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Rethinking Exclusion--The Rights of Cuban Refugees Facing Indefinite Detention in the United States

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I. INTRODUCTION

The United States Constitution vests in Congress the power to enact laws that control which aliens may enter the United States.[1] The power to determine the aliens who could enter has been extended to include the power to enact laws that control the classes of aliens already in the United States that should be deported.[2]

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1. Kleindienst v. Mandel, 408 U.S. 753 (1972); Galvan v. Press, 347 U.S. 522 (1954).

2. *See* Galvan v. Press, 347 U.S. 522, 529-32 (1954).

Congressional power to determine immigration policy can be analogized to a homeowner and a passerby. If the passerby, or alien, wishes to enter the private dwelling of the homeowner, or the United States, she may legally do so only at the express invitation of the homeowner. The homeowner need not explain why she refuses to allow a person into her home.[3]

Since the Supreme Court decisions in *The Chinese Exclusion Case*[4] and *Nishimura Ekiu v. United States*,[5] scholars, albeit with a great deal of criticism,[6] and the judiciary[7] have accepted the proposition that Congress has plenary power in matters of exclusion. The absolutist position that the excluded alien has no rights continues to go unquestioned in the courts. Through a careful analysis of the Supreme Court's principal assumption in *Nishimura*,[8] one scholar has questioned recently the plenary nature of Congress' exclusionary power.[9] The scholar challenged the *Nishimura* maxim that every sovereign nation has the power to admit aliens on whatever conditions it wishes as being without

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3. Similarly, Congress could, under accepted legal doctrine, exclude blacks and other racial minorities. In fact, Congress, in the past, has targeted specific minority groups for exclusion. The Japanese Immigrant Case, 189 U.S. 86, 94 (1903); The Chinese Exclusion Case, 130 U.S. 581, 585 (1889).

4. 130 U.S. 581 (1889).

5. 142 U.S. 651 (1892). In *Nishimura* the Supreme Court stated:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

Id. at 659.

6. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296-97 (1975) (suggesting that if the cases recognizing congressional power to exclude were decided today, they might be decided quite differently); Gordon, *The Alien and the Constitution*, 9 CAL. W.L. REV. 1, 23-24 (1972); *see also* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392-96 (1953); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173-80 (1983).

7. Every judicial opinion since 1953 that has confronted this proposition has agreed with it. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Galvan v. Press, 347 U.S. 522 (1954).

8. 142 U.S. 651 (1892).

9. *See* Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 823-29 (1983).

historical or international legal precedent.[10]

This Article will build upon the stable foundation presented in the arguments that challenged the *Nishimura* maxim, and will discuss major flaws in the practice of indefinitely detaining excludable aliens in the context of the Cubans who have been detained in various parts of the United States since their arrival in 1980. First, the Article focuses on the practical merits of the use of indefinite detention as a means of immigration policy. The Article concludes that the practice, which is extremely expensive, does not appear to limit mass migrations, and offers, at best, only a few benefits. Second, the Article examines the relationship between the indefinite detention of aliens by the United States and the statutory scheme of United States immigration laws, and it concludes that indefinite detention has no place within the United States scheme. The Article then explores the relationship between the indefinite detention of aliens and international law and finds that indefinite detention violates numerous international legal principles. Last, the Article proposes solutions to the perplexing dilemma of the indefinite detention of Cubans in the United States.

II. The Source of the Problem

A. The Facts

In April 1980 approximately 10,000 Cubans sought refuge in, and ultimately took over, the Peruvian Embassy in Havana, Cuba. Soon after the takeover, Prime Minister Fidel Castro presented the United States with a dilemma of unequaled proportions when he advised those Cuban citizens who had participated in the takeover of the Peruvian Embassy and anyone else who merely wished to leave Cuba to prepare themselves for travel to the United States. The United States Government, unprepared for the consequences, responded that it would welcome the refugees.[11] The "Freedom Flotilla" eventually deposited approximately 117,000 Cubans seeking refuge[12] on United States shores.[13]

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10. *See id.* at 829-41.

11. *See* N.Y. Times, Apr. 15, 1980, at 1, col. 6; N.Y. Times, May 6, 1980, at 1, col. 1.

12. Information on the number of refugees coming to the United States during the Freedom Flotilla has been imprecise. The numbers ranged from approximately 117,000 to 130,000. A congressional report used 116,978 as the official figure. *See* H.R. Rep. No. 1218, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S.

Most of the refugees arrived with little more than the clothes

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CODE CONG. & AD. NEWS 3810, 3812. Courts have used 125,000. *See, e.g.*, Alonso-Martinez v. Meissner, 697 F.2d 1160, 1161 (D.C. Cir. 1983); Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384 (10th Cir. 1981). The cases and reports do not identify the sources used to determine the number of Cubans that arrived in the Freedom Flotilla.

13. A review of newspaper accounts provides the following chronology of events in the Cubans' mass exodus:

(1) In January or February of 1980, several Cubans seeking refuge at the Peruvian Embassy in Havana entered the grounds of the embassy and refused to leave. Negotiations between the Peruvian and Cuban governments regarding the rights of the Cuban asylum seekers began. N.Y. Times, Apr. 6, 1980, at 1, col. 3.

(2) After attempting to persuade its citizens who had entered the embassy to leave, the Cuban Government announced that "it would no longer grant safe conduct [passes] to the 'antisocial elements' who wished to leave the country." The Government also stated that it would no longer post guards around the Peruvian Embassy nor try to prevent citizens wishing to leave from seeking refuge there. N.Y. Times, Apr. 5, 1980, at 2, col. 4.

(3) Upon learning of the Peruvian Embassy incident, Cuban-Americans began rallying in support of the Cuban citizens at the Embassy. N.Y. Times, Apr. 20, 1980, at 20, col. 1.

(4) The United States and its allies in Western Europe and Latin America began working on the orderly admission of refugees from the Peruvian Embassy. N.Y. Times, Apr. 15, 1980, at 1, col. 6; N.Y. Times, Apr. 12, 1980, at 4, col. 2; N.Y. Times, Apr. 11, 1980, at 2, col. 3.

(5) During the United States-Cuba negotiations, editorials in this country urged President Carter to grant asylum to all the Cubans in the Peruvian Embassy. *See, e.g.*, Hovey, *No Threat to Castro's Rule Seen in Embassy Rush*, N.Y. Times, Apr. 9, 1980, at 11, col. 1. Candidate Ronald Reagan urged the President to act to assist the Cubans at the embassy. *See* N.Y. Times, Apr. 10, 1980, at 3, col. 1.

(6) After allowing a number of refugee flights to Costa Rica, Cuba halted further transports to interim sites, demanding that the refugees be sent directly to the countries where they will settle. N.Y. Times, Apr. 19, 1980, at 6, col. 1.

(7) Reports appeared of Cubans exiled in the United States rescuing forty refugees with the approval of the Cuban Government. The United States Government acknowledged the rescue, but did not approve. *See* N.Y. Times, Apr. 22, 1980, at 7, col. 1.

(8) Castro challenged the United States to accept all the refugees and began issuing travel documents even to those not at the Peruvian Embassy. N.Y. Times, Apr. 24, 1980, at 1, col. 2. At the same time, the United States warned its citizens that the act of bringing in aliens would subject them to criminal prosecution and seizure of their boats. *Id.* Notwithstanding these warnings, American citizens travelled to Cuba to transport refugees to the United States. *Id.* at 15, col. 1.

(9) Governor Bob Graham of Florida urged the United States Government to rescind its policy of levying fines and criminal prosecutions against United States citizens bringing refugees back from Cuba. N.Y. Times, Apr. 30, 1980, at

on their backs. Although most of the refugees truly wished to flee communist Cuba,[14] upon their arrival in the United States they found that they generally were not welcome. Unlike earlier refugees, first generation Cubans already residing in the United States regarded the Freedom Flotilla refugees as criminals, bums and antisocials.[15]

Most of the approximately 117,000 Cubans who reached the United States were initially placed in detention facilities until sponsors could be found.[16] Most of the refugees appear to have been placed with sponsors by August 1980 when only 14,201 remained in detention.[17] By June 1982 between 1,300[18] and 1,800[19]

11, col. 1.

(10) President Carter, in a speech before the League of Women Voters, stated that the United States would "provide an open heart and open arms" for the refugees. N.Y. Times, May 6, 1980, at 1, col. 1.

With this last development, the boatlift proceeded and expanded until approximately 120,000 Cubans seeking asylum had arrived on United States shores. *See supra* note 12. For a general discussion of the events leading up to, and including the handling of, the boatlift, see Copeland, *The Cuban Boatlift of 1980: Strategies in Crisis Management,* 467 ANNALS 138, 142-48 (1983).

14. This conclusion is based on the author's conversations with approximately 60 to 70 detainees. *See also* Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980,* 56 NOTRE DAME LAW. 618, 627 (1981).

15. Numerous articles have been written about the Cubans who came to the United States in the Freedom Flotilla. The first articles were mostly sympathetic to the refugees. *See, e.g.,* Thomas, *Reporter's Notebook: A Symbol of Anger and Hope in Havana,* N.Y. Times, Apr. 12, 1980, at 1, col. 5. The articles, however, soon began to take on a negative tone. *See, e.g.,* Thomas, *Behind Barred Doors in Havana, Would-be Emigres Wait in Fear,* N.Y. Times, May 2, 1980, at 1, col. 2; *see also* N.Y. Times, May 18, 1980, at 1, col. 3; N.Y. Times, May 3, 1980, at 1, col. 6. The reason for the change in tone is unclear, but several factors may have been involved. The initial general sympathy toward the refugees led to a great deal of disappointment when Cubans exiled in the United States returned to Cuba seeking family members and were unable to secure their release. The exiles, however, were allowed to return with *some* family members on these trips. Also, the public perception developed that many of the Cubans who managed to escape were hardened criminals and mental patients. No empirical proof exists to indicate that hordes of criminals and mental patients were sent to the United States. For additional discussions of the public perception of the members of the Freedom Flotilla, see Nichols, *Castro's Revenge,* WASH. MONTHLY, Mar. 1982, at 38-42; Lang, *Castro's "Crime Bomb" Inside the U.S.,* U.S. NEWS & WORLD REP., Jan. 16, 1984, at 27.

16. *See infra* note 36.

17. N.Y. Times, Aug. 30, 1980, at 9, col. 1; *see infra* note 20.

18. *Detention of Aliens in Bureau of Prison Facilities: Hearings Before the Subcom. on Courts, Civil Liberties and the Administration of Justice of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 223 (1982).

19. *What Became of the Cubans?,* NEWSWEEK, Feb. 1, 1982, at 28.

refugees remained in detention.[20] These Cubans are being detained, not for criminal acts committed in the United States, but because of their legal inadmissibility into the United States.

B. Immigration Law

The labels that attach to an alien who has presented herself at a United States border seeking to enter the United States legally determine the rights and protections she will be afforded during the immigration process. First, whether the alien can prevail in the process of gaining legal "entry" into the United States will determine her treatment by the United States Government. If an alien manages to gain entry into the United States, she is thereafter afforded the due process protection that the Constitution gives to all United States citizens, even if the Government subsequently detains or attempts to deport her.[21] An alien who is refused entry, however, is excluded or excludable,[22] and before a

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20. The task of counting Cubans in detention centers is difficult for two reasons. First, a detention center is a transitory home for a Cuban, who may never have had a sponsor or who may have experienced a breakdown in the sponsor relationship. *See infra* note 36. A Cuban in detention may be released to another sponsor in a very short period of time. Accordingly, the constant flow of people in and out of detention centers, from sponsors to detention centers, and from halfway houses to detention centers makes arriving at a steady number very difficult. Second, many Cubans are transferred between detention centers. Any fix on the number of Cubans at one detention center will quickly become inaccurate because of the constant flow of detainees.

21. Even though deportation is not a criminal proceeding, the alien is entitled to due process. As the Court stated in The Japanese Immigrant Case, 189 U.S. 86 (1903):

> [T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. . . . Therefore, it is not competent for . . . any executive officer . . . *to cause an alien who has entered the country,* and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard. . . .

Id. at 100-01 (emphasis added).

22. General classes of excludable aliens are provided by statute. *See* 8 U.S.C. § 1182 (1982). An alien who arrives in a United States port cannot be excluded

determination is made regarding her status, she is termed an "alien in exclusion." Aliens who have presented themselves, but who have yet to be admitted or excluded, have not "entered" the United States.[23] Aliens who legally have not "entered" the United States are not afforded constitutional protections and can rely only on the protections and rights that Congress has afforded them in exclusion statutes.[24] Aliens who have been arrested, accused, or tried in the United States for violations of criminal statutes, however, are entitled to full constitutional rights in their trial and detention.[25] The Immigration and Nationality Act (INA)[26] provides for denial of admission to aliens who lack visas or other necessary documentation,[27] who have a record of prior criminal acts,[28] or who fail to meet health, economic, or numerous other criteria.[29]

Second, the Refugee Act of 1980[30] states that aliens may apply

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upon initial examination even when the immigration officer has determined that the alien is excludable. The alien is detained until a special hearing is held to determine whether the alien will be excluded and deported from the United States. *See* F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 358-59 (1961).

23. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 1.32 (1984). The use of the word "deported" is not intended to cause confusion between the terms exclusion and deportation. The INA uses the word "deportation" to describe the removal of aliens irrespective of whether it is a result of a deportation or exclusion hearing. The term "deportation" has been the subject of some confusion. *See Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts,* 71 YALE L.J. 760, 761 n.8 (1962).

24. *Id.* An alien who is a returning lawful permanent resident has greater rights than those of the typical alien. The rights accorded to returning aliens are still undetermined. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

25. Wong Wing Hang v. United States, 163 U.S. 228, 237 (1896); United States v. Henry, 604 F.2d 908, 913 (5th Cir. 1979). Similarly, aliens can sue or be sued in civil actions and receive all of the protections afforded to United States citizens.

26. 8 U.S.C. §§ 1101-1503 (1982).

27. *Id.* § 1182(a)(18), (20), (21). The United Nations, however, acknowledges that refugees do not always have proper papers for entry into their first country of refuge. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter cited as UNHCR HANDBOOK]; *see also* Zamara v. INS, 534 F.2d 1055 (2nd Cir. 1976).

28. 8 U.S.C. § 1182(a)(9), (10), (23) (1982).

29. *See id.* § 1182(a)(1)-(28).

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8, 22 U.S.C.).

for entry into the United States under "refugee" or "asylum" status. The major difference between the two categories is the location at which the alien may apply for a status. For refugee status, the alien must apply at designated places outside the United States border. For asylum status, the alien may apply either at a United States border or within the United States.[31] Both categories require that the alien establish a "well-founded fear of persecution" in her country of citizenship.[32] If the Immigration and Nationalization Services (INS) determines that an asylum applicant has established the requisite fear, it may confer asylum status on the applicant.[33] In refugee cases, the INS must then ascertain that the alien is also one of the persons of "special humanitarian concern to the United States."[34] If the INS grants the alien asylum status or refugee status, the alien has legally entered the United States. One year after legal entry, the alien may apply for an adjustment of her status to lawful permanent residence.[35]

Third, the INS must care for or keep track of aliens who have not had an exclusion hearing or who have been denied legal entry into the United States after an exclusion hearing. Of course, the ultimate goal of the INS is to deport all aliens ordered excluded. Until the excluded aliens can be deported, however, they, and all other aliens who have not legally entered the United States, are maintained by the INS through one of two methods: "detention" or "parole." Detention is tantamount to incarceration and from the alien's point of view, is less preferable than parole and its relative freedom. Parole is the legal fiction whereby the alien is

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31. "[A]n alien physically present in the United States or at a land border or port of entry . . . [may] apply for asylum." 8 U.S.C. § 1158(a) (1982).

32. *See id.* § 1101(a)(42)(A)-(B) (refugee status); *id.* § 1158(a) (asylum status).

33. The INS has refused to grant asylum when an alien has gained entry or arrived on United States shores through suspect means. *See In re* Salim, 18 I. & N. Dec. 311 (1982). If the asylum applicant has established the requisite fear but is refused asylum, the INS will not deport her until it is safe for her to return to her country. 8 U.S.C. § 1253(h) (1982).

34. *National Security Directive No. 93*, in U.S. DEP'T OF JUSTICE, I.N.S., WORLDWIDE GUIDELINES FOR OVERSEAS REFUGEE PROCESSING 24-25 (1983).

35. *See* 8 U.S.C. § 1159(a) (refugee status); *id.* § 1159(b) (asylum status). The number of refugees that may be admitted into the United States annually is limited by the Executive after consultation with Congress. *Id.* § 1157(a). Similarly, only 5,000 persons given asylum may be granted permanent residency in the United States annually. *Id.* § 1159(b).

deemed to remain at a United States border or port of entry, even though she is physically at liberty within the country. An applicant or excluded alien may be paroled if she posts bond, provides sufficient assurance that she will appear as required by the INS or happens to have a sponsorship arranged for her. A sponsor is an individual or organization that assumes responsibility for the well-being of the alien.[36] Most Cubans who remain in detention are either ineligible for any type of sponsorship or are eligible only for approved sponsoring programs that are unavailable. Only aliens who are to "enter" the United States or who were excluded previously are paroled or detained. The alien assigned "parole" status or detained upon arrival has no right to constitutional protections. In addition the Refugee Act discourages the use of parole as a substitute method for allowing a refugee to legally enter the United States.[37]

C. The Application of Immigration Law to Cuban Refugees

The Cuban refugees who arrived in the United States on the Freedom Flotilla lacked visas and, thus, were detained for a period of time. Most of the refugees were later released to sponsors. In many instances, INS' sole reason for denying Cuban aliens admission to the United States has been their lack of visas, even though it is generally understood that refugees do not always have the proper papers for entry into their first country of refuge.[38] Some Cuban refugees continue to be detained because

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36. 8 C.F.R. § 207.2(d) (1984). The term "sponsorship" is generally used for refugees but not for asylum applicants. An organization often may receive financial reimbursement from the federal government for costs associated with taking care of the alien. No clear guidelines or regulations describe the criteria the INS uses to determine whether an individual or organization is eligible as a sponsor for a detainee.

An individual interested in sponsoring an alien generally must submit documentation that demonstrates an ability to take care of the person. For example, the sponsor should be able to assist the alien in obtaining employment, finding housing, and enrolling in school. Affidavits of support for the alien that have been signed by the sponsors, however, probably are not enforceable by the government or the alien.

37. "The Attorney General may not parole . . . an alien who is a refugee unless the Attorney General determined that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled . . . rather than be admitted as a refugee . . . ." 8 U.S.C. § 1182(d)(5)(B) (1982).

38. *See supra* note 27. The Immigration Reform and Control Act of 1983

sponsors cannot be found for them.[39] Others remain in detention because government officials believe that the refugees *might* pose a threat to the public.[40] Still others are being held in "psychological" facilities even though they have not necessarily met the normal commitment standards applicable to aliens who legally entered the United States.[41] The primary legal problem common to all the Cuban refugees is that they arrived in the United States without proper documentation. The United States Government, however, was unable to deport the Cuban refugees who were ordered excluded.[42]

In a subsequent agreement with Cuba, the United States agreed to return some refugees who had arrived in the Freedom Flotilla.[43] The refugees who are to be returned to Cuba are named in a list on file with the Department of State, but not all Cuban refugees currently held in detention are on the list.[44] It is unlikely

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would provide for the legalization of Cuban refugees who are excludable only because of their lack of proper entry papers. The version of the bill passed by the Senate grants the Attorney General the discretion to waive grounds of excludability "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." S. 529, 98th Cong., 1st Sess. § 245A(c)(2), 129 CONG. REC. 6983 (1983). A lawsuit has been filed seeking an adjustment to permanent residency status for the members of the Freedom Flotilla. *See* Puig v. Nelson, No. 84-0838 (S.D. Ga. filed Apr. 5, 1984); *see also Marielitos File Class Action for 1966 Adjustment Act Benefits,* 61 INTERPRETER RELEASES 294 (1984).

39. *See supra* notes 17-20 and accompanying text.

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

41. *See* Banos v. Crosland, No. 80-2677 (D.D.C. Dec. 11, 1980). *See infra* note 82.

42. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384 (10th Cir. 1981); *see also* Nazario, *Cubans Jailed in U.S. Start a Fight,* Wall St. J., Jan. 21, 1983, at 17, col. 3.

43. The United States agreed to return 2,746 unnamed Cuban refugees in accordance with an agreement dated December 14, 1984.

44. Michael H. Armacost, Under Secretary of State, in an affidavit to the Supreme Court stated that the list is made up of persons "[w]ho are *ineligible* for legal entry into the United States under United States immigration law *due* to the commission of *serious crimes in Cuba,* the commission of *serious crimes in the United States,* or *severe mental* disorders." The above description by its wording alone excludes many Cuban refugees who are in detention with minor psychological crimes or for the commission of non-serious offenses.

Neither the State Department nor the INS has given an official explanation for the names selected for inclusion on the list. An unofficial source at one INS/PHS evaluation facility indicated that approximately 80% of the Cuban refugees in the center were on the list.

that the Cubans who are not on the list will be eligible to obtain detention-free status. The United States Government earlier announced that it would allow Cuban refugees who had arrived in the Freedom Flotilla to apply for adjustment of their status to lawful permanent residence pursuant to the Cuban Adjustment Act of 1966.[45] The Central Office of the INS subsequently issued a telegram to local INS offices stating that detained Cuban refugees would not be eligible for an adjustment of status.[46] Furthermore, the INS could conclude from a review of the Cuban Adjustment Act that the Act provides a basis for its denial of a status adjustment to the Cuban refugees because they lack parole status.[47] The end result is that Cuban refugees currently in detention face the possibility of being kept there for the rest of their lives. Serious legal questions challenge the authority of the United States or any country to hold refugees in detention for the mere civil infraction of "illegal immigration."[48]

The problems faced by Cubans who arrived in the Freedom Flotilla of 1980 were very different from the problems of Indochinese and other groups who previously sought refuge in the United States. In the past, the United States Government has always provided refugees permanent residency within a short period following their arrival.[49] The Cubans reasonably expected to

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45. *See* 49 Fed. Reg. 46, 212 (Nov. 23, 1984). The Cuban Adjustment Act, P.L. 89-732, § 1 provides in part: "[T]he 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,* may be adjusted [to permanent residence]." (emphasis supplied).

46. This possibility was confirmed in a recent article which appeared in a Miami newspaper which noted that 150 of the approximately 1,600 Cubans at the Atlanta Penitentiary are not on the deportation list but nevertheless will be detained indefinitely. *See* Grimm, *Mariel Refugees Guilty of Crime Now Face Prison or Deportation,* Miami Herald, Feb. 28, 1985.

47. *See infra* note 49.

48. *See infra* note 85 and accompanying text.

49. The Indochinese mass migration refugees were granted lawful permanent residency through the Indochina Refugee Adjustment Act of 1977, Pub. L. No. 95-145, 91 Stat. 1223 (repealed 1980). The Cubans who came to the United States when Fidel Castro assumed power were quickly granted lawful permanent residency through the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1982)). For a comparison of the treatment of Cuban and Indochinese refugees, see Note, *A Comparative Overview of the Vietnamese and Cuban Refugee Crises: Did the Refugee Act of 1980 Change Anything*?, 6 SUFFOLK TRANSNAT'L L.J. 25, 39-45, 49-57 (1982). Ad-

be treated, at a minimum, as refugees under the Refugee Act.[50]

The United States use of indefinite detention to solve the problem of the mass Cuban migration into the United States, however, is clearly unprecedented. Prior to 1954 United States immigration officials used detention as a means of preventing the entry of "undesirable" aliens into the United States. After 1954 the INS rarely placed excludable aliens in detention,[51] unless the INS decided to temporarily hold the alien pending her deportation or to facilitate her transition into United States society. Aliens have always been detained when the purpose was to conduct a speedy exclusion hearing and to facilitate deportation. Excludable aliens, however, have never been held for as long as some of the presently detained members of the Freedom Flotilla.[52] A review of available information reveals no recorded cases involving *indefinite* detention prior to the Freedom Flotilla of 1980.[53]

A change in the INS nondetention policy appears to have been made during 1980.[54] The INS apparently was motivated to make

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mission and permanent residency were granted to the displaced persons of World War II, Hungarians following the revolt of 1956 and countless other groups. *See, e.g.*, Act of July 25, 1958, Pub. L. No. 85-509, 72 Stat. 419; Act of Aug. 7, 1953, Pub. L. No. 83-203, 67 Stat. 400; Act of June 25, 1948, Pub. L. No. 80-774, 62 Stat. 1009.

50. *See supra* notes 30-35 and accompanying text.

51. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); 1A C. GORDON & H. ROSENFIELD, *supra* note 23, § 3.17c. In deportation cases, the imposition of detention is accompanied by setting bond. Payment of the bond will release the alien. In exclusion cases, the alien usually is paroled into the United States to allow the INS to complete the inspection process at a later date and place. Detention is rarely used. Clearly, the detention of all excludable aliens or those aliens who have not completed the inspection process would be expensive and impractical. *See supra* note 22 and accompanying text.

52. For example, in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), the petitioner had only been held for twenty-one months. The Cubans' confinement has lasted for almost five years.

