable and fair under the circumstances. *Id.*

122. *Id.*

123. *Id.* The court concluded that the Attorney General's order to continue the detention of the aliens was a controlling executive act. *Id.*

124. *Id.*

125. *Id.* at 903-04.

126. *Id.* at 904.

127. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

128. *Id.*

III. THE ELEVENTH CIRCUIT DECISION IN *GARCIA-MIR V. MEESE*

In *Garcia-Mir v. Meese*,¹²⁹ the Court of Appeals for the Eleventh Circuit addressed three claims the Mariel Cubans raised. First, the court considered whether the aliens had a nonconstitutionally based due process liberty interest entitling them to parole revocation hearings.¹³⁰ Second, the court determined whether international law provided protection against indefinite detention.¹³¹ Finally, the court raised the issue of the validity of the class action.¹³² The court concluded that the class action issue was moot, finding that the aliens did not have an actionable due process interest and that international law did not provide a source of relief.¹³³ The court's failure to ground protection for the aliens in due process or in international law exhausted all forms of legal relief available.

A. THE LIBERTY INTEREST

The Eleventh Circuit identified two sources of due process protections necessary for an individual to claim a nonconstitutionally based liberty interest.¹³⁴ The first source is the due process clause of the fifth amendment, which protects "core" values, such as the right to a fair trial.¹³⁵ The second source of due process protection stems from other rights not based on the Constitution that although not "core" values, are established sufficiently to constitute a deprivation of due process when denied.¹³⁶ The government cannot deny an individual the latter rights without providing the process that relevant rules and regulations require.¹³⁷

After identifying the sources of due process, the court distinguished the due process rights of excludable aliens from those of domestic per-

129. *Id.*

130. *Id.* at 1449.

131. *Id.*

132. *Id.*

133. *Id.* at 1455.

134. *Id.* at 1449.

135. *Id.*

136. *Id.*

137. *Id.* at 1449-50 (noting that even state conferred rights involve due process concerns). The court illustrated this principle by describing the "good-time credit" system that a state may establish in its prisons. *Id.* The court concluded that in such situations the state must apply fairly the rules that govern the system before depriving a prisoner of such credits. *Id.* Even in cases where the Constitution does not compel creation of the benefit, due process rights requirements attach. *Id.*

sons.¹³⁸ Whereas domestic persons have full due process protections under the fifth amendment, excludable aliens have virtually no constitutional protections.¹³⁹ Following the holding in *Mezei* that excludable aliens have only the due process rights the law chooses to provide, the Eleventh Circuit avoided the issue of the due process rights of unadmitted aliens.¹⁴⁰ In considering that the standards applicable in the domestic context also apply to these aliens, the court found that the Cubans failed to show the "existence of the particularized standards of review that yield a protected liberty interest."¹⁴¹

After dispensing with the due process analysis, the court focused on the INS regulations regarding parole.¹⁴² The parole issue allowed the court to determine whether the INS, in placing substantive limitations on its own discretion, conferred a liberty interest on the detained aliens.¹⁴³ The court affirmed the district court conclusion that the parole regulations alone did not create a liberty interest.¹⁴⁴ The court found that the parole regulations placed fewer substantive limitations on INS authorities than did the Status Review Plan.¹⁴⁵

The Eleventh Circuit, however, disagreed with the district court determination on the President's "invitation" to the Cubans to come to the United States.¹⁴⁶ The court concluded that the invitation did not constitute sufficient discretionary limitations on INS authorities to create a valid interest in parole.¹⁴⁷ The court rejected the argument that the President's public statements alone created an actionable liberty interest.¹⁴⁸

138. *Id.* at 1450.

139. *Id.*

140. *Id.* at 1450-51 (stating that it is prudent for a court to avoid resolving a dispute on constitutional grounds when alternate grounds for resolution are available).

141. *Id.* at 1450.

142. *Id.* at 1451-53; see 8 C.F.R. § 212.5 (1986) (setting forth parole regulations).

143. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1451-53 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

144. *Id.*

145. *Id.* at 1451 (determining that the parole regulations were more restrictive than the Status Review Plan).

146. See Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(e), 94 Stat. 1799, 1810 (1980) (codified at 8 U.S.C.A. § 1522 (West Supp. 1985)) (referring to these aliens as Cuban/Haitian entrants (Status Pending)).

147. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1451 (11th Cir.) (finding that the district court determination regarding restrictions on executive discretion that the President's invitation imposed and the classification as status pending entrants was flawed), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

148. *Id.* at 1451. The President has publicly invited refugees to come to the United States in the past. See *Paktorovics v. Murft*, 260 F.2d 610, 614 (2d Cir. 1958) (inviting Hungarian refugees to come to the United States). Congress later enacted legislation endorsing the President's actions. *Id.* at 614. The Eleventh Circuit noted that Congress

The Eleventh Circuit relied on the analysis of the United States Supreme Court in *Connecticut Board of Pardons v. Dumschat*,¹⁴⁹ and *Olim v. Wakinekona*¹⁵⁰ to address the argument that the special parole category of "Cuban/Haitian entrants (status pending)" conferred greater liberty interests on the detained Cuban aliens than on other excludable aliens. In *Dumschat*, the Supreme Court explained that a constitutional entitlement does not arise because the state granted a discretionary privilege in the past, but rather arises from the statutory limitations imposed on state authorities.¹⁵¹ Similarly, in *Olim*, the Supreme Court discerned a protected liberty interest arising from substantive statutory limitations on official discretion.¹⁵²

The circuit court applied the rationale of *Dumschat* and *Olim* to the claims of the detained Cubans and concluded that the necessary substantive limitations on the discretionary parole powers of the INS did

had not taken the same steps toward the Mariel Cubans. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1451 n.5 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

In *Garcia-Mir v. Meese*, the court noted that to determine that one of the political branches alone can create or extinguish constitutional rights would undermine the established system of checks and balances. *Id.* at 1451.

149. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981). In *Dumschat*, the respondent was sentenced to life imprisonment for murder in 1964. *Id.* at 460. Dumschat was eligible for parole in 1983, but the Connecticut Board of Pardons (CBP), the body empowered to commute life sentences by reducing the prison term, repeatedly denied Dumschat's applications for commutation of his sentence. *Id.* at 460-61. Dumschat sought a declaratory judgment that the CBP violated his fourteenth amendment due process rights in denying his applications without explanation. *Id.* The Court held that the statute in this case created no entitlement because it merely gave the CBP the power to commute sentences. *Id.* Moreover, the Court declared that a state need not explain its reasons for a decision when the statute does not require it to act on prescribed grounds. *Id.* at 465-67.

150. *Olim v. Wakinekona*, 461 U.S. 238 (1983). In *Olim*, the respondent was serving concurrent sentences for murder, rape, robbery, and escape. *Id.* at 240. Prison officials classified Wakinekona as a maximum security risk. *Id.* The petitioners, a Program Committee investigating disciplinary breakdowns within the maximum control unit in the Hawaii State Prison, held a hearing at which they singled out Wakinekona as a troublemaker. *Id.* On the petitioners' recommendation, authorities transferred Wakinekona to a prison on the mainland. *Id.* at 241. Wakinekona sued petitioners alleging that they deprived him of due process because the same people that conducted the hearing recommended his transfer. *Id.* at 243. The Court held that prison regulations in Hawaii do not place substantive limitations on the prison administrator's discretion to transfer an inmate. *Id.* at 249.

151. See *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (noting that the statute or other rule must define the obligations of the authority).

152. See *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (stating that when a decision maker operates without substantive limitations, a liberty interest is not created). For example, when the decision maker can transfer a prisoner for any reason or no reason at all, there are no limitations on his or her discretion that would create a liberty interest for the prisoner. *Id.*

not exist.¹⁵³ The Cubans argued that their "special status" under the Refugee Education Assistance Act of 1980 (REAA)¹⁵⁴ provided the necessary limitations on INS discretion.¹⁵⁵ The court ruled, however, that the REAA special status related solely to social welfare benefits and did not affect parole decisions.¹⁵⁶ The court emphasized that immigration authorities paroled the Cubans pursuant to the same parole provision as other aliens,¹⁵⁷ and therefore did not confer special treatment.¹⁵⁸

Finally, in addressing the liberty interest of the Cubans whose parole the INS revoked, the circuit court relied on the Supreme Court decision in *Morrissey v. Brewer*.¹⁵⁹ In *Morrissey*, the Court held that the fourteenth amendment protects a liberty interest in parole; therefore, government authorities may not terminate parole without an orderly process.¹⁶⁰ The Mariel Cubans, however, could not persuade the Eleventh Circuit that the presumption of releasability argument the Supreme Court recognized in *Morrissey* was sufficient to constitute a liberty interest for the aliens. Although the court found parallels between the detained Cubans' case and *Morrissey*,¹⁶¹ it distinguished the two cases based on the nature of the liberty interests involved.¹⁶² The circuit court recognized that the liberty interest established in *Morrissey* was constitutional, whereas the Cubans claimed a nonconstitutionally

153. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1452 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

154. Refugee Education Assistance Act of 1980, § 501(a)(1), 8 U.S.C.A. § 1522 (West Supp. 1985).

155. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1452 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

156. *Id.* The court equated the President's power to exercise authority over entrants under the REAA to Chapter 2 of Title IV of the INA, which provides for social welfare benefits. *Id.*; see Refugee Education Assistance Act of 1980, § 501(a)(1), 8 U.S.C.A. § 1522 (West Supp. 1985) (providing welfare, medical, educational, and resettlement benefits).

157. See Immigration and Nationality Act of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982) (delineating the general parole regulations).

158. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1452 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986). Further, the court noted that the INS did not establish special regulations for these aliens. *Id.*

159. *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Morrissey* was convicted of false drawing of checks and sentenced to not more than seven years confinement. *Id.* at 472. He was paroled the following year, but the Iowa Board of Parole revoked his parole and returned him to prison because he violated the parole regulations. *Id.* at 472-73.

160. *Id.* at 482. The court concluded that the authority revoking parole must hold an informal hearing to assure that it will base the finding of parole violations on facts of the parolee's behavior. *Id.* at 484.

161. *Morrissey v. Brewer*, 408 U.S. 471 (1972) (addressing parole revocation with respect to citizens with full constitutional rights).

162. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1452 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

based interest.¹⁶³ The court based its decision on the Supreme Court determination in *Mezei* that excludable aliens do not possess constitutional protections.¹⁶⁴ Consequently, the Eleventh Circuit held that the Cubans did not possess the due process protections the Supreme Court recognized in *Morrissey*.¹⁶⁵

The court further distinguished constitutional from nonconstitutional liberty interests.¹⁶⁶ Relying on *Greenholtz v. Nebraska Penal Inmates*,¹⁶⁷ the circuit court stressed the difference between a liberty *had* and a liberty *desired*.¹⁶⁸ A liberty *had* creates an actionable interest, whereas a liberty *desired* does not.¹⁶⁹ Following the logic of *Greenholtz*, the court concluded that the *Morrissey*-type parole revocation deprived the inmate of the liberty interest he had, while the *Greenholtz*-type denial of parole was nonactionable because the inmate never had a liberty interest.¹⁷⁰ In *Garcia-Mir*, the Cubans claimed they had a liberty interest existing independent of the parole authority, thereby making it a constitutional interest.¹⁷¹ The court, however, found that the parole authority did not create the interest at stake and, therefore, the Cuban aliens did not possess the liberty interest claimed.¹⁷²

163. *Id.* at 1452-53.

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

165. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

166. *Id.*

167. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). In *Greenholtz*, inmates of the Nebraska Penal and Correctional Complex brought a class action claiming that the Board of Parole denied them procedural due process because the Board refused to parole them. *Id.* at 3-4. The Supreme Court held that the state does not create an entitlement to parole merely by providing for the possibility of parole. *Id.* at 9-11.

168. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986). While a nonconstitutional liberty interest arises from the creation of rules that will bestow a benefit, a constitutional liberty interest arises when one actually has one's liberty, and it is not dependent on promulgated rules. *Id.*

169. *Id.* According to the holding in *Greenholtz*, a *Morrissey*-type parole revocation entails deprivation of a liberty *had*, whereas a *Greenholtz*-type parole release involves denial of a liberty *desired*. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9 (1979).

170. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

171. *See supra* note 168 (stating that a constitutional interest does not depend on promulgated rules).

172. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986). The INS never paroled Cubans in the first subclass, therefore, the Cubans possessed only a *Greenholtz*-type liberty desired interest. *Id.* Cubans in the second group had a *Morrissey*-type liberty interest because the INS revoked their parole. *Id.* Because the *Morrissey*-type liberty interest is constitutional, however, it did not apply to these unadmitted aliens. *Id.*

The circuit court made three determinations on the liberty interest. First, the due process clause does not protect the excludable Mariel Cuban aliens.¹⁷³ Second, the rules and regulations did not limit substantively the discretionary powers of INS authorities so as to create a liberty interest for the aliens.¹⁷⁴ Third, the aliens had no actionable claim under the logic of *Morrissey* because the interest recognized in that case was a constitutionally based interest.¹⁷⁵

B. THE INAPPLICABILITY OF INTERNATIONAL LAW

The Cubans also challenged their detention as a violation of customary international law prohibiting prolonged arbitrary detention.¹⁷⁶ The court recognized that customary international law is a part of the common law of the United States, and that domestic legislation should avoid violations of international law.¹⁷⁷ The court determined, however, that international law overrides domestic law in a domestic forum only in the absence of a controlling executive or legislative act or judicial decision.¹⁷⁸ The court found that the International Security and Development Cooperation Act of 1980 (ISDCA)¹⁷⁹ was a controlling enactment that displaced the customary international law prohibition against prolonged detention.¹⁸⁰

The court's interpretation of the ISDCA was the critical element in the attempt to establish legislative intent to detain aliens indefinitely. In *Fernandez-Roque v. Smith*, a previous decision of the same court, the Court of Appeals for the Eleventh Circuit determined that the de-

173. See *id.* at 1449-51 (discussing the due process issue).

174. See *id.* at 1451-52 (failing to find a limitation on discretion).

175. See *id.* at 1452-53 (concluding that the holding in *Morrissey* did not apply).

176. *Id.* at 1453; see RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) comment h (Tent. Draft No. 6, 1985) (stating in pertinent part, "[d]etention is arbitrary if it is supported only by a general warrant, or is accompanied by notice of charges; if the person detained is not given the opportunity early to communicate with family or to consult counsel; or is not brought to trial within a reasonable time").

177. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.) (stating the common law of the United States has incorporated the public law of nations), *cert. denied sub nom.* *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

178. *Id.* The court relied on *The Paquete Habana* and the Restatement (Revised) of Foreign Relations Law of the United States § 131 comment d to support its conclusion that domestic legislation or judicial decision may override international law. *Id.*

179. International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, 94 Stat. 3131 (1980) (codified in scattered sections of 22 U.S.C.) (authorizing appropriations for the fiscal year 1981 for international security and development assistance, the Peace Corps, refugee assistance, and for other purposes).

180. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir.), *cert. denied sub nom.* *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

portation statute¹⁸¹ did not restrict the Attorney General's power to detain indefinitely.¹⁸² This lack of restriction was not sufficient to establish the affirmative intent of Congress to grant the Attorney General the power to detain aliens.¹⁸³ The court in *Garcia-Mir v. Meese*, however, discerned sufficient congressional intent to justify continued detention of the aliens.¹⁸⁴ The court interpreted language in the ISDCA¹⁸⁵ as support for the proposition that the Cuban aliens in the first group should remain in continued detention until their deportation.¹⁸⁶ In holding that this statute allows prolonged detention of the aliens in the first subclass, the court found a controlling legislative enactment that superseded customary international law.¹⁸⁷

As for the second subclass of aliens who were incarcerated because of parole revocations, the circuit court agreed with the district court that the Department of Justice lacked the power to detain without a hearing.¹⁸⁸ The court concluded that in the absence of a controlling legislative act, the Attorney General's actions terminating the Status Review Plan and revoking parole constituted controlling executive acts.¹⁸⁹ The Mariel Cubans argued that controlling executive acts must originate with the President, and in this case the acts originated with the Attorney General.¹⁹⁰ In response, the court declined to interpret the decision in *The Paquete Habana*¹⁹¹ as prohibiting the President's cabi-

181. 8 U.S.C.A. § 1227(a) (West Supp. 1985).

182. *Fernandez-Roque v. Smith*, 734 F.2d 576, 580 n.6 (N.D. Ga. 1985).

183. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-54 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986); *see Fernandez-Roque v. Smith*, 622 F. Supp. 887, 902 (N.D. Ga. 1985) (noting that although the deportation statute does not address indefinite detention, it does not restrict the Attorney General's discretion to detain excludable aliens), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

184. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 n.9 (11th Cir.) (citing the ISDCA as congressional intent to detain), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

185. *Id.* The ISDCA states that, "[t]he Congress urges the Executive branch, consistent with United States law, to seek the deportation of such individuals." *Id.*

186. *Id.*

187. *See id.* at 1454 (citing the ISDCA as the controlling enactment that supersedes international law).

188. *Id.*

189. *Id.* at 1454-55.

190. *Id.*

191. *The Paquete Habana*, 175 U.S. 677 (1900); *see Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986) (stating that the amicus brief in *Garcia-Mir* mischaracterized the facts that distinguished *The Paquete Habana*).

During the Spanish American War, the United States captured two Cuban fishing vessels off the coast of Cuba, claimed them as prizes of war, and sold them. *The Paquete Habana*, 175 U.S. 677, 678-79 (1900). The Secretary of the Navy gave an admiral permission to seize vessels likely to aid the enemy. *Id.* at 713. The Supreme Court

net officers from taking controlling executive actions.¹⁹²

The court also noted that the Cuban aliens mistakenly relied on the Restatement of Foreign Relations Law of the United States because subsequent drafts modified the Restatement to allow the President to take actions violating international law when acting within his or her constitutional authority.¹⁹³ The court asserted that under a recent version of the Restatement of Foreign Relations Law, the President has constitutional authority to delegate power to executive departments¹⁹⁴ that may disregard international law if domestic needs so dictate.¹⁹⁵ Consequently, the court of appeals recognized that the Attorney General's acts may supersede the dictates of international law.¹⁹⁶

Finally, relying on the decision in *Jean v. Nelson*,¹⁹⁷ which extended the holding in *Mezei* to indefinitely detained aliens, the court found controlling judicial precedent preventing it from applying international law.¹⁹⁸ The court thereby avoided a decision that would restrain the political branches in dealing with changing world conditions.¹⁹⁹ As a result of this decision, the detained Mariel Cubans have exhausted their claims in the federal courts and face indefinite detention, barring deportation proceedings or congressional action on their behalf.

V. EVALUATION OF THE LEGAL ISSUES

A. LEGALITY OF THE DETENTION

The Court of Appeals for the Eleventh Circuit correctly concluded that detaining excludable aliens is legal under the INA.²⁰⁰ The INA

held that the seizures were unlawful because international law exempted fishing vessels lawfully employed in their vocation from capture as prizes of war. *Id.* at 686.

192. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

193. *Id.* at 1454-55.

194. *See* U.S. CONST. art. 2, § 2 (vesting the President with authority over the officers of the executive departments). Under this section, the President may require the opinion of executive officers on any subject relating to the duties of their offices. *Id.*

195. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

196. *Id.*

197. *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (holding that even an indefinitely detained alien could not challenge his detention without a hearing), *aff'd*, 472 U.S. 846 (1985).

198. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.) (noting that in *The Paquete Habana* the United States Supreme Court applied a judicial ruling to interdict the reach of international law), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

199. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

200. *See generally* *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) (affirming the detention of excludable aliens).

provides the legal basis for detaining both deportable and excludable aliens.²⁰¹ The INA, however, addresses the duration of detention only with respect to deportable aliens.²⁰² Provisions regarding deportable aliens are extensive, detailing the methods of arrest and custody, and in particular, establishing a six month detention period once the final deportation order issues.²⁰³ The Attorney General must effect the deportation of the alien within six months.²⁰⁴ If the INS has not deported the alien within the six month period, the INS may release the alien subject to supervisory conditions.²⁰⁵

In contrast to the six month detention specified for deportable aliens, the INA does not address the appropriate duration of detention for excludable aliens not immediately deported.²⁰⁶ The silence of the statute on this issue is significant because it suggests that Congress did not intend prolonged detention for excludable aliens.²⁰⁷ Although the INA mentions the possibility that the country from which the alien arrived may not be willing to accept his or her return, it presumes the possibility of deportation to another country.²⁰⁸ The only mention of detaining excludable aliens is that those responsible for bringing the aliens to the United States must pay any detention expenses.²⁰⁹

The distinction concerning detention signifies the different degrees of constitutional protection the United States affords deportable and excludable aliens. The deportable alien who has crossed the border and is physically present in the United States receives protection against infringement of rights.²¹⁰ The excludable alien, however, has not yet initiated an entry, despite his or her physical presence in the United States.²¹¹ Therefore, the excludable alien has not acquired the same

201. 8 U.S.C. §§ 1252(a), 1227(a) (1982).

