RECENT DEVELOPMENTS

IMMIGRATION — DUE PROCESS — THE AVAILABILITY OF CONSTITUTIONAL SAFEGUARDS TO DETAINED CUBAN ALIENS, Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986).

I. FACTS

Appellees, Cuban aliens,[1] brought a class action suit against the Attorney General of the United States alleging violation of their fifth amendment due process right to a parole revocation hearing.[2] Appellees had come to the United States during the Mariel boatlift after

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[1] Appellees came to the United States in the 1980 Mariel boatlift with approximately 130,000 Cuban refugees. In early April of 1980, approximately 10,800 Cuban citizens claiming status as political refugees sought sanctuary in the Peruvian Embassy in Havana. On April 14, 1980, President Carter declared that pursuant to the Refugee Act of 1980, up to 3,500 of these refugees would be admitted into the United States. President Carter allocated up to $4.25 million for their resettlement. This gave rise to the Mariel boatlift, or "Freedom Flotilla," by which some 130,000 Cuban refugees, in nearly 1,800 boats, came to the United States. *See* United States v. Frade, 709 F.2d 1387 (11th Cir. 1983). The United States Government denied admission to those aliens who did not possess proper documentation, and to others who were excludable under the provisions of the Immigration and Nationality Act of 1980, 8 U.S.C. §§ 1101, 1182 (1982); Fernandez-Roque v. Smith, 622 F. Supp. 887, 891 (N.D. Ga 1985). *See infra* note 24 and accompanying text for an explanation of the exclusion provisions of the Immigration and Nationality Act and for case law that characterizes excludable aliens.

[2] Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986). The action is more specifically a consolidation of class actions brought on behalf of the unadmitted refugees who were, are, or will be incarcerated at the Atlanta Federal Penitentiary. *Id.* at 1448.

In *Fernandez-Roque*, 622 F. Supp. at 891, the district court divided the class into two subclasses. The "First Group" includes criminal offenders and mentally incompetent persons who were sent to the United States by Castro in an attempt to rid Cuba of such undesirables. The government has detained these aliens since their arrival in the United States. The "Second Group" consists of all other Cuban refugees, who the Attorney General paroled into this country under the general alien parole statute, 8 U.S.C. § 1182(d)(5) (1982), but whose paroles the Attorney General subsequently revoked. *See infra* note 6 for an explanation of the reasons for Appellees' parole revocation. The Eleventh Circuit previously had found that members of the First Group do not have any liberty interst in parole. *Fernandez-Roque*, 622 F. Supp. at 891. The Eleventh Circuit addressed the Second Group's liberty interests on appeal. *Garcia-Mir*, 788 F.2d at 1446.

President Carter announced that the United States would welcome Cuban immigrants.[3] Congress shortly thereafter enacted the Refugee Education Assistance Act, which created a special immigration and parole classification for Mariel Cubans.[4] The Attorney General initially denied entry to those Cuban aliens, including Appellees, who did not have proper entry documents.[5] The Attorney General later paroled most of the Appellees but subsequently revoked their parole.[6] The government then detained Appellees in the Atlanta Federal Penitentiary while awaiting final resolution of their applications for entry.[7]

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[3] WEEKLY COMP. PRES. DOC. 834-35 (May 5, 1980), *quoted in Fernandez-Roque*, 622 F. Supp. at 898, n.16.

[4] Pub. L. No. 96-422, 1980 U.S. CODE CONG. & ADMIN. NEWS (94 Stat.) 1799 (codified at 8 U.S.C. § 1522 note (1982)). *See infra* notes 20-21 and accompanying text for a discussion of the Refugee Education Assistance Act of 1980 and its application to Mariel Cubans.

[5] The Attorney General also denied entry to those Cuban aliens who were mental patients or convicted of serious crimes in Cuba under the exclusion provisions of the Immigration and Nationality Act of 1980, 8 U.S.C. § 1182 (1982). Aliens denied admission are classified as "excludable" aliens. For an explanation of the differences between excludable and admitted aliens, *see infra* notes 21-25 and accompanying text.