53. This conclusion was reached based upon a review of reported exclusion cases.

54. Although it is difficult to determine the exact date when the policy shift occurred, a review of cases and practice shows an increase in the use of detention in 1980. *See* cases cited *infra* note 55. On June 26, 1981, the Office of the United States Attorney General issued a memorandum recommending mass detention and interdiction to resolve the "Cuban/Haitian problem." *See Detention of Aliens in Bureau of Prison Facilities: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 223-29 (1982) (memorandum from Subcomm. Chair Robert W. Kastenmeier to Subcomm. members). The interdiction

the policy shift because of its concern that the nondetention policy encouraged migration falling outside the regulatory scheme of the Refugee Act. The INS apparently thought that the notorious use of detention would deter aliens from choosing the United States as a place of refuge. Strong evidence, however, supports the conclusion that the detention policy was specifically reinstituted to discourage nonwhite immigration.[55] Notwithstanding INS insistence that its detention policy is colorblind, detention is still the norm when Cuban and Haitian aliens are in exclusion.[56]

Whether the increased use of detention has accomplished the proffered policy objective of discouraging illegal immigration remains unclear.[57] Under a policy of indefinite detention, however, the members of the Freedom Flotilla who have been paroled face the ominous and ironic prospect of being returned to detention at any time and remaining there with no possibility of release. The use of detention raises an important question of its legality when the United States Government is unable to execute the deportation of the excludable Cubans and when no other country will accept them.[58]

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policy was instituted in September 1981. *See* Exec. Order No. 12, 324, 46 FED. REG. 48,109 (1981). The detention policy guidelines were issued by the Attorney General on Apr. 16, 1982. *See Detention Policy Guidelines in Exclusion Cases,* 59 INTERPRETER RELEASES 349 (1982). Except for the Cubans and Haitians, few cases of long term detention for excludable aliens exist, notwithstanding the asserted change in policy.

55. *See* Vigile v. Sava, 535 F. Supp. 1002, 1016-18 (S.D.N.Y. 1982); Bertrand v. Sava, 535 F. Supp. 1020 (S.D.N.Y. 1982), *rev'd,* 684 F.2d 204 (2d Cir. 1982); Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Policy,* 45 LAW & CONTEMP. PROBS. 173 (1982); Comment, *The Discrimination Against Haitian Aliens Seeking Asylum in the United States,* 13 CUM. L. REV. 593 (1982-83); Comment, *Jean v. Nelson: A Stark Pattern of Discrimination,* 36 U. MIAMI L. REV. 1005, 1024-28 (1982).

56. The detention of Haitians has diminished, but the decrease may be a result of the policy of interdiction (boarding vessels while they are still in international waters). *See* Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).

57. A.C.L.U., SALVADORANS IN THE UNITED STATES: THE CASE FOR EXTENDED VOLUNTARY DEPARTURE 55 (1983). The massive influx of Salvadorans into the United States is an example of a situation in which refugees will continue to seek refuge in the United States no matter how oppressive the entry requirements might be. Salvadoran refugees probably reasoned that detention in a safe country would be better than the possibility of death in their own country.

58. This Article will not discuss the problems confronting Haitian refugees seeking asylum in the United States. The Haitians are not subject to indefinite detention because if they are excluded, the Haitian Government is more than

III. THE PAROLE AUTHORITY

An alternative to the detention of aliens who have been refused legal entry into the United States is "parole."[59] A paroled alien who is physically admitted into the country legally remains as if she were merely at a United States border seeking admission,[60] and, therefore, cannot avail herself of any constitutional protections.[61]

Although parole power was not statutorily authorized until 1952, the executive branch used it long before then.[62] The basic

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willing to take them back. One issue that does apply to the Haitians is the legality of their initial detention pending the resolution of their asylum claims.

59. The statutory source for the parole power provides:

> 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.

8 U.S.C. § 1182(d)(5)(A) (1982).

Prior to the enactment of the Refugee Act of 1980, *supra* note 30, parole was the customary method by which refugees were admitted into the United States.

60. *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 23, § 2.54.

61. The assertion of constitutional rights has been predicated on an alien's proof of having made entry into the United States. *See, e.g.*, Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953); *In re* Application of Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1982).

62. F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 370 (1961); 1 C. GORDON & H. ROSENFIELD, *supra* note 23, § 2.54. For example, in Nishimura Ekiu v. United States, 142 U.S. 651 (1892), the Court described what we now recognize as parole in its presentation of the facts of the case:

> With this report [Commissioner of Immigration] Thornley sent a letter to the collector, stating that after a careful examination of the alien immigrants on board the Belgic he was satisfied that the petitioner and five others were "prohibited from landing by the existing immigration laws," . . . and that, pending the collector's final decision as to their right to land, he had "placed them *temporarily in the Methodist Chinese Mission,* as the steamer was not a proper place to detain them, until the date of sailing."

Id. at 652-53 (emphasis added).

The use of parole is logically connected to the practice of exclusion, which was first enacted statutorily in 1875. The current exclusion statute provides for an inspection and a hearing process, processes that require the use of parole. Be-

foundations of the use of parole power have never been questioned. Case law reveals blind acceptance of the legitimacy and use of parole power by the court.[63] The Supreme Court first considered the issue of parole power in *Kaplan v. Tod*.[64] The Court, without discussing the legal authority of the Government to use parole, assumed that its use was totally proper.[65] The Government generally uses parole to allow the physical inspection of aliens or to allow excludable persons seeking refuge in the United States to reside within its borders. The most significant legal aspect of parole is that it precludes an alien from asserting any rights other than the rights conferred by exclusion statutes.[66]

The application of parole power by the INS and its absurd legal consequences have been criticized.[67] The absurdity of the applica-

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cause of the numerous grounds for exclusion, *see* 8 U.S.C. § 1182(a)(1)-(33) (1982), and the multitude of refugees coming to the United States, the process of determining who will stay and who will leave logically requires a figurative "removal from the vessel" by the INS during the process. One regulation provides that an individual may be paroled "prior to examination . . . subsequent to such examination and pending a final determination of admissibility . . . or after a finding of inadmissibility." 8 C.F.R. § 212.5 (1981).

In accordance with the regulation, the INS officer merely issues the alien a document called an arrival-departure record (I-94) upon which is affixed " paroled pursuant to Section 212(d)(5) of the INA." The INS Operations Instructions (policy manual) only notes that the parole decision shall not be exercised below the level of an officer in charge or an immigrant inspector in charge of a port of entry. *See* I.N.S., Operations Instructions 212.5a, *reprinted in* 4 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE 23-167 (1984).

63. The cases reveal that parole was assumed to be a legitimate exercise of governmental authority. Litigants have never challenged the authority to use parole and the Supreme Court has never examined parole's legal basis. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Wan Shing v. United States, 140 U.S. 424 (1891); Chew Heong v. United States, 112 U.S. 536 (1884).

64. 267 U.S. 228 (1925).

65. Justice Holmes never used the word "parole" in his opinion. Holmes was more concerned with the definition of "entry" and its effect of precluding an alien from gaining United States citizenship through the naturalization of her father. To obtain citizenship derivatively through one's parents, the statute in effect at the time required an alien to have been dwelling in the United States. According to the Court, even though the alien had been allowed to be in the custody of the Hebrew Society in New York, "[s]he was still in theory of law. . . at the boundary line." *Id.* at 230.

66. *See supra* notes 22-23 and accompanying text.

67. *See, e.g.*, Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984). *See Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 787-88

tion of the parole fiction is best illustrated by the use of an example. Alien A physically enters the United States through the Mexico-United States border by climbing a barbed wire fence. Alien B physically enters the United States on a boat which is met on arrival by INS officials. B is placed in a detention camp but escapes by cutting a hole in the fence and travels to another part of the country to carry on a new life. Another alien, C, physically enters the country in the same manner as B and is placed in a detention camp but is allowed to leave the camp because she has been sponsored by S. After spending a week with S, C travels to another part of the country. D enters the country in the same manner as B and C, is placed in a detention camp, escapes from the camp, crosses into Mexico, and returns to the United States to build a new life in another part of the country.

Under accepted immigration doctrine, even though A, B, C and D have all physically entered the country, only A and D are entitled to constitutional protection because they each effectuated a legal entry within the meaning intended by the INA.[68] Aliens who surreptitiously gain physical entry are rewarded with constitutional protections. Aliens, including the Cuban refugees, however, who gain physical entry through official channels, are penalized by the withholding of all constitutional protections.

The mental gymnastics necessary to justify the difference between the treatment of an alien, such as B, who escapes parole, and the treatment of an alien, such as A or D, who escapes detection at the border, stretch the bounds of logic and reason. Although the Government legitimately needs the exclusion power, it should not exercise the power to create an unrealistic notion of entry into the United States that is based entirely on a legal fiction. A system that allows parole to be granted to an alien and then revoked numerous times without affording any constitutional protections to the alien defies all logic and seems to have a policy objective as its only justification.

Generally, the use of parole benefits inadmissible aliens. More-

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(1961). In one case, while the court accepted the rule that an alien in parole had no constitutional rights it noted that "indeed the legal fiction strains credulity where, as here, one 'stopped at the boundary line' has nevertheless managed to marry and to father two children in the United States." Stellas v. Esperdy, 250 F. Supp. 85, 87 (S.D.N.Y. 1966). *See also Extending the Constitution to Refugee-Parolees,* 15 SAN DIEGO L. REV. 139 (1975).

68. *Cf. In re* Tanahan, 18 I. & N. Dec. 339 (1981).

over, the proper exercise of parole power is essential to attaining the immigration policy objectives of family reunification and maintaining a humanitarian concern for refugees.[69] The use of parole power also corrects bureaucratic errors in the adjudication of visa applications. Historically, otherwise inadmissible aliens were admitted under parole when justified by compelling humanitarian reasons. When used in a proper manner, the parole power is of tremendous benefit both to the alien and to the Government. Consequently, the parole power should not be curtailed.[70]

Limits, however, must be placed on the exercise of parole authority and its effect on the rights of persons who are physically present in the United States. The exercise of parole power is legitimate to the extent that it permits aliens to be considered for legal admission. Once the exclusion process has been completed and parole has been granted and revoked numerous times over a number of years, the continued use of parole to deny an alien all legal rights becomes absurd. The present application of parole power and the legal effect of the parole designation are a mockery of the exercise of governmental authority in a constitutional republic.

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69. The use of parole is not designed to achieve the immigration policy objective of meeting the employment needs of the United States.

70. Congress has not been critical of the exercise of the parole power in a nonrefugee context because it does not significantly hinder basic immigration policy. Most nonrefugee cases are humanitarian oriented and serve the immigration policy of family reunification. The exercise of the parole authority in refugee situations has received major criticism that played an important role in the enactment of the Refugee Act of 1980, *supra* note 30.

In 1952 when Congress enacted the McCarran-Walter Act, a Congressional committee noted that:

> [T]he broader discretionary authority is necessary to parole inadmissible aliens into the United States in *emergency cases,* such as the case of an alien who requires immediate medical attention . . . and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness for purposes of prosecution.

H.R. REP. No. 1365, 82nd Cong., 2d Sess. 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952). Later, in 1965 a Senate committee made a similar comment in enacting an amendment to the immigration laws. *See* S. REP. No. 748, 89th Cong. 1st Sess. 16-17 (1965); *Refugees Under United States Immigration Law,* 24 CLEV. ST. L. REV. 528, 532 n.26 (1975). For an excellent discussion of the parole controversy and the Refugee Act of 1980, see, Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 SAN DIEGO L. REV. 9, 30-31 (1981).

The exercise of the parole power by the INS to determine whether a Cuban refugee will be detained or paroled, is purely discretionary. Without the INS grant of parole, a Cuban refugee will remain in detention indefinitely. Similarly, whether a previously granted parole to a Cuban refugee is revoked also lies within the discretion of the INS. Thus, the INS does not use published guidelines to determine which Cuban refugees will be granted parole from detention facilities.[71] Because the use of parole as a tool for *allowing* the admission of otherwise inadmissible aliens has historically proven beneficial, it is difficult to accept the current practice of withholding parole as a means of keeping Cuban refugees in detention indefinitely.

IV. Limitations on the Exclusion Power

One scholar found the power to exclude aliens limited by domestic and international law.[72] Although every nation has the power to exclude aliens, the power is never unlimited.[73] Accordingly, this scholar concludes that the power to exclude is not plenary. Even if one refuses to accept his analysis, a careful review of the exclusion cases reveals the soundness of the conclusion that the exclusion power is not plenary.

In *The Chinese Exclusion Case*,[74] the Supreme Court refused to invalidate a statute that required the exclusion of Chinese[75] and noted that only the Constitution and considerations of public policy and justice restrict Congress' power to exclude.[76] While the

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71. The INS, however, abides by the tacit rule that Cuban refugees held in detention because of "psychological" problems can be paroled only to "acceptable" halfway house sponsors. Of course, "Acceptable" remains undefined, although family members clearly are not proper sponsors. Under the Attorney General Review Plan, *see infra* note 110, Cuban refugees in detention at the Atlanta Penitentiary periodically have been given the opportunity to show a Justice Department panel that they are not "dangerous." No objective criteria or guidelines are used in the panels' determinations.

72. Nafziger, *supra* note 9, at 823-28.

73. *Id.* at 828.

74. 130 U.S. 581 (1889).

75. The Court mainly discussed the interrelationship of treaties, statutes and congressional abrogation of treaties. The Court spoke in general terms of the right of nations to determine their own foreign policy, including the right to prevent the admission of certain people. *See id.* at 599-611.