202. *Id.* 1252.

203. *Id.*

204. *Id.* § 1252(c).

205. *See id.* § 1252(d) (stipulating the conditions of release pending deportation to which the alien is subject).

206. *See id.* § 1227(a)(1) (providing only that the INS should deport an excludable alien immediately).

207. *See supra* note 40 and accompanying text (discussing the Attorney General's power to grant aliens temporary harborage through parole).

208. 8 U.S.C. § 1227(a)(2) (1982) (presuming that the INS can deport the alien to the country where he or she resides; was born; is a citizen, subject, or national; or if the INS cannot deport the alien to any of the other countries, to any country willing to accept him or her).

209. *Id.*

210. *See generally* Lopez & Lopez, *supra* note 55, at 745-54 (distinguishing between the rights of deportable aliens who have physically entered the United States and excludable aliens at the border).

211. *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 n.2 (11th Cir. 1984).

rights as the deportable alien.²¹² This logic partially emanates from the fact that because the excludable alien is usually still physically at the border, the alien facilitates his or her return to the country from where he or she came. Congress appears to have contemplated a short detention period that would allow authorities to arrange the immediate return of the alien.²¹³ If immediate deportation is not appropriate or possible, the INA allows the temporary admission of the excludable alien through parole.²¹⁴

The INA vests the Attorney General with the discretionary authority to parole excludable aliens for emergent reasons or for reasons in the public interest.²¹⁵ Because the INS does not regard this type of admission as an entry,²¹⁶ Congress may have perceived the presence of the excludable alien as temporary. Because Congress allowed physical presence without conferring the usual protections associated with that presence, Congress may not have expected the paroled alien to be present for an extended period of time.²¹⁷

A problem of prolonged detention arises from the uncertainty in the length of detention of undeportable aliens. This problem occurs when the INS cannot return the alien to the country from where he or she came, and no other country will accept the alien. If detention is for the purpose of ensuring deportation²¹⁸ and the INS cannot effect deportation,²¹⁹ parole usually resolves this problem.²²⁰ Nevertheless, the problem is more complex when immigration officials do not release the detained aliens because it is believed that the aliens may pose a dangerous threat to the public or themselves.²²¹ The circuit court in *Garcia-Mir v. Meese* confronted this dilemma and decided in favor of

212. Lopez & Lopez, *supra* note 55, at 745-54.

213. See 8 U.S.C. § 1227(a)(1) (1982) (requiring immediate deportation).

214. *Id.* § 1181(d)(5).

215. *Id.* § 1182(d)(5)(A).

216. See *supra* note 43 and accompanying text (noting that parole did not confer legal admission).

217. 8 U.S.C. § 1182(d)(5)(A) (1982).

218. See *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985) (recognizing the validity of detention pending deportation under international law), *rev'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

219. See *supra* note 85 and accompanying text (reporting that Cuba refused to accept the return of the aliens).

220. See *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1957) (stating that "parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted"). Consequently, "detention has been the exception not the rule." *Id.*

221. See *supra* note 99 and accompanying text (stating that the INS may detain aliens when they pose a risk to themselves, to society, or when they are likely to abscond).

detention while the government secures the return of the aliens to Cuba.²²²

B. AFFIRMATIVE LEGISLATIVE GRANT OF AUTHORITY THAT
SUPERSEDES THE APPLICATION OF INTERNATIONAL LAW

The INA itself does not address the Attorney General's power to detain an alien indefinitely. The decision in *Garcia-Mir v. Meese* stops short of suggesting that the lack of restriction on the Attorney General to detain indefinitely is a sufficient grant of power that supersedes international law.²²³ Instead, the court sought an affirmative legislative grant of authority to justify the Attorney General's power.²²⁴ The court relied heavily on what it perceived as congressional intent to grant the executive branch the power to detain indefinitely, thereby overriding the provisions of customary international law.²²⁵ The ISDCA, on which the court relied to justify the power to detain aliens,²²⁶ instructs the executive to "seek the deportation of such individuals."²²⁷ The court emphasized that the language of the enactment requires the executive to comply with United States law, and that United States law incorporates international law.²²⁸

The court, however, overlooked an important point. The language of the ISDCA calls for the deportation, not detention, of aliens.²²⁹ The ISDCA urges the executive branch to take action to effect the return of the Cubans, through negotiations with the Cuban government or through some other method the executive deems appropriate.²³⁰ Seeking deportation, however, has little to do with an affirmative legislative grant to detain. The court reads the language of the ISDCA as congressional intent to continue detention of the Cubans until deporta-

222. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.) (concluding that the Cuban aliens will remain in detention unless Congress or the executive branch takes some action on their behalf), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

223. See *id.* at 1453-54 (finding no restriction in the statute on the Attorney General's power to detain).

224. *Id.*

225. *Id.* at 1454.