[6] In conjunction with this special parole classification, the Immigration and Naturalization Service (INS) developed certain parole revocation policies applicable only to Mariel Cubans. *Fernandez-Roque*, 622 F. Supp. at 895. Until May 1982 the INS would revoke a Mariel Cuban's parole if he had no fixed address, no sponsor, and no means of support, or if he had been convicted of a serious misdemeanor or a felony. *Id.* After May 1982 the INS would revoke a Mariel Cuban's parole only if he had been convicted of a serious misdemeanor or a felony and had completed his prison sentence, or if he presented "a clear and imminent danger to the community or himself." *Id.* In March 1983 an additional parole revocation policy was promulgated for those Mariel Cubans who had been released from the penitentiary to halfway houses, providing for the revocation of their parole upon violation of the conditions of their parole. *Id.* Over the past five years, in accordance with these guidelines, the INS has revoked Appellees' paroles for crimes as serious as murder, armed robbery, and aggravated assault, or for less serious crimes such as driving under the influence. *Id.* at n.12. The INS has revoked the parole of many other Mariel Cubans for noncriminal parole violations. *Id.*

[7] The indefinite detention of the Cuban aliens is the product of a serious dilemma confronting the United States Government. The United States has not admitted the aliens, and the Cuban Government has refused them readmittance. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). In 1983 the Reagan Administration informed the Cuban Government that until it agreed to the return of the excludable aliens, the United States would halt admission of all Cubans to this country. N.Y. Times, July 3, 1986, at 1, col. 6. This led to an immigration accord between the United States and Cuba which was announced in December 1984. Under the accord Cuba agreed to take back 2,700 excludable aliens in exchange for the United States taking 3,000 political prisoners and up to 20,000 regular immigrants per year. The accord was suspended by Cuba on May 20, 1985, when

Appellees claimed this indefinite detention violated their constitutionally protected liberty interest in parole.[8]

The United States District Court for the Northern District of Georgia found that Appellees had a constitutionally-based liberty interest in parole.[9] The Eleventh Circuit Court of Appeals reversed the trial court and remanded the question of whether the aliens might have a nonconstitutionally-based liberty interest.[10] On remand, the district court held for Appellees, finding the government's acts violative of Appellees' nonconstitutionally-based, federally created liberty interest in parole.[11] The district court ordered the government to prepare and implement a plan for providing Appellees with parole revocation hearings.[12]

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the United States began "Voice of America" broadcasts over Radio Marti. *Id.*

On July 2, 1986, the governments of the United States and Cuba agreed to revive the immigration accord. Cuba first demanded that the United States discontinue broadcasting over Radio Marti. *Id.* The Cuban Government then dropped that demand, seeking instead access to "clear channel" AM frequencies in order to broadcast throughout the United States. N.Y. Times, July 11, 1986, at 3, col. 1. The United States Government would not agree to this, and on July 10, 1986, the State Department announced that the talks had collapsed. No further talks are scheduled. *Id.*

The government's use of detention as an alternative to placing the excludable aliens elsewhere is addressed in Boswell, *Rethinking Exclusion - The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. INT'L & COMP. L. 925 (1984).

[8] Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983).

[9] Appellees also argued that because general principles of international law forbid prolonged arbitrary detention, their present indefinite detention was unlawful. *Garcia-Mir*, 788 F.2d at 1453. The court rejected this argument reasoning that public international law applies only in the absence of controlling executive or legislative acts, or judicial opinions. Since controlling executive acts existed, as well as judicial decisions, the court deemed international law inapplicable. *Id., aff'g Fernandez-Roque*, 622 F. Supp. at 887.