76. *Id.* at 604. The Court stated:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their

full meaning of the opinion is not entirely clear, the Court presumably intended that the constitutional limitation would be accompanied by a limitation based on judicial review.[77] An application of the constitutional limitations on the "plenary" power to exclude occurred when the Supreme Court found that lawful permanent residents in exclusion could not be deprived of their "constitutional rights to procedural due process."[78] Therefore, even though Congress' power to exclude is broad, it is not absolute.[79]

A second limitation, the "common decency" limitation, has been used judicially to define the bounds of treatment of the alien in exclusion.[80] In *Rodriquez-Fernandez v. Wilkinson,*[81] for example, the Tenth Circuit posed the hypothetical question whether the Government could order the execution of an alien in exclusion without first convicting the alien of a capital crime. The court

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relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powe[r] to . . . admit subjects of other nations to citizenship, [is a] sovereign powe[r], *restricted in [its] exercise only by the constitution itself and considerations of public policy and justice which control, more or less the conduct of all civilized nations.*

Id. (emphasis added).

77. "The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as questions of National concern . . . ." The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 556 (1870) (Bradley, J., concurring).

78. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953). The Supreme Court recently decided that an exclusion hearing held upon a re-entry attempt does not prejudice a lawful permanent resident's rights. Landon v. Plasencia, 459 U.S. 21, 32-33 (1982).

79. *Cf.* Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983), *rev'd on other grounds,* 727 F.2d 957 (11th Cir. 1984) (en banc) (the power "over immigration matters and aliens is plenary and knows *few* bounds" (emphasis added)).

80. The "common decency" limitation is not necessarily a pure limitation on power. Rather it may be either a delineation of the point at which the power to exclude ceases to be absolute, the point at which the power to control the alien totally lapses or a limitation under international law.

81. 654 F.2d 1382 (10th Cir. 1981). In *Wilkinson,* a detained Cuban sought release through habeas corpus after he learned that Cuba refused to allow him to return to the United States. *Id.* at 1384. *See generally* Recent Development, *Indefinite Detention of Excluded Aliens Held Illegal,* 17 TEX. INT'L L.J. 101 (1982) (reporting on the *Wilkinson* case).

concluded that the cases which prohibit the punishment of aliens for mere violations of immigration law supported a negative answer to its hypothetical question.[82]

The common decency limitation, however, restricts the Government's detention power only when the conditions of detention impinge upon conventional standards of morality. The limitation prevents outrageous acts but, as currently developed, fails to define the bounds of the power to exclude. The rarely articulated limitation, therefore, merely confirms the expectation that aliens cannot be punished solely for immigration violations.

The infliction of punishment is the exercise of penal authority and is unrelated to the immigration authority, which is regulatory in nature. Congress is much more limited in its ability to make the commission of acts criminal than in its ability to make the commission of acts grounds for exclusion. Congress' expansive ability to create appropriate grounds for exclusion is illustrated by the more than 700 grounds for deportation that one commen-

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82. *Wilkinson*, 654 F.2d at 1387. The court relied very heavily on Wong Wing Hang v. United States, 163 U.S. 228 (1896); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

In an unreported district court case both the Government and the court implicitly recognized a common decency limitation on governmental authority. Banos v. Crosland, No. 80-2677 (D.D.C. Dec. 11, 1980). In *Banos*, Cuban refugees, who were being detained at a mental hospital in Washington, D.C., filed petitions for habeas corpus challenging their detention and the conditions at the mental hospital. In the petitions, the refugees alleged that they were forced to receive thorazine and other strong psychotropic drugs. Implicit in the pleadings and affidavits was the Cuban refugees' belief that they had the right to refuse the drug treatments unless they were subject to criminal sanctions and it had been shown that they were dangerous to themselves or to others. *Id.* slip op. at 5. The INS/PHS Facility at St. Elizabeth's is not unlike a prison. Cuban refugees are not allowed to walk outside of a barbed wire area of 50' by 150'. The time allowed outside the barbed wire enclosed area is severely restricted. Cuban refugees can move freely only in their own "ward" area. The facility employs more guards, doctors, social workers and other personnel than refugees that it detains. Some Cuban refugees have requested transfer to the Atlanta federal penitentiary in lieu of staying at the INS/PHS facility (based on discussions with doctors at the INS/PHS facility and with attorneys who represent the detained Cubans).

In the past, Cuban refugees feigned illness to secure a transfer to the St. Elizabeth's Mental Hospital's infirmary because they believed that the treatment at St. Elizabeth's was better (based on conversations with attorneys who represent the detained Cubans). Doctors at the INS/PHS Evaluation Facility at St. Elizabeth's Hospital admit that many detainees can receive only limited treatment because of the facility's orientation toward detention and away from treatment.

tator has found.[83] The common decency standard sets limits on Congress' expansive authority to regulate immigration. Perhaps courts that have used the common decency standard intended to say that governmental actions are reprehensible when tantamount to criminal sanctions and, therefore, fall outside Congress' immigration authority.[84]

No case that addresses the exclusion issue distinguishes between the power to exclude and the power to control an alien once excluded. Understanding this subtle distinction may help resolve the indefinite detention dilemma. Congress derives the authority to control immigration from both the Constitution and the inherent sovereign powers of a nation.[85] Congress has used its authority to establish grounds and procedures to aid in the deter-

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83. Wasserman, *The Undemocratic, Illogical and Arbitrary Immigration Laws of the United States,* 3 INT'L LAW. 254, 260 (1969); *see also* Gordon, *The Need to Modernize Our Immigration Laws,* 13 SAN DIEGO L. REV. 1, 2 (1975).

84. In Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975), *aff'd sub nom.*, Fiallo v. Bell, 430 U.S. 787 (1977), a three-judge panel wrote: "Unless the immigration laws in question are wholly devoid of any conceivable rational purpose, or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration, they are not unconstitutional encroachments . . . ." *Id.* at 166 (footnotes omitted). The *Fiallo* reasoning is not a per se finding that indefinite detention falls outside the immigration authority of Congress but it certainly lends support to the theory. Another limit on Congress' authority to regulate immigration is its inability to exclude, or banish, United States citizens. Banishment is specifically prohibited, and, thus, outside Congress' immigration-regulating function. While the Supreme Court has not addressed the constitutionality of banishment from the United States in a non-immigration context, such conditions have been found to be unconstitutional and characterized as cruel and unusual punishment when applied to aliens. *See* Jung v. United States, 312 F.2d 73 (9th Cir. 1962); *see also* Rutherford v. Blankenship, 468 F.Supp. 1357, 1360 (W.D. Va. 1979). In one case in which a court was faced with the question whether a person's sentence could be commuted on the condition that he not return *to the state,* the court noted that such a sentence could be considered a violation of personal rights, but rights that had been bargained away. Carchedi v. Rhodes, 560 F.Supp. 1010, 1015-16 (S.D. Ohio 1982). A number of other constitutional rights would be implicated if Congress attempted to banish citizens *from the United States,* including the right to travel freely, Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); and the right of association with friends and loved ones, Eisenstadt v. Baird, 405 U.S. 438 (1972).

In addition, the argument that United States citizens cannot be banished from the United States is supported by the fact that the immigration laws only apply to aliens. *See* 1A C. GORDON & H. ROSENFIELD, *supra* note 23, § 4.5a.

85. *See* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

mination of an alien's admissibility to the United States. The Executive, through the INS, works within the statutory scheme by deciding whether an alien falls into an inadmissible class.[86] Thus, the INS, which enforces the legislative mandate of Congress, may not unilaterally exclude new classes of persons.[87] Once the INS captures an alien and determines his excludability, it has completed a large portion of its job.[88] The Government, of course, also should supervise aliens between the time they are apprehended and the time of the exclusion hearing.[89] Congress allows the INS to admit aliens temporarily while retaining the power to later exclude them.[90] The INS may detain aliens, a practice that currently remains the exception rather than the rule; require the posting of bond; or impose other conditions on the ability of an alien to obtain freedom when his exclusion hearing is pending.[91]

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86. 1 C. GORDON & H. ROSENFIELD, *supra* note 23, § 2.26. The D.C. Circuit stated in dicta, however, that the Executive could take certain actions in the immigration area based upon its foreign affairs powers. *See* Narenji v. Civiletti, 617 F.2d 745, 747-48 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); *see also* Yassini v. Crosland, 618 F.2d 1356, 1362 (9th Cir. 1980) (allowing INS to revoke deferral of departure dates for Iranian nationals); Olegario v. United States, 629 F.2d 204, 226-28 (2d Cir.) *cert. denied*, 450 U.S. 980 (1980) (Executive discretion allowed when delicate foreign affairs matter implicated). The *Narenji* and *Yassini* holdings do not apply to the Executive actions in the Freedom Flotilla situation because in both cases, the President was acting in an emergency when attempting to negotiate the release of the United States hostages in Iran.

87. *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 23, § 2.2b; United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Gegiow v. Uhl, 239 U.S. 3, 9 (1915). In *Narenji*, the D.C. Circuit found that the Executive had certain powers as a result of its foreign policy responsibilities. 617 F.2d at 647-48; *see supra* note 86. *Narenji* is again distinguishable from the Cuban refugees' case because in *Narenji* the Executive was merely selectively enforcing the INA, not creating a new ground for exclusion.

88. An apprehended alien is placed in exclusion or deportation proceedings and is under the jurisdiction of an immigration judge. If the administrative procedures and judicial appeals result in a final order of exclusion, the alien should be deported immediately. 8 U.S.C. § 1227(a) (1982). The primary role of the INS, therefore, is to apprehend aliens, present them before an immigration judge and effect their departure if necessary.

89. The INA provides that exclusion hearings before an immigration judge will be conducted as soon as possible. *See* 8 U.S.C. §§ 1225(b), 1226, 1227.

90. *See supra* notes 36, 59-61 and accompanying text (discussing parole). The INS also may allow a temporary admission to complete the inspection process. 8 U.S.C. § 1223(a). An alien who is outside INS custody and has not been legally admitted is most likely parole status.

91. 8 C.F.R. §§ 212.5(a), 235.3(b) (1984).

Exclusion statutes and regulations are based exclusively on the grounds and procedures for procuring the speedy exclusion and deportation of aliens.[92] The statutes omit any reference to the conferral of authority on the INS to control aliens subsequent to the issuance of an order of exclusion[93] and, therefore, apparently do not specifically confer authority on the INS to detain excluded aliens indefinitely.[94]

The statutes also fail to specify the authority granted the INS over excluded aliens who cannot be deported or the length of time the INS can exercise its dual power to control such individuals. It is the author's belief that the INS' authority should continue almost totally unfettered while preparations are being made to deport an individual who has received an order of exclusion. As efforts to deport an excluded alien either cease or become impracticable,[95] the INS' authority over the alien should diminish

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92. The INA provides that

> [a]liens shall be detained on board the vessel or at the airport of arrival . . . unless the Attorney General directs their detention in a United States immigration station or other place specified by him . . . for a *sufficient time* to enable the immigration officers and medical officers to subject such aliens to observation and examination *sufficient to determine whether or not they belong to the excluded classes.*

8 U.S.C. § 1222 (emphasis added). While not precise, the term "sufficient time" cannot be construed to mean an indefinite amount of time.

The INA also provides for further mental and physical examination of aliens and a review of the attending physician's conclusions by a medical review board. 42 C.F.R. § 34.4 (1984). During the inspection process, an alien cannot be excluded but is considered "excludable." The entire process should be concluded immediately following the exclusion order. 8 U.S.C. § 1227(e). One writer believes that a 1981 change in the INA allows prolonged detention, Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees,* 70 GEO. L.J. 1303, 1304 n.11 (1982), but such an interpretation does not appear to be accurate. The INA was amended merely to expand the deportation power by allowing aliens to be deported to any country. *See* 8 U.S.C. § 1227(a)(2); H.R. REP. No. 264, 97th Cong., 1st Sess. 24, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 2577, 2593.

93. *See* 8 U.S.C. § 1227. In contrast, deportation statutes contemplate the possibility or impracticability of deportation by providing for the release and supervision of deportable aliens. *See id.* § 1252(c).

94. Courts, however, have upheld the postexclusion order authority to control aliens by reasoning that the authority is a logical extension of the power to exclude. *See* Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122-24 (N.D. Ga. 1983), *rev'd,* 734 F.2d 576 (11th Cir. 1984).

95. The Cuban Government has steadfastly refused to allow excluded Cuban refugees to return and has ignored all United States efforts. On May 25, 1983 a

until the INS ceases to have any authority to detain an alien. As time passes the Government only needs to know the whereabouts of an alien. This concept of diminishing control parallels the treatment accorded persons to be deported and most persons in exclusion.[96] When an exclusion order is rendered unenforceable through "impossibility of performance" the INS' control over an excluded alien should be limited.