226. See *supra* note 182 and accompanying text (citing the language of the enactment).

227. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 n.9 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

228. *Id.*

229. See International Service and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 716, 94 Stat. 3131, 3162 (1980) (codified in scattered sections of 22 U.S.C.) (calling for the deportation of the detained Cuban aliens).

230. See *supra* notes 179-82 and accompanying text (discussing the provisions of the ISDCA regarding these Cubans).

tion.²³¹ This language, however, may also imply that Congress recognized the urgent necessity to release the Mariel Cubans from indefinite detention and to procure their return to Cuba.²³²

The INA does not give the Attorney General an affirmative grant to detain excludable aliens indefinitely. Nevertheless, the circuit court in *Garcia-Mir v. Meese* did not hesitate to find congressional intent to detain the Mariel Cubans in a statute that requests their deportation.²³³ A different interpretation of that same statute supports the view that Congress recognized the inequity in indefinite detention. In finding congressional intent to grant the Attorney General the power to detain, the courts again avoided an important constitutional question.

C. AVOIDING THE CONSTITUTIONAL QUESTION

Immigration law accords deportable and excludable aliens a lesser degree of constitutional protection than that accorded resident aliens or United States citizens.²³⁴ Nevertheless, since the United States Supreme Court decision in *Yick Wo v. Hopkins*,²³⁵ courts have recognized that aliens are persons under the Constitution, and are entitled to equal protection under law when present in United States territorial jurisdiction.²³⁶ While most of the case law in this area focuses on equal protection, the analysis applies equally to the due process rights of aliens present within United States territory.²³⁷ In contrast, United States

231. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 n.9 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

232. *See supra* notes 179-82 and accompanying text (urging deportation, not detention, in the ISDCA).

233. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

234. *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 n.2 (11th Cir. 1984); *see Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 790 (D. Kan. 1980) (stating that excludable aliens do not enjoy the same constitutional rights guaranteed to citizens and aliens who have entered the United States), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

235. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

236. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210-30 (1982) (holding that children of illegal aliens are entitled to equal protection under the fourteenth amendment); *Mathews v. Diaz*, 426 U.S. 67, 77-87 (1976) (extending fifth amendment protection against discrimination to illegal aliens); *Graham v. Richardson*, 403 U.S. 365, 370-83 (1971) (holding that the fourteenth amendment prevents states from withholding welfare benefits from alien beneficiaries); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (emphasizing that the fourteenth amendment protects individuals within the territorial boundaries of the states, including illegal aliens); *see also* Note, *Plyler v. Doe: Expanding the Application of the Equal Protection Clause to Illegal Aliens*, 10 OHIO N.U.L. REV. 563, 564 (1983) (discussing the Supreme Court decision in *Plyler* that extended equal protection to children of illegal aliens).

237. *See supra* note 236 (discussing court decisions recognizing the constitutional rights of aliens).

immigration law denies the same due process status to excludable aliens, although these aliens may be physically present within United States jurisdiction as well.²³⁸

Consequently, while there is support for the extension of constitutional rights to aliens, there is also precedent that denies excludable aliens the same rights.²³⁹ In *Jean v. Nelson*²⁴⁰ the Court of Appeals for the Eleventh Circuit held that excludable aliens have no constitutional rights with regard to admission, asylum, or parole. The Supreme Court, however, affirming on other grounds, specifically stated that the court of appeals should not have reached the constitutional question.²⁴¹ Accordingly, in *Garcia-Mir v. Meese*, the Eleventh Circuit avoided the constitutional question.

The extent of constitutional protections accorded excludable aliens thus remains a viable issue. Because excludable aliens may find themselves in inequitable circumstances, courts must determine the scope of their constitutional protection. Until the courts answer the question of how much due process protection excludable aliens within United States territory possess, government authorities can continue to hold these aliens in prolonged detention.

D. THE SIGNIFICANCE OF *GARCIA-MIR V. MEESE*

The Eleventh Circuit decision in *Garcia-Mir v. Meese* is significant for two reasons. First, the decision represents a reaffirmation of the old approach in immigration law, namely, that excludable aliens possess no due process rights under the United States Constitution. Second, the decision exemplifies the failure of present immigration law and policy to provide an adequate solution to the problem.

First, in following the decisions in *Mezei* and *Jean v. Nelson*, the

238. See *Fernandez-Roque v. Smith*, 734 F.2d 576, 578 n.2 (11th Cir. 1984) (discussing the "entry fiction").

239. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 27-28 (1982) (finding that aliens have no constitutional rights to be admitted to the United States); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207-16 (1953) (holding that the continued detention of an undepotable alien did not violate any statutory or constitutional rights); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (finding that the Attorney General, acting pursuant to his or her parole authority, may exclude an alien without a hearing; cf. *Jean v. Nelson*, 727 F.2d 957, 967-69 (11th Cir. 1984) (holding that excludable aliens have no constitutional rights entitling them to admission, asylum, or parole), *aff'd*, 472 U.S. 846 (1985). See generally Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985) (discussing the rights of aliens under the Constitution and the constitutional principles governing immigration and deportation).

240. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

241. *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

decision in *Garcia-Mir v. Meese* reaffirms the Attorney General's power to detain excludable aliens, even when the detention is indefinite.²⁴² The decision also supports the proposition that excludable aliens may not challenge their detention under a nonconstitutionally based right.²⁴³ In this respect, the decision goes beyond the questionable outcome in *Jean v. Nelson* that excludable aliens have no constitutional rights with respect to admission, asylum, or parole.²⁴⁴ The decision in *Garcia-Mir* hinders possible protection for excludable aliens.

Although the detention in *Garcia-Mir* and in *Mezei* were substantially different,²⁴⁵ the Eleventh Circuit reaffirmed the current validity of the detention recognized in *Mezei*.²⁴⁶ The decision in *Garcia-Mir*, however, goes farther than *Mezei*. Rather than limiting detention of excludable aliens to border detention, the result in *Garcia-Mir* also permits incarceration inside the United States.

Second, the decision in *Garcia-Mir* demonstrates a failure of the status quo in immigration law. When an inequitable situation results from the absence of a provision in the law, Congress or the courts should clarify the law. Two different circuit courts addressing the dilemma of the Mariel Cubans reached opposing conclusions. These opposing conclusions exemplify an inequitable situation that the courts or Congress must ameliorate.²⁴⁷

In *Rodriguez-Fernandez v. Wilkinson*, the Court of Appeals for the Tenth Circuit held that the INA does not permit indefinite detention as an alternative to exclusion.²⁴⁸ Accordingly, after a reasonable time²⁴⁹

242. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), (relying on the Court decision in *Jean v. Nelson* interpreting *Mezei* to conclude that the power to detain extends to an indefinite period of time), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

243. *Id.* at 1452-53.

244. *Jean v. Nelson*, 727 F.2d 957, 984 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

245. Compare *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (detaining aliens on Ellis Island, literally at the border) with *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986) (detaining aliens at a maximum security prison within United States territorial jurisdiction).

246. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

247. Compare *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (concluding that the INA does not allow prolonged and indefinite detention and ordering the excludable aliens' release) with *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982) (concluding that Congress implicitly authorized the Attorney General to order the indefinite detention of excludable aliens).

248. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1981). A Mariel Cuban detained in the federal penitentiary in Leavenworth, Kansas, not a member of the *Garcia-Mir* class, brought habeas corpus proceedings for his release. *Id.* at

during which the INS negotiates the aliens' return, if the INS does not deport the aliens, they must release them.²⁵⁰ Otherwise, detention would become impermissible punishment, not detention pending deportation.²⁵¹ Conversely, in *Palma v. Verdeyen*, the Court of Appeals for the Fourth Circuit concluded that Congress, through the INA, implicitly authorized the Attorney General to detain excludable aliens indefinitely if the INS cannot return them successfully.²⁵² The different conclusions of these two circuits demonstrates that the INA is open to contrary interpretations concerning the duration of an excludable alien's detention. Until the United States Supreme Court addresses the question, or until new legislation limits the duration of detention for excludable aliens,²⁵³ lower courts will continue to interpret the Act's silence on the duration of detention in different ways. In the meantime, a number of Mariel Cuban aliens suffer from lengthy detentions.²⁵⁴

V. RECOMMENDATIONS

Courts currently construe the INA in several different ways. Either Congress, the executive branch, or the courts must find solutions to ameliorate the treatment accorded the Mariel Cubans. This Note suggests several possible remedies for the situation.

First, the most obvious solution, and the one Congress consistently calls for, is the deportation of the detained Cubans.²⁵⁵ The United States can accomplish this through pressing enforcement of the December 14, 1984 agreement with Cuba, or negotiating a new agreement. Considering the present stalemate in the negotiations for the return of the aliens, however, the United States government should address other options.

1384.

249. *Id.* at 1389-90. The Court failed to elaborate on what is a reasonable length of time for the detention. *Id.* The INS detained the alien in *Rodriguez-Fernandez* for over one year. *Id.* at 1384-85.

250. *Id.* at 1384-85.

251. *See id.* at 1387 (discussing the nature of this group of aliens' detention).

252. *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982).

253. *See* H.R. 3810, 99th Cong., 2d Sess., reprinted in 132 CONG. REC. 9801-26 (1986) (proposing to amend the INA, but failing to specify duration of an excludable alien's detention). The bill, however, specifically calls for the deportation of the Cuban aliens. *Id.*

254. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied sub nom. *Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

255. *See* International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 716, 94 Stat. 3131, 3162 (1980) (codified at scattered sections of 22 U.S.C.) (calling for the deportation of the Cubans); *see also* H.R. 3810, 99th Cong., 2d Sess., reprinted in 132 CONG. REC. 9801-26 (1986) (same).

A second possibility, although not a solution for all the detained Cubans, is to reimplement the Attorney General's Status Review Plan.²⁵⁶ The Plan would allow a case-by-case review of the detainees' files. The INS may find that it can release aliens who do not pose a risk to society.

Third, if the administration holds the Cubans in preventive detention indefinitely, Congress should consider an adjustment of their status. Through a legislative enactment, Congress can grant these aliens minimal due process rights. This change would put the Cubans on equal footing with people held in civil internment.

Finally, Congressional reconsideration of the deportable and excludable distinction may clarify immigration law and guide legislatures, courts, and administrators in the future. It is time for immigration law to stop hiding behind the "entry fiction" and squarely address the issue of detained excludable aliens. Alternatively, Congress should amend the INA to incorporate a limitation on the duration of detention of excludable aliens. The latter suggestions may make many Mariel Cubans eligible for release on parole. Any of these solutions would give detained Cubans and future detained aliens some relief from indefinite incarceration.