For a complete history of the proceedings, see Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982) (considering the jurisdictional issues raised by the issuance of a temporary restraining order preventing the government from deporting Mariel Cubans); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984) (excludable Cuban aliens do not have a constitutionally-based liberty interest in parole); Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985) (considering the scope and effect of a Status Review Plan promulgated by the Attorney General and its effect on the parole of some excludable Cuban aliens); *Fernandez-Roque*, 622 F. Supp. at 887 (excludable Cuban aliens have a nonconstitutionally-based liberty interest in parole).

[10] *Fernandez-Roque*, 734 F.2d at 576. A nonconstitutionally-based liberty interest is one which is federally created, and although not arising from the Constitution, it gives rise to due process protection. *Id.*

[11] *Fernandez-Roque*, 622 F. Supp. at 904.

[12] *Id.* The district court limited its holding to those aliens who had not been

The government subsequently filed emergency motions with the Eleventh Circuit to stay the district court's order.[13] The court of appeals denied the government's motion for a stay of the order to prepare the plan but granted the government's motion to stay implementation of the plan.[14] The court of appeals then heard the case on the merits to determine whether the district court correctly found a nonconstitutionally-based liberty interest in parole.[15] On appeal, *held*: reversed. Unadmitted aliens, a class of Mariel Cuban refugees accorded special immigration and parole status by the Refugee Education Assistance Act, do not have a nonconstitutionally-based due process liberty interest entitling them to parole revocation hearings. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986).

II. LEGAL BACKGROUND

In 1980 thousands of Cuban refugees entered the United States in the "Freedom Flotilla."[16] The Freedom Flotilla began in late April 1980, and President Jimmy Carter stated his position on the situation soon thereafter. In an address before the League of Women Voters in May of 1980, President Carter announced that the United States

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mental patients and who had not committed serious crimes in Cuba. *Id.* The court held that each of these aliens was entitled to a hearing at which his continued detention must be justified by a showing "that he is likely to abscond, to pose a risk to the national security, or to pose a serious and significant threat to persons or property within the United States." *Id.* The district court found that the procedures that must be included in a constitutionally adequate detention hearing included: (1) written notice and disclosure of evidence; (2) presentation of evidence by the alien; (3) confrontation and cross-examination; (4) a neutral hearing body; and (5) a written statement of the basis for a decision. *Fernandez-Roque*, 567 F. Supp. at 1134-36. The district court further found that the Cuban aliens were entitled to the additional procedural protections of the privilege against self-incrimination, the right to counsel, and the placing of the burden of proof by clear and convincing evidence on the government. *Id.* at 1137-40.

[13] Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986). In addition, the government sought summary reversal on the merits, which the court of appeals denied. *Garcia-Mir*, 788 F.2d at 1455.

[14] *Garcia-Mir*, 788 F.2d at 1455.

[15] The court of appeals additionally ordered that two other issues be decided in the new action. The first questioned the applicability of public international law, discussed *supra* note 9. The second concerned whether the class should continue to be maintained, which the court of appeals dismissed as moot in view of their decision that Appellees had no further recourse in the courts. *Garcia-Mir*, 788 F.2d at 1455.

[16] *See supra* note 1 for a discussion of the circumstances leading up to the Freedom Flotilla.

would welcome "with an open heart and open arms"[17] those Cubans who wished to immigrate to this country. In that speech President Carter recognized the possibility that tens of thousands of Cuban refugees would come in the Mariel boatlift and declared that the United States would receive them "with understanding, as expeditiously as we can . . . ."[18]

In response to the influx of Cuban and Haitian refugees, Congress enacted the Refugee Education Assistance Act (REAA).[19] The REAA created a special immigration classification for Cubans and Haitians.[20] Through this classification, the government treated Cuban aliens in many respects more generously than it normally treats excludable aliens.[21]

The Immigration and Nationality Act of 1980 (1980 Act), which governs excludable aliens, does not provide such aliens with many of the rights given to aliens deemed admitted.[22] An admitted alien

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[17] *Fernandez-Roque*, 622 F. Supp. at 898, n. 16 (quoting President Carter's address to the League of Women Voters).