Policy arguments that favor limiting the INS' authority are compelling because, in most cases, no other country will accept the Cuban refugees once they are excluded. Consequently, a finding of excludability by the INS has absolutely no effect on a Cuban refugee's continued presence in the United States. The INS' inability to execute the exclusion order, therefore, ends its practical ability to control the Cuban aliens and should effectively terminate its day to day control of their activities. From a policy standpoint, it is a waste of government resources for the INS to act as nursemaid to excluded aliens who cannot be deported. This is particularly objectionable when there is no factual support for the presumption that aliens in exclusion endanger the health or well-being of the general population.

In the postexclusion stage for aliens who cannot be deported, the government involvement should be either purely penal, if the person has committed a crime, or medical, if the person is suffering from medical or psychological illnesses. The INS' involvement at this stage does not benefit the country or the alien, and when an alien is in need of medical treatment, INS involvement most likely prevents the effective treatment of the individual because

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diplomatic note was delivered to the Cuban Government. The note contained the INA provision that prohibits the United States from granting immigrant visas to Cuban-Americans in the United States who are petitioning for their families in Cuba. *See INS Puts Cuba on Visa Sanctions List,* 60 INTERPRETER RELEASES 666 (1983); *see also* 8 C.F.R. § 243.8 (1984); Leich, *Contemporary Practice of the United States Relating to International Law,* 77 AM. J. INT'L L. 875 (1983). It is not known whether Cuba even responded to the note.

96. *See supra* note 94. If no country will accept a person, Congress' attempt to exclude certain aliens is totally frustrated. If the Cuban refugees are here permanently, as it appears they are, the statutory authority of the INS over them is eliminated. From a legal and practical standpoint, persons who have been ordered deported but who cannot be deported are identical to excluded aliens. While neither group is welcome in the country nor has a greater right to stay than the other, neither should be under the total authority of the INS. The anomaly is that the judicial interpretations consider the excluded alien, not the deportable alien, to be under the exclusive control of the INS.

of the limited treatment capabilities within a detention facility.[97] Placing excludable aliens with psychological problems in conventional mental institutions would likely prepare them for an ultimate entry into society. Maintaining special psychological evaluation centers for the Cuban refugees only causes a further drain on the public treasury. Similarly, maintaining special detention centers where Cuban refugees may spend the rest of their lives for the commission of civil wrongs cannot be justified by the added expense to the public.

Even though Congress has exercised its "plenary" power over immigration by delegating it to the Executive, the INS clearly lacks statutory authority to control postexclusion aliens. Presumptively, a power not delegated cannot be exercised. The INS, therefore, is not entitled to exercise the authority to control postexclusion aliens by implication.[98]

V. The Parole/Detention Dilemma

The Refugee Act of 1980[99] creates a mechanism for the orderly admission of refugees into the United States. This Act provides a method for determining whether Cuban refugees should be admitted,[100] but instead of using this method, the INS paroled Cuban refugees into the country, placed them in detention facilities, and then, as sponsors were found, paroled them into the sponsors' custody.[101]

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97. *See supra* note 82. If treatment is not as effective in a detention facility as it is in conventional health care institutions, placing the Cuban refugees in the appropriate institutions would seem to be a better use of the money currently being spent to detain the aliens.

98. The same result would follow if, for example, the Executive were to issue a new policy to direct the exclusion of all persons who happen to be Asian.

99. *Supra* note 30.

100. *See* 8 U.S.C. § 1157(b) (1982).

101. Although it severely criticized and tried to restrict the use of parole, Congress did not specifically prohibit its use. 1 C. Gordon & H. Rosenfield, *supra* note 23, § 2.54; *see* 8 U.S.C. § 1182(d)(5)(b). Some have argued that later congressional action, *see* Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799 (Codified as amended at 8 U.S.C. § 1522 note), placed a stamp of approval on the exercise of the parole power. *See* Note, *The Indefinite Detention of Excluded Aliens: Statutory and Constitutional Justifications and Limitations*, 82 Mich. L. Rev. 61, 76 (1983). It is the author's belief, however, that Congress was faced with a *fait accompli*. Congress was told that asylum applications were being processed on a "case by case" basis. *See* H.R. Rep. No. 1218, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News

The only options that an alien legally may use to physically "enter" the United States are with a valid visa, through asylum, or under a grant of parole.[102] Because most Cuban refugees did not have valid visas and because asylum applications were rarely even processed,[103] the only viable alternative that allowed a Cuban refugee to gain physical access to the United States was the grant of parole. Under immigration law, however, the condition precedent to constitutional protection is legal entry into the United States.[104] The grant of parole does not constitute legal entry[105] and, therefore, does not afford constitutional protection to the Cuban refugee.

Current INS policy, which offers parole to the refugee, presents

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3810, 3813. It had to decide whether to provide money to the states for assisting the Cuban refugees, not to determine their future treatment.

102. For the statutory definition of "entry," see 8 U.S.C. § 1101(a)(13). The use of the term "legal" is meant only to indicate an entry after some inspection by the INS. *See generally* 8 U.S.C. §§ 1182(a)(20), 1158(a). It should not be confused with legal entry into the country. A paroled alien has not gained legal entry into the United States. 8 U.S.C. § 1182(d)(5); Siu Fung Luk v. Rosenberg, 409 F.2d 555 (9th Cir. 1969).

103. Most immigration attorneys are well aware of the refusal of the INS to process asylum applications. The trial court in *Fernandez-Roque* required certain applications to be processed, but the reversal of the trial court by the Eleventh Circuit may impair continued processing. *See* Fernandez-Roque v. Smith, 867 F. Supp. 1118 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984); Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 621 n.36 (1981).

An alien granted asylum has entered the country legally and may eventually obtain lawful permanent residence. 8 U.S.C. § 1159(b) (1982). The INS' failure to process Cuban refugee asylum applications keeps the alien in the status of an applicant for entry. As applicants for entry, their continued detention is legally justified. Many of the Cubans who arrived in the Freedom Flotilla probably harbor well-founded fears of persecution in Cuba. Under the Refugee Act of 1980, the Cubans could be granted asylum, which would result in legal entry, freedom from all restraint, and afford them all constitutional protections. *See supra* notes 100-101 and accompanying text.

One alternative to granting asylum is "withholding of deportation." This device gives the alien a safe haven in the United States but does not provide the future benefits of permanent residency or eventual citizenship. *See* 8 U.S.C. § 1253(h); *In re* Lam, 18 I. & N. Dec. 15 (1981).

104. Because the Supreme Court has held that the INA may define entry requirements, Congress, in effect, determines who will receive constitutional protections. *See, e.g.*, Reid v. INS, 420 U.S. 619 (1975); Leng May Ma v. Barber, 357 U.S. 185 (1958); United States *ex rel.* Brancato v. Lehman, 239 F.2d 663 (6th Cir. 1956).

105. *See supra* note 102.

even the paroled Cuban refugees with several major problems. First, paroled Cuban refugees are constantly subject to the possibility of rearrest because the grant of parole is discretionary and is easily revoked.[106] Second, the INA restricts the immigration of an alien's family members unless the alien is either a lawful permanent resident or United States citizen.[107] Thus, the Cuban refugees' parole status prevents future family reunification. Third, the lack of entry for the paroled Cubans keeps them in a state of limbo because they cannot return to their country, but can only remain in the United States as "non-persons" with very few rights.

As discussed earlier, detention has been used in conjunction with parole to control the Cuban refugees. The initial argument used by the Government in support of detention asserted that its use was necessary to control the refugees pending their exclusion hearings,[108] although the Government had no idea when hearings would be held. The Government then advanced the argument that an exclusion order issued in an exclusion hearing would render the excluded Cuban refugee ineligible for federal benefits.[109] The Government used review panels of Department of Justice employees to determine whether certain Cuban refugees were eligible for parole.[110]

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106. 1A C. GORDON & H. ROSENFIELD, *supra* note 23, § 3.17c.

107. *See* 8 U.S.C. §§ 1151(b), 1152(e)(1)-(2).

108. *See* Alonso-Martinez v. Meissner, No. 81-2233, slip op. at 4 (D.D.C. Oct. 16, 1981), *vacated as moot,* 697 F.2d 1160 (D.C. Cir. 1983); Banos v. Crosland, No. 80-2677, slip op. at 8 (D.D.C. Dec. 11, 1980).

109. *See* Alonso-Martinez v. Meissner, 697 F.2d 1160, 1163 n.9 (D.C. Cir. 1983). The validity of this argument must be questioned. Under the Refugee Education Assistance Act of 1980, an alien who is granted asylum is eligible for benefits. 8 U.S.C. § 1522 note (§ 101(3)(c)). Many paroled Cuban refugees with final exclusion orders still receive benefits. Thus, the only benefits that an excludable Cuban might not receive any longer are state impact funds (based on conversations with attorneys who represent detained Cubans). The counter argument, however, recognizes two weaknesses in the government's argument. First, the individual Cuban should decide whether she wishes to run the risk that her benefits, if any are being received, will be cut off simply because it has not happened in the past with Cubans who had final orders of exclusion. Second, it is not clear that the benefits will be cut off because they have not been terminated. Third, if the person is granted asylum she is no longer an "entrant" and may be able to present a constitutional argument challenging the termination of her benefits.

110. *The Attorney General's Status Review Plan* was initiated by the Government under an agreement reached by the parties in *Fernandez-Roque.* Under

Detained Cuban refugees can be released into the community only if paroled by the INS. The absence of any clear INS guidelines for granting parole[111] makes it extremely difficult for a detained Cuban refugee to know how to improve her chances of being paroled. Similarly, no clear INS guidelines for parole revocation exist. Parole generally is revoked when the parolee's sponsorship "breaks down."[112] Breakdowns may occur when an alien becomes distressed, because a sponsor loses interest in its parolee, or for various other reasons. The reason for the breakdown, however, is irrelevant because the mere lack of a sponsor will justify the revocation of parole. The Cuban refugee's only opportunity to challenge the revocation is by filing for a writ of habeas corpus.[113] Cuban refugees, especially those without immediate family in the United States, often do not challenge their parole revocations.[114] The revocation process immediately returns the refugee to, or places her in, a detention facility. Between an alien's arrest and her removal to a detention facility, she may be

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the plan, Department of Justice employees conduct interviews with detained Cuban refugees, review the refugee's files, and make recommendations to the INS Commissioner about whether the alien should be paroled.

Cuban refugees who are not members of the class in *Fernandez-Roque* are not subject to the review plan. The class as certified includes only the Cuban refugees incarcerated at the Atlanta Penitentiary. Fernandez-Roque v. Smith, 91 F.R.D. 117, 126 (N.D. Ga. 1981). For a full explanation of the procedures of the review plan, see the district court opinion in *Fernandez-Roque*, 567 F. Supp. 1115, 1130-31 (N.D. Ga. 1983). The continued existence of the review plan is questionable because *Fernandez-Roque* was reversed on appeal. 734 F.2d 576 (11th Cir. 1984). After the reversal, the Government is not compelled to proceed with the review plan.

111. Regulations refer only to the discretion of the INS. The INS will not allow many detainees at the INS/PHS Facility to be paroled even to family members in the United States.

112. The INS often does not learn of a breakdown until the parolee encounters problems or goes to the INS with questions about her immigration status.

113. *See, e.g.*, Bertrand v. Sava, 684 F.2d 204, 210 (2d Cir. 1982).

114. Cuban refugees, like other aliens, are usually unfamiliar with the United States immigration system and find it difficult to procure legal counsel. For example, even though an attorney supervised the class in *Fernandez-Roque*, most Cuban refugees did not have counsel when they went before the review panels. The Cuban refugees' only advocates are the attorneys working on each individual case. Even when a Cuban refugee has legal counsel, however, INS officials often fail to notify the attorney that his client's parole has been revoked (based on conversations with attorneys who represent detained Cubans).

handed a notice of parole revocation.[115] Thus, any notion that parole of the Cuban refugee equates to a grant of absolute freedom is simply a misconception.

After the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*,[116] scholars speculated that the Court had allowed limited rights for aliens in exclusion because the Court was satisfied that the procedures in the exclusion statutes accorded aliens sufficient protections.[117] The use of the parole fiction for the Cuban refugees raises doubts about the fundamental fairness afforded these aliens. Although aliens in exclusion may not be entitled to constitutional protections, it is difficult to argue that they are totally without the legal rights emanating from international law. The rights of individuals do not depend upon citizenship in a state. All individuals have basic rights that are independent of their national identity or lack thereof. Accordingly, a right does not cease to exist simply because the source of that right is not found in our Constitution.

VI. INTERNATIONAL LAW

One issue not addressed by the courts is whether indefinitely detained aliens have protections other than those found in the Constitution. This Article suggests that the courts must look beyond their conclusion that the Constitution does not protect aliens in exclusion to find possible protections inherent in international law. More important, international law provides a great deal of guidance in resolving the legality of indefinite detention of aliens in exclusion, particularly because domestic law is vague on the issue of extended detention.

If the courts had concluded that the Cuban refugees in indefinite detention deserved constitutional or "constitution-like" protections,[118] an examination of international legal standards would have been unnecessary. A Supreme Court decision favorable to the refugees based on domestic statutes would have been far bet-

115. The regulations require written notice. 8 C.F.R. § 212.5(d)(2) (1984).

116. 345 U.S. 206 (1953).