CONCLUSION

Over the six year history of legal challenges to detention, the courts have stated that excludable Mariel Cubans have no rights under the United States Constitution,²⁵⁷ nor statutorily based rights,²⁵⁸ nor protection against prolonged detention under international law.²⁵⁹ Additionally, the Mariel Cubans have now exhausted their legal remedies in federal court. The result of the Eleventh Circuit decision in *Garcia-Mir v. Meese* is a reaffirmation of indefinite detention recognized in *Shaughnessy v. United States ex rel Mezei*. *Garcia-Mir v. Meese*, however, extends that detention to excludable aliens inside United States territory.

The courts are not solely responsible for the continued detention of the Mariel Cubans. The executive branch set the policy incarcerating this group of aliens, some for as long as seven years. In the hope that the INS will be able to deport these individuals to Cuba, the legislature

256. See *supra* note 80 and accompanying text (describing the Status Review Plan).

257. *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984).

258. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

259. *Id.*

is also unwilling to take affirmative steps to resolve the problem of the indefinite detention aliens face.

Until the courts accept the challenge of clearly delineating the rights of excludable aliens inside the United States, undeportable excludable aliens may, at the discretion of the INS, continue to face indefinite incarceration. Until Congress amends the provisions of the INA to incorporate a limitation on the duration of the detention of excludable aliens, Mariel Cubans will remain in detention awaiting deportation. Additionally, federal courts will continue to interpret the statute inconsistently.

The Eleventh Circuit decision in *Garcia-Mir v. Meese* reaffirms the view that the government need not recognize the rights of excludable aliens. In addition, the government may detain these aliens as long as necessary to effect deportation. Consequently, the courts and the immigration laws have reduced the Mariel Cubans to the status of inmates without rights.

POSTSCRIPT

In a discretionary decision in November 1986, the INS decided to release all but 275 to 300 detained Cubans.²⁶⁰ As of November 1987, there were approximately 3,800 Mariel Cubans in detention centers around the country.²⁶¹ On November 20, 1987, the State Department announced that Cuba had agreed to restore the 1984 agreement for the return of 2,746 Mariel Cubans.²⁶² As part of the agreement, the United States will accept up to 20,000 Cuban immigrants per year.

After the announcement of the United States/Cuba agreement, Mariel Cubans, detained at the Oakdale, Louisiana federal detention center protested their deportation. The protests escalated until the aliens rioted and took control of the center, holding hostages to ensure that the United States government met their demands.²⁶³ The following day, the Mariel Cubans detained in Atlanta rioted and took control of

260. See Sinclair, *Cubans Here May Be Paroled*, Wash. Post, Nov. 9, 1986, at A16, col. 1 (reporting that the INS considered releasing the aliens). The expense incurred to maintain 1,800 detainees prompted the INS decision. *Id.* The cost to the government to house and feed these individuals is approximately \$65 per day. *Id.*

261. *What Happened to the Marielitos?*, N.Y. Times, Nov. 25, 1987, at B6, col. 1.

262. Lewis, *U.S. and Havana Agree to Restore Immigration Pact*, N.Y. Times, Nov. 21, 1987, at 1, col. 1; Goshke, *U.S. and Cuba to Reactivate Migration Pact*, Wash. Post, Nov. 21, 1987, at A1, col. 6.

263. Smothers, *Cuban Inmates Facing Expulsion, Take Over a Center in Louisiana*, N.Y. Times, Nov. 23, 1987, at 1, col. 3; Maraniss, *Cuba Exiles Holding 20 as Hostages*, Wash. Post, Nov. 23, 1987, at A1, col. 1.

the federal penitentiary.²⁶⁴ In an effort to end the uprisings and release the hostages, Attorney General Edwin Meese III offered to declare a moratorium on deporting the detained Cubans.²⁶⁵ The Attorney General offered full, fair, and equitable review of the detainees' files before deportation.²⁶⁶ One week after the prison siege began in Louisiana, the inmates agreed to release their hostages and turn themselves over to prison authorities.²⁶⁷ Similarly, five days later, the inmates at the Atlanta penitentiary released their hostages and ended the prison takeover.²⁶⁸

After seven years, the end of detention may be in sight for the Mariel Cubans. Once again, an unexpected, unique situation has brought the immigration laws concerning exclusion under public scrutiny. Perhaps, as a result of the attention the Mariel Cubans have attracted, Congress will address the problems of the immigration laws concerning exclusion.

264. Harris, *Meese Offers to Delay Cuban Deportations, Rioting Spreads to Atlanta Penitentiary*, Wash. Post, Nov. 24, 1987, at A1, col. 5.

265. *Id.*

266. *Id.*

267. Rezendas, *Siege Ends At Prison In Louisiana*, Wash. Post, Nov. 30, 1987, at A1, col. 1.

268. Smothers, *Cubans With 89 Hostages Agree to End Atlanta Prison Takeover*, N.Y. Times, Dec. 4, 1987, at A1, col. 2; Phillips and Thompson, *Officials, Inmates Agree to End Prison Siege*, Wash. Post, Dec. 4, 1987, at A1, col. 1.