[18] *Id.* President Carter's speech was interpreted to signify governmental approval of the boatlift. *See* N.Y. Times, May 6, 1980, at 1, col. 1.

[19] Pub. L. No. 96-422, 1980 U.S. CODE CONG. & ADMIN. NEWS (94 Stat.) 1799 (codified at 8 U.S.C. § 1522 note (1982)).

[20] This classification defines "Cuban and Haitian entrant" in the following manner:

> (1) any individual granted parole status as a Cuban/Haitian (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and
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> (2) any other national of Cuba or Haiti
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> (A) who
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> (i) was paroled into the United States and has not acquired any other status under the Immigration and Nationality Act;
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> (ii) is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act, or
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> (iii) has an application pending with the Immigration and Naturalization Service; and
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> (B) with respect to whom a final, nonappealable, and legally enforceable order of deportation or exclusion has not been entered.

Id. § 1501(e).

[21] *See Garcia-Mir*, 788 F.2d at 1451. The REAA includes a section which is applicable only to Mariel Cubans and Haitian refugees. 8 U.S.C. § 1501 (1982). This section enumerates procedures for the furnishing of assistance "for the processing, care, maintenance, security, transportation, and initial reception and placement in the United States of Cuban and Haitian entrants." *Id.* § 1501(c)(1)(A).

[22] 8 U.S.C. §§ 1101-1525 (1982). Chapter IV subjects those seeking admission to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." *Id.* § 1226(a). Chapter V concerns aliens who

is one who has gained entry into the United States, whether legally or illegally. The government must provide an admitted alien with due process proceedings before expelling him.[23] An excludable alien is one who has not yet gained entry into the United States, such as an alien whom the Immigration and Naturalization Service (INS) has taken into custody at the border.[24] The INS may exclude such an alien without proceedings conforming to due process.[25]

A court determining the due process rights of an alien may review the determinations made by the INS.[26] At least one circuit has found that the circumstances surrounding an alien's entry into the United States may change the status of an excludable alien. In *United States ex rel. Paktorovics v. Murff*,[27] the Second Circuit found that a presidential proclamation, coupled with legislative action, effected a change in the status of an excludable alien so that the INS should consider him constructively admitted.[28] In *Paktorovics* the Attorney

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already have entered the United States, and who are subject to "expulsion" if they fall within certain "general classes of deportable aliens." *Id.* § 1251.

The new Immigration Reform and Control Act, discussed at *infra* note 85, does not grant any new rights to excludable aliens.

[23] Rules regarding aliens who have gained entry into the United States are set forth in Chapter V of the Act. 8 U.S.C. §§ 1251-60 (1982). Decisions illustrating the distinction between the two classes of aliens include Leng May Ma v. Barber, 357 U.S. 185 (1958) (United States immigration laws distinguish between aliens seeking admission and those who have entered); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (alien on the threshold of initial entry stands on different footing from admitted alien); Maldonado-Sandoval v. Immigration and Naturalization Serv., 518 F.2d 278 (9th Cir. 1975) (differences between exclusion proceedings for excludable aliens and deportation proceedings for admitted aliens are significant).

[24] Chapter IV of the Act sets forth the rules regarding aliens seeking admission into the United States and subjects these aliens to exclusion proceedings. 8 U.S.C. §§ 1221-30 (1982). *See also* United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980) (en banc), *aff'd sub nom.*, United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982) (to accomplish "entry," alien must be present in the United States and be free of official restraint).

[25] 8 U.S.C. § 1226 (1982).

[26] While many courts have held that judicial review of INS or Attorney General decisions with respect to aliens is limited to determinations involving a final order of deportation, *see* Moret v. Karn, 746 F.2d 989 (2d Cir. 1984), Holley v. Immigration and Naturalization Serv., 727 F.2d 189 (1st Cir. 1984), other courts have interpreted the scope of their judicial review more broadly. *See infra* notes 45-49 and accompanying text.