117. *See* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 277-80 (1956); *see also* Recent Cases, *Right of Due Process in Exclusion Proceedings*, 33 NEB. L. REV. 94, 96 (1953); Note, *Exclusion from the United States Without a Hearing*, 27 S. CAL. L. REV. 315, 321 (1956).

118. "Constitutional-like" protections refer to Supreme Court-fashioned remedies based on statutes rather than the Constitution.

ter than a decision based on international law because the latter subordinates domestic law to international standards. Because the Supreme Court decisions regarding the rights of aliens in exclusion so poorly define domestically cognizable rights, however, the rights embodied in international law must now be explored.[119] In exploring whether international law supports the proposition that indefinite detention of aliens is impermissible when no other country will accept the aliens, this Article advocates that customary international law prohibits the practice of indefinite detention.

In recent years the body of codified standards from international law that protect human rights has expanded enormously. In the twentieth century the signing of many multilateral agreements has established norms for the protection of human rights. Since the holocaust of World War II, the international community has become increasingly concerned with human rights. This concern, initially expressed only in multinational agreements, recently has become embodied in the domestic statutes of individual nations. The growth and development of international and domestic human rights standards symbolically support the argument that the right to be free from indefinite detention is cognizable under international law. Since World War II the recognition of human rights has become a legitimate concern of international law and a goal of foreign relations. The United States, for example, currently uses human rights as an instrument of foreign policy in its dealings with other nations.[120]

A. International Agreements

More than twenty-one international agreements currently address human rights issues. This Article will explore only the

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119. The Supreme Court has held consistently that aliens in exclusion are not protected by the Constitution. It is the author's opinion that granting constitutional protections to an alien who is beyond the point of exclusion is the better approach. The following discussion proceeds assuming the Supreme Court has rejected the constitutional rights argument.

120. *See, e.g.*, 22 U.S.C. §§ 2151n(a), 2304(a)(2) (1982). For an outline of Congress' intent, see *id* § 2151. The use of foreign policy as a human rights enforcement tool has not gone without criticism. *See* HUMAN RIGHTS AND U.S. HUMAN RIGHTS POLICY: THEORETICAL APPROACHES AND SOME PERSPECTIVES ON LATIN AMERICA 5-29, 53-59 (H. Wiarda ed. 1982); *see also* Boyle, *International Law as a Basis for Conducting American Foreign Policy*, 8 YALE J. WORLD PUB. ORD. 103 (1982) (arguing that the practice is contrary to international law).

agreements that address the issue of indefinite detention. The United Nations agreements on indefinite detention include the United Nations Charter, the Convention Relating to the Status of Stateless Persons,[121] the Universal Declaration of Human Rights,[122] the Convention[123] and Protocol Relating to the Status of Refugees,[124] the International Covenant on Civil and Political Rights[125] and the Geneva Conventions of 1949.[126]

The United Nations Charter, one of the few international agreements signed by the United States, created the United Nations and reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person."[127] The Charter demands no specific duties and obligations from its signatories, but requires member nations to work toward the establishment of universal respect for human rights and fundamental freedom for all persons.[128]

The Convention Relating to the Status of Stateless Persons defines stateless persons as those "not considered as a national by any state."[129] Individuals who have lost their nationality presumably come within this definition. For example, when the members of the Freedom Flotilla left Cuba designated as traitors, they

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121. *Done* Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter cited as Convention on Stateless Persons].

122. G.A. Res. 217, 3 U.N. GAOR 71, U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration].

123.. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

124. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

125. G.A. Res. 2200A, 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) [hereinafter cited as ICCPR]. For a discussion of the history and implementation of the ICCPR, see Mose & Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights,* 21 SANTA CLARA L. REV. 271 (1981).

126. Reference to the Geneva Conventions of 1949 includes the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

127. U.N. CHARTER preamble.

128. The U.N. Charter states that the members of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." *Id.*

129. Convention on Stateless Persons, *supra* note 121, art. 1(a).

were taunted by government-organized crowds. Many had been threatened by Cuban authorities who warned that they could never return to Cuba.[130] Pronouncements by Fidel Castro supported these threats.[131] Under Cuban law, the circumstances surrounding the refugees' departure and the departure itself were grounds for loss of Cuban nationality.[132]

Thus, the Cuban refugees bear all the indicia of stateless persons, although an extremely conservative reading of the Convention could lead to a different conclusion.[133] The Cuban Government's refusal to accept the return of its citizens even upon final orders of exclusion issued by the INS is an act of abandonment that leaves the Freedom Flotilla members without a spokesperson or advocate in the world community. An alien's main advocate is usually the government of his original country. The members of the Freedom Flotilla, however, have no governmental body to advocate their case. The Convention on Stateless Persons is evidence of the world community's special concern for the welfare of persons in situations similar to the Cuban refugees. When aggregated with other international agreements, the evidence creates a strong argument for the viability of the use of customary international law to protect the rights of displaced persons.

The Universal Declaration of Human Rights, although not a self-executing document, evinces the United Nations' strong concern for the recognition of fundamental human rights. The Declaration, like the United States Declaration of Independence and Constitution, provides everyone with the "right to life, liberty and the security of person,"[134] entitles everyone to recognition "as a person before the law,"[135] and prohibits arbitrary "arrest, detention or exile."[136] Although without the force of an executed treaty,

130. N.Y. Times, May 3, 1980, at 1, col. 6; N.Y. Times, Apr. 25, 1980, at A1, col. 5; N.Y. Times, Apr. 20, 1980, at E2, col. 1.

131. *See* Granma, Sept. 16, 1980 at 1 (Granma is the official newspaper of the Cuban Communist Party).

132. CONSTITUCION art. 32(c) (Cuba), *reprinted and translated in* 4 CONSTITUTIONS OF THE WORLD (A.Blaustein & G. Flauz eds. 1979); *see also*, Klein, *The Socialist Constitution of Cuba (1976)*, 17 COLUM. J. TRANSNAT'L L. 451, 478-83 (1978).

133. None of the court opinions dealing with the rights of Cuban refugees have considered whether the refugees are actually stateless.

134. Universal Declaration, *supra* note 122, art. 3.

135. *Id.* art. 6.

136. *Id.* art. 9.

the Universal Declaration both embodies a standard by which all nations can be judged and aids in an understanding of the current status of international custom.

The Convention and Protocol Relating to the Status of Refugees,[137] which became effective in 1968, are the principal international agreements that address the fundamental right to leave one's country to seek and enjoy asylum. The Refugee Act of 1980[138] was enacted to make United States immigration practice more consistent with the Protocol.[139] Currently, more than seventy nations are parties to the Convention and Protocol. The Protocol provides that host countries will grant persons who have a "well-founded fear of being persecuted" in their own country on account of "race, religion, nationality, membership of a particular social group or [for] political opinion" will be granted rights in the host country that are similar to the rights enjoyed by nationals of the host country.[140]

Using the test that the Protocol provides, the members of the Freedom Flotilla clearly should have been given refugee status. They perceived themselves as refugees; when they arrived at United States shores they requested asylum and completed asylum applications. The INS, however, has yet to process most of the asylum applications.[141] The deliberate inaction by the INS apparently disregards the Protocol, the Refugee Act of 1980, and the INS regulations.[142] The inaction avoids according the refugees

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137. *See supra* notes 123-24.

138. *Supra* note 30.

139. *See* H.R. REP. No. 608, 96th Cong., 1st Sess. 18; S. REP. No. 256, 96th Cong., 1st Sess. 9, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 149; H. CONF. REP. No. 781, 96th Cong., 1st Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 161.*See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 SAN DIEGO L. REV. 9 (1981).

140. Protocol Relating to the Status of Refugees, *supra* note 124, art. 1(A)(2).

141. *See supra* note 103 and accompanying text.

142. INS regulations state that "[u]pon receipt of Form I-589, the district director shall in all cases request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State." 8 C.F.R. § 208.7 (1984); *see also id.* §§ 108.1, 208.1, 208.3(a), 208.9(b).

Absolutely no action was taken on the Cuban refugees' asylum applications. The government has advanced the argument that preventing the Cuban refugees from becoming ineligible for public benefits through a grant of asylum or a finding of excludability was the reason for the INS' inaction. The authority cited for this position was section 501(e) of the Refugee Education Assistance Act of

the rights they would have received upon legal entry and leaves the Cuban refugees knocking at the United States legal border without a constitutional footing.

United States courts that have addressed the indefinite detention cases barely mentioned the INS inaction.[143] The courts seem unwilling to recognize a special status for aliens applying for asylum.[144] If the purpose of the Protocol was to require signatory nations to treat aliens fleeing persecution on a similar footing with nationals of the host country, the INS inaction seems to violate the Protocol purposes. Furthermore, United Nations guidelines on the recognition of refugees state that a person is a refugee when he fulfills the Protocol's criteria and that "refugee recognition" necessarily occurs prior to the time the host country gives formal recognition.[145] In view of the special concerns expressed in international law, United States courts should recognize the rights that inure to the Cuban refugees and all other aliens even when in exclusion.

The International Covenant on Civil and Political Rights (ICCPR),[146] which currently has been signed by more than sixty nations, contains provisions that specifically apply to the question of detention. Together with the International Covenant on Economic, Social and Cultural Rights (ICSCR),[147] which has also

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1980, *supra* note 101. For comments regarding this position, *see supra* note 109.

143. *See, e.g.*, Alonso-Martinez v. Meissner, 697 F.2d 1160, 1163 (D.C. Cir. 1983).

144. In Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit held that refugees do not have a statutory or constitutional right to be notified of the right to apply for asylum. *Id.* at 983. The *Jean* court intended in part to clarify Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982) where the three judge panel seemed to interpret the Refugee Act as creating a "right to petition for asylum." *Id.* at 1038; *see Jean*, 727 F.2d at 976 n.27. *Contra* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 376 (C.D. Cal. 1982) (Refugee Act requires notice of the right to apply for asylum); *see also* Nunez v. Boldin, 537 F. Supp. 578, 586 (S.D. Tex. 1982), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). The far-reaching *Jean* decision sought to limit the rights of aliens in exclusion.

145. UNHCR HANDBOOK, *supra* note 27, at 9. The Board of Immigration Appeals has referred to the *Handbook* for guidance. The *Handbook* is a well-recognized source of international refugee custom because the U.N. High Commissioner is regarded as very experienced in refugee matters. *See* McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981); *In re* Rodriguez-Palma, 17 I. & N. Dec. 465, 468 (1980).

146. *Supra* note 125.

147. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316

been widely accepted, the ICCPR treats detention realistically by recognizing the effects of detention that go beyond the impairment of individual liberties. Both Covenants recognize that detention necessarily prevents free expression, work, exchange of ideas, education, and other fundamental rights, which are referred to in international agreements, but are often taken for granted. The ICSCR gives special protection to each of these valuable rights and prohibits countries from impinging on the enumerated individual rights except when necessary to protect national security or public order.[148]

The ICCPR does not distinguish between persons applying for entry at a country's border and those who have already entered the country, but rather speaks of persons "within its territory and subject to its jurisdiction."[149] The ICCPR reiterates the Universal Declaration of Human Rights' forceful recognition of an individual's inherent right to life,[150] freedom from arbitrary arrest or detention,[151] and freedom from inhuman or degrading treatment or punishment.[152] The Covenant neither distinguishes between aliens in exclusion and deportation, nor recognizes the legal fiction of parole. The ICCPR, however, provides that an alien who is lawfully within a country may be expelled, but only after receiving the opportunity to present his case.[153]

The ICCPR delineates various individual rights such as the right to be free from arrest and detention. Individuals receive these rights based upon their physical presence within a country rather than upon the status bestowed by the host country. Only individuals who have been *duly convicted of crimes,* or whose exclusion can be justified as a means of protecting national security and the preservation of public order are deprived of the full com-

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(1966) [hereinafter cited as ICSCR].

148. ICSCR, *supra* note 147, art. 8. The ICCPR also established methods to enforce its prohibitions. A Human Rights Committee was established, ICCPR, *supra* note 125, art. 1, and authorized to review the claims of individuals who allege violations of their rights. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No.16) at 59, art. 2(1), U.N. Doc. A/6316 (1966).

149. ICCPR, *supra* note 125, art. 2.

150. *Id.* art. 6.

151. *Id.* art. 9.

152. *Id.* art. 7.

153. *See id.* art. 13.

plement of ICCPR rights.[154]

International law has always demonstrated a strong concern for both combatants and civilians during time of war. The Geneva Conventions of 1949[155] provide an additional international source of support for an understanding of the rights available to the Cuban refugees in detention. A number of common concerns are evinced in the Geneva Conventions, but the concerns most relevant to the issue at hand are those dealing with the rights of interned civilians. The Convention maintains a general policy against the detention of civilian noncombatants by allowing internment only when a civilian presents a risk to national security or voluntarily appears for internment.[156] The Cuban refugees would appear to come within the definition of civilian noncombatants because they are civilians, rather than citizens of a nation at war with the United States, and because they have not been labelled as national security risks. Thus, a straightforward application of the Geneva Conventions suggests that the Cuban refugees currently have fewer rights than prisoners of war, a result that clearly is illogical and inconsistent with international law.