[27] 260 F.2d 610 (2d Cir. 1958).

[28] *Id.* at 614. The court held that the President's act could not change the law, but it could effect a change in status sufficient to entitle the alien to constitutional protection. *Id.*

General had paroled Appellant, a Hungarian refugee, who was being held in a United States prison.[29] The Attorney General subsequently revoked Appellant's parole without a hearing when government officials discovered his membership in the Communist Party.[30] Appellant had come to the United States because of President Eisenhower's public pronouncements welcoming to the United States Hungarian refugees seeking escape from persecution in their home country.[31] Appellant argued that this "invitation" effected a change in his alien status, and that he should therefore be deemed admitted to the United States.[32] The Second Circuit agreed with Appellant, holding that the President's invitation provided the alien with a change in classification.[33] The court ruled that because Appellant was an admitted alien and thus had a constitutional right to parole, the government was required to provide Appellant with a parole revocation hearing.[34]

If an alien is unable to gain entry into the United States, the INS will consider the alien excludable under the exclusion provisions of the 1980 Act.[35] Under this Act the INS must attempt to deport an

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[29] Because the alien in this instance applied for and was granted parole into the United States prior to coming from Hungary and thus did not "enter" the country of his own volition, he was considered an excludable alien. *Id.* at 611.

[30] Paktorovics denied that he had communistic tendencies, and the United States officials handling the matter subsequently abandoned the issue of his communist connections. Instead, he was ruled to be deportable on the sole ground of his failure to produce a visa which neither he nor any other Hungarian refugee in his class possessed. *Id.* at 612.

[31] *Id.* at 613. The pronouncements that Paktorovics relied on were in President Eisenhower's Message to Congress on January 31, 1957. The President's message discussed the plight of the "[t]housands of men, women, and children [who] have fled their homes to escape Communist suppression." *Id.* President Eisenhower stated that "[o]ur position of world leadership demands that, in partnership with the other nations of the free world, we be in a position to grant asylum." *Id.* at 613-14.

[32] *Id.* at 614.

[33] *Id.* This change entitled Paktorovics to the constitutional protections generally reserved for admitted aliens. *See infra* note 60 and accompanying text for an explanation of the rights granted to admitted aliens.

[34] The court also considered the precedential effect of the decision in ruling for Appellant. If the court held for the government, the effect would be disastrous on the tens of thousands of other Hungarian refugees who came to the United States as a result of the President's promulgation of United States foreign policy. The United States could force these refugees to leave "on the mere say-so of a Government official, however unreasonable and capricious this say-so may be, and even if there is no basis whatever for such a ruling . . . . Under the special circumstances of the case of these Hungarian refugees, we think their parole may not be revoked without a hearing . . . ." *Id.* at 612.

[35] 8 U.S.C. § 1182 (1982). The INS will then determine whether the alien will be allowed to enter, or whether he will be deported. *Id.* § 1226(a).

excludable alien immediately.[36] If the INS is unable to deport the alien promptly, the 1980 Act provides for the alien's temporary detention until final disposition of his entry application.[37] Once the INS detains an excludable alien, the 1980 Act provides for the possibility of his parole into the United States.[38] The decision to parole falls within the discretion of the Attorney General.[39]

The Supreme Court has upheld the Attorney General's broad discretionary power to revoke or deny parole to an excludable alien without first granting the alien a revocation hearing. In *Shaughnessy v. United States ex rel. Mezei*,[40] the Court recognized this broad discretionary power by ruling that the government properly detained an excludable alien while attempting to deport him. Mezei claimed that since an alien parole statute existed, he had a right to be paroled into the United States. The Court held that an excludable alien has "not entered" the United States despite his presence here, and therefore could not challenge the Attorney General's discretionary procedures.[41]

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[36] *Id.* § 1227. "Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came . . . unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." *Id.* § 1227(a).

[37] *Id.* § 1225(b). The courts have long upheld the temporary detention of excludable aliens awaiting deportation. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228 (1896).