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154. *Id.* arts. 4, 8.

155. *Supra* note 126.

156. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 126, provides that:

> [any interned person] shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board . . . . If the internment or placing in assigned residences is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case with a view to the favourable amendment of the initial decision.

Id. art. 43. The Convention further provides that the internment of civilians is allowed only when "absolutely necessary" to the security interests of the occupying forces. *Id.* art. 42.

The Conventions also provide (1) that prisoners be treated humanely whether they are in detention or otherwise, without reference to their "race, colour, religion or faith, sex, *birth* or wealth, or *any similar criteria*," Convention Relative to the Treatment of Prisoners of War, *supra* note 126, art. 3(1) (emphasis added); (2) persons who take no active part in wars or civilians require similar protection as noted in (1) above, Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 126, art. 3(1); (3) persons detained as saboteurs or spies "shall . . . be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial," *id.* art. 5; (4) the wounded and sick "shall be the object of particular protection and respect," *id.* art. 16; and (5) those in an occupied territory who have lost their employment "*shall* be granted the opportunity to find paid employment," *id.* art. 39 (emphasis added).

The preceding analysis of numerous international agreements provides insight into the most basic human rights of life, liberty, and freedom from inhuman or degrading punishment, which are currently recognized by the international community. When viewed collectively these agreements lead to the undeniable conclusion that every individual, whether civilian or prisoner of war, is entitled to the basic human rights enumerated above. It is shocking that the United States would provide a prisoner of war or alleged criminal with better protections than the indefinitely detained Cuban refugees.

B. Regional Agreements

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),[157] the OAS Charter,[158] the American Convention on Human Rights,[159] and the American Declaration of the Rights and Duties of Man[160] are important regional agreements that address human rights questions. A review of the regional agreements will further demonstrate the abhorrence of indefinite detention under international law.

The European Convention, which has become the model for regional agreements on human rights,[161] encompasses the rights and protections contained in both the Universal Declaration of Human Rights and the United Nations Charter. The European Convention specifically enumerates basic rights of life,[162] protection from torture or inhuman treatment,[163] freedom from slav-

157. Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter cited as European Convention].

158. Dec. 13, 1951, 119 U.N.T.S. 48.

159. Nov. 22, 1969, O.A.S.T.S. No. 36, *reprinted in* 9 I.L.M. 99 (1970) [hereinafter cited as American Convention].

160. Res. XXX, 9th Int'l Conf. of American States, Pan American Union (1948) [hereinafter cited as American Declaration].

161. The legislative history of the American Declaration is replete with references to the European Convention. There is also a great deal of similarity in language between the two agreements. *See* 2 T. BUERGENTHAL & R. NORRIS, HUMAN RIGHTS LAWS OF THE INTERAMERICAN SYSTEM, binder 12, at 29 (1983). The Universal Declaration, *supra* note 122, provided the initial foundation for both the European and American Conventions. *See* Buergenthal, *The American and European Conventions on Human Rights; Similarities and Differences,* 30 AM. U.L. REV. 155 (1980).

162. European Convention, *supra* note 157, art. 2.

163. *Id.* art. 3.

ery,[164] and the right to be free from arbitrary arrest or detention.[165]

The American Convention on Human Rights embodies the western hemisphere's concern for human rights. The American Convention, patterned after the European Convention, provides that the infliction of penal punishment shall be limited to criminally convicted individuals[166] and that the deprivation of physical liberty shall occur only under conditions specifically covered by a nation's constitution.[167] Both the European and American Conventions establish commissions to investigate allegations of human rights abuses and advise its parent organization on human rights issues.[168]

Both the European and American Conventions operate on two important premises: (1) that the essential human rights, the rights to liberty, personal security, and equality before the law, are not derived from an individual's nationality, but from the individual himself;[169] and (2) that the law of these two regions should be based on the protection of human rights.[170]

Because of the similarities between the two conventions, a discussion of the provisions of the European Convention identifies the important aspects of both agreements. The European Convention states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[171] that "[e]veryone has the right to liberty and security of person,"[172]

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164. *Id.* art. 4.

165. *Id.* art. 5.

166. American Convention, *supra* note 159, art. 5(3), *reprinted* at 102.

167. *Id.* art. 7(2), *reprinted* at 103.

168. *Id.* arts. 31-51, *reprinted* at 111-16; European Convention, *supra* note 157, arts. 19-37.

169. American Convention, *supra* note 159, preamble, *reprinted* at 101; European Convention, *supra* note 157, art. 1.

170. American Convention, *supra* note 159, preamble, *reprinted* at 101; European Convention, *supra* note 157, preamble.

171. European Convention, *supra* note 157, art. 3. It has been said that what is and what is not permissible under article 3 can only be determined by looking at (1) how the treatment or punishment affects the individual, that is whether the treatment is voluntary or not, or (2) the harmfulness of the punishment to a prisoner's physical or mental health. J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 35-37 (1969); *see also* F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (1974); McDougal, *Human Rights in the U.N.*, 58 AM. J. INT'L L. 603 (1964).

172. European Convention, *supra* note 157, art. 5(1).

and that no person can be deprived of the right to liberty unless convicted (presumably of a criminal offense).[173] The one provision on immigration matters suggests only a limited authority to detain aliens.[174]

The European Convention also prohibits "torture *or* . . . inhuman or degrading treatment"[175] and defines inhuman treatment as "the deliberate infliction of physical or mental pain or suffering."[176] The prohibition of degrading treatment was designed to prevent all forms of cruel treatment or punishment. The difficulty with article 3 is determining what is "inhuman" or "degrading." Indeterminate sentencing, isolation detention, prohibition of access to the press, prohibitions of communication between aliens detained in different institutions, and censorship of mail, arguably, are all considered inhuman or degrading within article 3. In the context of criminal punishments, these practices would be allowed under the Conventions if they served the legitimate end of preserving order in a penal institution. Whether a particular practice violates the Conventions depends upon the effect that the practice has on an individual. The greater the harm a practice causes the individual, the more likely it is that the practice violates the Conventions.

The European Convention drafters intended article 5 to preserve the important individual rights of liberty and personal security. The use of detention or incarceration was contemplated by the drafters in the context of criminal punishment. Article 5(f) is useful in assessing the question of exclusion and deportation. It provides one of the permissible exceptions to the prohibition of arrest and detention and allows a person "against whom *action* is

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173. *Id.* art. 5(1)(a).

174. *Id.* art. 5(1)(f). It authorizes "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person *against whom action is being taken with a view to* deportation or extradition" (emphasis added). Article 5(4) provides that "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." *Id.* art. 5(4).

175. *Id.* art. 3. The inclusion of the word "or" is intended to broaden the protections available to individuals because "torture" alone was considered to be too narrow a proscription. *See generally* J. FAWCETT, *supra* note 171, at 34-41.

176. J. FAWCETT, *supra* note 171, at 35. Interpretations of article 3 have referred to United States Supreme Court rulings on the Eighth Amendment. *Id.* at 35 n.4 (citing *Louisiana* ex rel. *Francis v. Resureber*, 329 U.S. 459 (1947)).

being taken *with a view* to deportation or extradition" to be detained.[177] The Convention, therefore, permits the legitimate denial of a fundamental liberty interest to individuals accused of criminal acts or to individuals who are unable to care for themselves. Under the Convention, a fundamental interest deprivation may occur in the fulfillment of a legal obligation or in the implementation of deportation.

An essential element of the right to be free is the ability to challenge a detention before a court that is *competent* to review the legality of the detention.[178] Prior interpretations of the United States immigration statute have not recognized this right. United States courts have ruled that, because exclusion is a plenary power outside their jurisdiction, the courts are without authority to review the underlying legality of the detention of aliens.[179] Consequently, detained persons find it difficult to chal-

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177. European Convention, *supra* note 157, art. 5(1)(f).

178. *See id.* art. 5(4); *see also* F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 103-04 (1974). The *Restatement* provides the same language as the European and American Conventions. *See* RESTATEMENT (SECOND) FOREIGN RELATIONS § 179(2)(b) (1965). While it is not entirely clear what is meant by "competent," an argument can be made that the limited scope of review under the United States law is not sufficient.

179. Under United States law the question of the legality of indefinite detention has not been squarely addressed. With only one exception, indefinite detention cases have turned on the issue of whether there had been an "abuse of discretion" in the context of the parole decision. *See* Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1054-56 (N.D. Ga. 1981); Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd* 734 F.2d 576 (11th Cir. 1984); *but see* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). Judicial review under the abuse of discretion standard is extremely limited as the courts have taken into account the "plenary" nature of the exclusion power. *Fernandez-Roque*, 734 F.2d at 583; Bertrand v. Sava, 684 F.2d 204, 212 (2d Cir. 1982). A clearer enunciation under the parole power and the extent to which aliens can be invidiously discriminated against in the denial or granting of parole was addressed in Jean v. Nelson, 727 F.2d 957, 976 (11th Cir.) (en banc), *cert. granted to 11th Cir.* 105 S. Ct. 563 (1984).

Although a strong argument can be made that the present form of review is insufficient, a court's ability to review abuse of discretion in the denial of parole could be argued as being "competent" review. A more balanced approach would recognize a more comprehensive review than one limited to abuse of discretion in the parole decision while avoiding the illegality or legality of indefinite detention. The limitations of judicial review under United States law, if continued, subject the Cubans to constantly facing the possibility of renewed detention. Notwithstanding the arguments under international law, the indefinite detention question was squarely addressed only by the *Rodriguez-Fernandez* court,

lenge the underlying legality of detention in the courts. The judicial interpretations, however, appear to conflict directly with the preceding international treaties. The effect of this narrow view is that even when a detained person has a right to freedom, a questionable assumption in itself, that right may not be successfully asserted before a United States court.

A German court, however, has specifically prohibited the prolonged detention of an alien following the issuance of an order of deportation.[180] In reviewing a request for release from detention by a Yugoslavian whose native country and all other countries refused to accept him, the German court stated that

> a longer period of detention would offend against the Convention on Human Rights, and in particular the principles laid down in Article 5; for *it would be out of proportion to the intended objective, and would, by becoming in effect of indefinite duration, lose its character of a provisional measure . . . .*[181]

One writer has interpreted the decision to mean that "[d]etention that is unduly prolonged may . . . lose the character of being detention with a view to . . . deportation," and may, therefore, violate article 5.[182] The German court's interpretation of article 5 is consistent with the argument that detention with no realistic anticipation of deportation goes beyond a nation's immigration power. The German court's interpretation of international law is logical and consistent with a reasonable interpretation of a nation's permissible immigration authority and merits consideration by United States courts.

Although the United States has not signed all the preceding international conventions, it still may be responsible for violations of the conventions under international law.[183] The widespread ac-

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which decided the case under United States domestic law.

180. Judgment of Mar. 10, 1965, Amstgericht, Köln, *cited in* J. FAWCETT, *supra* note 171, at 117 n.1.

181. *Id.*, *translated* at J. FAWCETT 116-17.

182. J. FAWCETT, *supra* note 171.

183. Unless Congress has statutorily called for the direct violation of a rule of customary international law, a construction that violates that rule will be avoided. *See* The Paquete Habana, 175 U.S. 677 (1900); *see also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); 1 L. OPPENHEIM, INTERNATIONAL LAW 29-30 (8th ed. 1955); G. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW 44-58 (1937); RESTATEMENT (SECOND) FOREIGN RELATIONS § 3 reporters' note 2 (1965); Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1-2), 101 U. PA. L. REV. 26, 792 (1952-1953).

ceptance of the conventions' standards in the international community establishes minimum requirements to which all nations should conform. The basic concept that customary international law binds the United States Government is not new to United States courts. The Tenth Circuit, for example, based its decision to release Cuban refugees from detention on international law principles.[184]

A court facing a question that involves the applicability of international law must resolve the threshold issue of whether domestic law provides a clear directive on the particular question. If domestic law clearly applies, then it is unnecessary to consider international law. A court generally will not interpret a statute so that the interpretation violates a principle of international law, unless a clear congressional mandate supports the interpretation.

This Article previously established that although Congress has clearly defined which persons should be denied entry into the United States in the exclusion statutes, Congress did not include provisions for the treatment of an excluded alien whom no other nation will accept.[185] Although the Fourth Circuit has interpreted Congress' silence as allowing the Executive to detain excluded aliens indefinitely,[186] the inadequacy of the approach merely highlights the importance of a search in international law for an equitable solution to the excluded alien's dilemma.