It was impossible for the Mariel Cubans to return to Cuba due to a deterioration in relations between the United States and Cuba. *See supra* note 7 for a discussion of attempts to return Appellees to Cuba.

[38] 8 U.S.C. § 1182(d)(5)(A) (1982). The Attorney General is permitted "in his discretion [to] parole into the United States temporarily under such conditions as he may prescribe for emergent reasons deemed strictly in the public interest any alien applying for admission to the United States." *Id.*

[39] Section 1182(d)(5)(A) is further implemented by the regulation found at 8 C.F.R. § 212.5(b) (1986). This regulation permits the district director in charge of a port of entry to parole into the United States temporarily, any alien applying for admission provided the alien satisfies various conditions found in 8 C.F.R. § 212.5(c) (1986). It should be noted, however, that the authority of the district director to parole is subject to the discretion of the Attorney General. *Id.* Moreover, courts have found it improper to interfere with the Attorney General's decision in granting parole. The Attorney General's discretionary power to grant parole to an excludable alien, as well as judicial review of such decision, is discussed in Note, *The Indefinite Detention of Excluded Aliens: Fernandez v. Wilkinson*, 1981 DET. C.L. REV. 925, 928-31 (1981).

[40] 345 U.S. 206 (1953).

[41] *Id.* at 212.

In *Jean v. Nelson*[42], the Court relied on *Mezei* in ruling that indefinitely incarcerated Haitian aliens could not challenge the Attorney General's decision to incarcerate them without first providing the aliens with a hearing. The Court decided that excludable aliens do not have standing to question the INS's parole policies. The aliens in *Jean* contended that the INS discriminated against Haitain entrants since its immigration policy centered on race and national origin. The Court found this discrimination constitutionally permissible, holding that the fifth amendment does not apply to the parole of unadmitted entrants.[43]

Under the 1980 Act a court's jurisdiction to review INS determinations is limited to "final orders of deportation."[44] Many courts, however, have interpreted the statutory provision broadly, upholding review of all matters which affect the final order.[45] Thus, courts have reviewed matters even where the challenge was to the denial of an adjustment in status.[46] In *Marino v. INS*[47], the Second Circuit ruled that the denial of an adjustment in an alien's status is subject to judicial review to determine whether the immigration judge correctly applied appropriate standards.[48] Moreover, the Second Circuit's re-

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[42] 105 S. Ct. 2992 (1985).

[43] *Id.* at 2999.

[44] 8 U.S.C. § 1105a(a) (1982). "The procedure prescribed by, and all the provisions of the Act of December 29, 1950 . . . shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States . . . ." *Id.*

[45] Chadha v. Immigration and Naturalization Serv., 634 F.2d 408 (9th Cir. 1980); *see also* Bae v. Immigration and Naturalization Serv., 706 F.2d 866 (8th Cir. 1983); Marino v. Immigration and Naturalization Serv., 537 F.2d 686 (2d Cir. 1976).

[46] *See* Bagamasbad v. Immigration and Naturalization Serv., 531 F.2d 111 (3d Cir. 1976), *rev'd on other grounds*, 429 U.S. 24 (1976) (rule of review of final deportation orders obtains even where challenge seeks review only of a denial of an adjustment of status); Galvez v. Howerton, 503 F. Supp. 35 (D.C. Cal. 1980) (district court has jurisdiction to review denial by INS of an adjustment in status).

[47] *Marino*, 537 F.2d at 690. The 1980 Act provides for an adjustment of a temporary alien's status, upon fulfilling the requirements of the section, to that of a person lawfully admitted for permanent residence. 8 U.S.C. § 1255 (1982). The adjustment of status from admitted alien to permanent resident is used here as an analogy to the "adjustment" of the status, by President Carter's proclamation, of an excludable alien to that of an admitted alien.