From an examination of international law, it is shown that treaties, conventions, protocols, and writings of scholars delineate certain fundamental rights that flow, not from legal entry into a nation, but from one's existence as an individual. Treaties that provide specific rules on the issue include United Nations documents and regional agreements. In general, these agreements provide individuals with (1) the right to be free from detention ex-

184. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981). Other courts have dealt with the rights of the detained Cubans but have avoided basing their decisions on international law. *See, e.g.*, Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049 (N.D. Ga. 1981). In Fernandez-Roque v. Smith, 567 F. Supp. 1115, (S.D. Ga. 1983), *rev'd*, 743 F.2d 576 (11th Cir. 1984), the court determined "that the rights accorded petitioners under international law are no greater than those provided under our own Constitution." *Id.* at 1122 n.2. *See also* Fernandez v. Wilkinson, 505 F. Supp. 787-95 (D. Kan. 1980).

185. *See supra* notes 94-96.

186. Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir. 1982). For a discussion of the role of the executive and legislative authority over immigration, see 1 C. GORDON & H. ROSENFIELD, *supra* note 23 §§ 1.5a, 1.5b, 2.2.

cept when the individual is faced with criminal charges, is unable to care for herself, or is in the *process* of deportation; (2) the right to be treated as a national under the law of the host country;[187] and (3) the right, upon detention, to be treated humanely and not degraded or tortured. An examination of the international agreements provides a basis for the conclusion that rights of the individual are protected under international law. The drafters of the RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW, for example, considered that the United Nations Charter would be adhered to by all states including nonmembers.[188] Scholars, however, disagree over whether the United Nations Charter has hardened into customary international law.[189] The view that the provisions of multilateral agreements will form rules of customary international law also will not be without detractors. Whether the treaties will immediately generate customary international law is also a matter of disagreement among scholars.[190] Although these treaties do not create rights that an alien may successfully assert in litigating affirmative claims before United States courts, the treaties can assist in the determination of whether indefinite detention is permissible. After reviewing these agreements, one can only conclude that the indefinite detention of an alien who is without the right to effective judicial review is a violation of the accepted standards

187. The Convention on Aliens, Feb. 20, 1928, 46 Stat. 2753, T.S. No. 815, 132 L.N.T.S. 301, of which the United States is a party, requires foreigners to be treated with the *same* guarantees of "essential civil rights" enjoyed by nationals. *Id.* art. 5. The *Restatement* recognizes this requirement of equal treatment: "It has recently been suggested that states are bound by international law to respect certain basic human rights of all persons, whether aliens or nationals, and that responsibility for injuries to aliens is merely one aspect of such a general responsibility." RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 165 comment b (1965).

188. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 102 comment h (Tentative Draft No. 1, 1980).

189. *See Panel Discussion, Contemporary Views on the Sources of International Law: The Effect of the U.N. Resolutions on Emerging Legal Norms*, 73 AM. J. INT'L PROC. 300 (1979); 1 L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518 (1973). With respect to the obligations of the member states of the O.A.S., see T. BUERGENTHAL, R. NORRIS, D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 26-35 (1982).

190. *See* Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-1966); D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970).

of international law.[191]

It is not an exaggeration to say that the United States has violated each of the fundamental principles in its dealings with the Cuban refugees. The Cubans have been treated with less respect than the criminals who are protected under the European and American Conventions and our criminal statutes. The United States courts have completely ignored the effects of prolonged detention on the individual aliens and the devastating effects of detention in mental institutions on aliens who are not mentally incapacitated. Irrespective of whether excluded aliens are entitled to constitutional protections, they are entitled to the humane treatment required by the basic standards of international law. Furthermore, detention of the aliens should extend for a fixed time, and then only upon a clear showing of a potential danger to society.

An individual's conviction for a criminal offense is the critical factor that generally allows a state to punish the individual. The normal form of punishment for criminal acts in the United States is deprivation of liberty. An alleged criminal is deprived of his liberty only after the process of carefully determining the facts in a trial that has resulted in a conviction. Excluded aliens in indefinite detention have none of these rights because, as the argument goes, constitutional protections do not apply to aliens in exclusion.[192] The more persuasive and logical reasoning proposes that certain basic and fundamental rights, enunciated in numerous international documents as well as in the Declaration of Independence, prevent reprehensible governmental actions. A contrary finding would literally mean that no domestic or international legal restraints can prevent Congress or the Executive from ordering the execution of Cuban refugees in response to the current alien dilemma.

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191. For a discussion of the enforcement of international human rights in domestic courts, see Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights in State and Federal Courts,* 18 TEX. INT'L L.J. 291 (1983); Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law,* 74 AM. SOC. INT'L L. PROC. 20-25 (1980).

192. The Government has also argued that these Cubans can be detained because they are excludable. Almost every Cuban, whether in or out of detention, however, is inadmissible to the United States. As noted earlier, the primary difference between detained and nondetained Cubans is that in the latter case the INS has not yet learned that the sponsor/alien relation has broken down. *See supra* notes 112-15 and accompanying text.

VII. CRITIQUE

A. Overview

Traditionally, legal questions have been resolved by first balancing the interests and rights of opposing parties and then attempting to reach a logical solution based on the balancing conclusions. The Supreme Court has decided that aliens in exclusion have no rights other than those provided in the immigration statutes. The immigration statutes, although clearly providing methods to effect the speedy exclusion of excluded aliens, provides no guidance on the proper procedure for processing excluded aliens when no other country will accept them.

This Article has attempted to focus on the limits of the power to exclude, the Executive's misuse of the parole authority, and the rights of excluded aliens under international law. Customary international law supports the interpretation that indefinite detention is not a proper exercise of a nation's immigration authority. International law places a premium on the propositions that an individual's right to liberty arises independently of any national affiliation and that one's liberty cannot be restrained simply because one commits the nonpenal act of attempting to enter the United States. The exclusion power, although extensive, is not without limitations imposed by the courts. Supreme Court decisions in exclusion cases have always qualified the power to exclude; the Court has never stated that Congress had unlimited authority to deal with aliens.

The Executive has misapplied the parole authority and has totally ignored the statutorily designed mechanism for the admission of refugees. The Executive's abuse of parole authority raises the question whether Cuban refugees should be considered to have legally entered the United States and thus, to have been accorded "constitutional-like" protections.[193]

The Judiciary's hesitancy to interfere in immigration matters has reached an extreme that allows Congress to establish when aliens may assert constitutional rights. The dangerous consequences of the unfettered exercise of immigration power are easily imaginable. Surely, the Supreme Court would not sanction enactment of a statute in which Congress equates legal entry in the United States with obtaining citizenship and thereby limits the rights of all aliens to only those Congress sees fit to afford aliens.

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193. *See supra* notes 118-19.

Nevertheless, the end result of such a statute would be no different than the Executive's use of parole to prevent the assertion of constitutional rights by aliens physically present in the United States for more than five years. The Supreme Court must reexamine the doctrines of parole and entry and the doctrines' currently devastating and illogical effects on the vesting of individual rights. The framework for such an analysis dictates further examination of the governmental authority to regulate immigration and Congress' power to limit arbitrarily those rights basic to any civilized nation's system of jurisprudence.

B. Proposed Solution

This Article has argued that an immigration policy of indefinite detention ignores reality and offers, at best, dubious returns. The Cuban refugees may never be allowed to return to Cuba or any other country. Accordingly, their continued detention increases both the difficulty of integrating the refugees into society and the already tremendously high cost to the Government.

The most logical solution to the Cuban refugee dilemma requires a pragmatic approach to the problem, which examines the reasons for the continued detention of refugees. First, the major impediment to the release of the detained Cuban refugees is the unavailability of sponsors. To alleviate the relative paucity of sponsors, the Government could simply set up its own halfway houses or use existing criminal probation programs to sponsor the Cubans for parole. Second, the detention facilities for Cuban refugees with alleged psychological problems should be converted into halfway houses. Third, many refugees are currently in detention because the Government believes that the refugees would present a danger to society if released. These individuals should be given an opportunity to show that they are not dangerous. The common thread connecting the three proposed solutions is that the Government, instead of volunteer organizations, should sponsor the Cuban refugees.

Additionally, Cuban refugees who truly suffer from psychological problems should be placed in regular mental institutions in the United States. The crux of the problem, however, is determining which aliens are in need of treatment. Many of the refugees are not suffering from treatable psychological problems and are a danger to neither themselves nor others. In fact their condition would not be sufficient to detain anyone but an alien in exclusion or parole. The continued detention of these people can

only lead to the deterioration of their situation.

Any resolution of the question of what should be done with aliens in exclusion who face indefinite detention requires a balancing of individual and national interests. Aliens desire not only freedom but also, under some circumstances, support. The primary interest of the Government is the protection of the public at large from real, not imagined, dangers.

If the alien in indefinite detention does not merit constitutional protections, international law provides ample support for the recognition of a different category of human rights. Whether these rights are fundamental rights implicit in the Constitution or are rights derived from natural or international law does not matter. What is important is the ample support that fundamental rights lend to the proposition that every individual, regardless of his immigration status, is entitled to freedom unless previously convicted of a crime or otherwise shown to present a danger to society. A corollary of this basic human right is the right to be released from detention after a reasonable period of time pending deportation or exclusion. A recognition of this right does not restrict a government's power to exclude aliens.

The proposals made here do not ignore the "behavioral" problems and criminal acts exhibited by some of the detained Cubans. The refugees who have committed crimes in the United States should be punished for those crimes. Similarly, persons who present dangers to themselves or others should be civilly committed for their own protection and that of others.

To date, the standards used to determine whether a Cuban refugee in detention is dangerous have been based on the precept that the Cuban refugee has absolutely no rights. These people enjoy fewer recognized rights than common criminals and wartime combatants and noncombatants. The United States Government must realize that the detained Cubans are not criminals. The Government must establish a review plan for all refugees presently detained that circumvents the inadequacies of the plan proposed in *Fernandez-Roque v. Smith*.[194]

Finally, the Cuban refugees currently in detention are learning no useful skills, but merely drain the public fisc. Each day spent languishing in detention makes their eventual successful adjust-

194. *See supra* note 110 and accompanying text. The Cuban refugee who perceives herself as having committed no wrong can be expected to express only outrage with any ineffective review plan.

ment to society more difficult. Acts of desperation and frustration, including violence and suicide in detention facilities, may eventually exceed those acts similarly occurring in the average penal correction institution. A Cuban refugee can only be expected to strive to meet the requirements for release if the possibility for release exists. When a Cuban refugee realizes that release from detention is impossible, however, commission of desperate and destructive acts of violence and suicide become more likely because the Cuban refugee views these acts as the only means of expressing her dissatisfaction with indefinite detention.

The issue of whether a government has the power to indefinitely detain an alien is immensely important irrespective of the outcome in individual deportation efforts. Indefinite or long term detention has an enormous impact on the law as well as on the person subjected to languishing in a jail or mental facility through no fault of his own. Certainly, the United States' unquestioned use of this type of detention in the case of the Cuban refugees who came to this country in the Freedom Flotilla may be repeated in the future as a "legitimate" exercise of the exclusion and parole powers. It cannot be said that the detention is no longer indefinite merely because an agreement has been reached to return some Cuban refugees to Cuba. Regardless of the numbers of persons who are eventually returned to Cuba under the agreement, many Cubans will remain in this country. It is unclear whether those in detention will remain confined or if they will eventually be released. Their eventual release, notwithstanding the issue on whether an alien can be confined for such extensive periods, remains an issue which must be addressed.

Even though an agreement has been reached, it is impossible to determine who among these individuals will remain in indefinite detention. First, a Cuban who is on the list has no way of knowing whether or not he will be deported. Second, the agreement limits the deportations to not more than 100 persons in any given month.[195]

When this is viewed with the threat of protracted litigation it is probable that Cuba could change its position on the agreement before all the Cubans on the list could be deported. As the Government stated, "[g]iven the unpredictability of world events, and the possibility that Cuba could renege on the agreement at any

195. The number of Cuban refugees on the list exceeds 2700. The process of deporting the Cubans, therefore, could take more than two years.

time, it is essential that the United States begin implementation now."[196] As Mr. Justice Rehnquist noted in *Garcia-Mir v. Smith*,[197] there are approximately 1500 persons who have yet to exhaust their administrative remedies or at best, the INS will possibly be faced with as many individual claims which could disrupt subsequently the entire deportation process.

Now that the United States has reached this agreement with Cuba, the question of individuals' claims of indefinite detention are, if not extinguished, then certainly changed in character. A strong argument can be made that, at least for individuals on the list to be returned to Cuba, detention is pursuant to deportation efforts even though it is not known when that might occur. With respect to the other Cubans not on the list, their detention continues to be indefinite.

Finally, one cannot assume that the remaining 120,000 or more Cubans who present themselves for adjustment to lawful permanent resident status will not be found ineligible and further detained. The legal question will arise once more of whether or not the government has the power to indefinitely detain an alien simply because she is in "exclusion" or has lost her "parole" status.

196. Memorandum in Support of Government's Motion for a Stay of the District Court's October 15, 1984 Order Pending Appeal at 2, Jan., 1985 (11th Cir. 84-8993).

197. 105 S. Ct. 948 (1985).

* "I am grateful to my family, friends and colleagues who gave me the encouragement and support, without which I could not have completed this article."