[48] In *Marino* an immigration judge had denied an alien's application for adjustment of status to that of permanent residence on the grounds that the alien had been convicted in Italy of a crime involving moral turpitude within the meaning of the Act, 8 U.S.C. § 1182 (1982). The Second Circuit ruled that as the Italian tribunal had prevented the alien from appealing the decision, the Italian conviction had never become final, and thus the alien was not rendered ineligible for adjustment of status.

view of the Attorney General's decision to exclude an alien in *Paktorovics* shows that a court may in certain circumstances review INS determinations other than deportation orders.[49]

III. COMMENT

The Eleventh Circuit based its decision in *Garcia-Mir v. Meese*[50] on the premise that Appellees as excludable aliens have no constitutional rights.[51] The court failed, however, to address the primary issue of whether Appellees should be classified as admitted aliens. The court rejected Appellees' claim of a constitutionally-based liberty interest in parole on the grounds that a right to parole arises from the Due Process Clause of the fifth amendment.[52] The court reasoned that Appellees could not assert such a right absent a privilege to claim constitutional protections generally. In so holding the court relied on precedent that permits excludable aliens to claim only those constitutional rights provided to them by specific legislation.[53] Consequently, the court found that for Appellees to successfully claim a constitutionally-based liberty interest in parole, they must point to a legislative act granting them constitutional protection.[54] The court found no such legislative act.[55] Therefore, by deciding the case in

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Marino, 537 F.2d at 690. In so holding the court found that the immigration judge's ruling on this matter was subject to judicial review, even though it could not be considered the final order of deportation as set forth in the Act, 8 U.S.C. § 1105a(a) (1982). *Marino*, 537 F.2d at 690.

[49] *Paktorovics*, 260 F.2d at 615. The court stated:

> We do not say that the discretion of the courts should be substituted for the discretion to be exercised by . . . law. We do say that there must be a hearing which will give assurance that the discretion of the Attorney General shall be exercised against a background of facts fairly contested in the open.

Id.

[50] 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986).

[51] *Id.* at 1449. The court relied on *Mezei*, 345 U.S. at 212, for the premise that excludable aliens cannot look to the Constitution to challenge adverse proceedings. For other cases illustrating this point, *see* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (aliens denied entry do not enjoy constitutional rights); *In re* Cahill, 447 F.2d 1343 (2d Cir. 1971) (same).

[52] *Garcia-Mir*, 788 F.2d at 1450.

[53] *Id.* For excludable aliens, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

[54] *Garcia-Mir*, 788 F.2d at 1450.

[55] The court ruled that the Refugee Education Assistance Act of 1980, *supra* note 4, cannot be read as setting in place the necessary limits on discretion because the

this manner, the court avoided a constitutional question and resolved the case on narrow grounds.[56]

The Eleventh Circuit next examined the merits of Appellees' claim of a protected, nonconstitutionally-based liberty interest.[57] The trial court had found such a protected interest, ruling that President Carter's invitation, as well as the creation of a special immigration classification for Mariel Cubans, limited the Attorney General's discretion to revoke an alien's parole. The trial court found that this discretionary limitation resulted in a nonconstitutional liberty interest in parole protected by the Constitution.[58] The court of appeals disagreed with this analysis, noting a lack of precedent to support the trial court's reasoning.[59]

In their analyses both the trial court and the Eleventh Circuit failed to address the threshold question of Appellees' alien status. The courts began with the premise that Appellees were excludable aliens

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purpose of that Act was not to effect parole. *Garcia-Mir*, 788 F.2d at 1452.

The court also evaluated Appellees' argument that nonconstitutionally-based liberty interests could arise absent particularized limitations on official discretion. Appellees relied on Morrissey v. Brewer, 408 U.S. 471 (1972), in claiming that a state's grant of freedom to a prisoner creates a nonconstitutional liberty interest, regardless of the existence of particularized standards limiting discretion. The court rejected this argument finding "a crucial distinction between being deprived of a liberty one has . . . and being denied a conditional liberty that one desires." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 9 (1979), *quoted in Garcia-Mir*, 788 F.2d at 1453. Since the court assumed Appellees were excludable aliens, they had no liberty. Any resemblance to liberty was merely an extension of their detention. *Id. See Leng May Ma*, 357 U.S. at 185; *see also* Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960).

[56] The issue the court failed to address was whether the Constitution applied to excludable aliens to the extent of giving them constitutionally-protected, nonconstitutionally-based due process rights. It should be noted, however, that a court always should avoid deciding a case on a constitutional question when alternate grounds exist, *see* Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); (Brandeis, J., concurring). The alternate grounds chosen by the Eleventh Circuit in this case, however, were not necessarily those that would provide the better-reasoned result. *See infra* notes 73-76 and accompanying text.

[57] The court did not have to consider the nonconstitutional liberty interest claim since its holding that excludable aliens are not entitled to any constitutional rights, practically speaking, nullified Appellees' claim. Presumably the court went further to protect itself in the event of an appeal.

[58] *See Fernandez-Roque*, 622 F. Supp. at 887.

[59] Appellees referred the court of appeals to *Paktorovics* to evidence the proposition that the President's act created a liberty interest. The court rejected this argument. *Garcia-Mir*, 788 F.2d at 1451. *See infra* notes 67-74 for a discussion of the Eleventh Circuit's analysis of *Paktorovics*.

and thus failed to consider whether executive action had changed Appellees' status to admitted aliens. This consideration is vital because once the United States admits an alien, he is afforded a variety of constitutional rights.[60] Although the INS may exclude an alien using provisions of the 1980 Act,[61] certain circumstances can effect a change in the alien's status and in the constitutional protection he can expect.

One example of the circumstances which can effect a change in an alien's status is found in the *Paktorovics* case.[62] In that case the Second Circuit found that because Appellant came to the United States in response to the President's invitation, the United States had effectively admitted him.[63] The court determined that while the President could not change the law by inviting Hungarian refugees to the United States, he could alter their legal rights by changing their immigration status.[64] Subsequently, the Second Circuit concluded that the Constitution required a hearing prior to the revocation of Appellant's parole.[65]

The Eleventh Circuit should have applied the *Paktorovics* reasoning and afforded Appellees in *Garcia-Mir* admitted status. This appli-

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[60] *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (the children of illegal aliens have a right to free public education); Graham v. Richardson, 403 U.S. 365 (1971) (undocumented aliens have a liberty interest in welfare benefits); Truax v. Raich, 239 U.S. 33 (1915) (right to earn living in common callings); *but see* Mathews v. Diaz, 426 U.S. 67 (1976) (Congress has no duty to give all aliens the full benefits of citizenship).

[61] 8 U.S.C. § 1182 (1982). *See supra* note 35 and accompanying text for an explanation of how and why the INS may exclude an alien.

[62] *Paktorovics*, 260 F.2d at 610. For an explanation of the *Paktorovics* decision and the circumstances that led to the court's determination that Appellant was to be treated as an admitted alien, *see supra* notes 27-34 and accompanying text.

[63] The Second Circuit held Appellant had been admitted not only due to the presidential invitation, but also because of the legislative enactment endorsing the President's act. *Paktorovics*, 260 F.2d at 614. The *Paktorovics* decision may be interpreted to imply that such legislative action is not necessary, as the court held that the tender and acceptance of such an invitation alone creates a change in an alien's status. *Id.*

[64] *Id.* The court stated:

> True it is that the President has no power to change the law by inviting Paktorovics and the other Hungarian refugees to come here, but this is not to say that the tender of such an invitation and its acceptance by him did not effect a change in the status of Paktorovics sufficient to entitle him to the protection of our Constitution.

Id. The Second Circuit's ruling supports the conclusion that reliance on an executive act can give rise to a change in an alien's status.

[65] *Id.* The court's ruling illustrates that a court may find that an alien, whom the government originally classed excludable, could undergo a change of status to that of an alien now admitted to the United States.

cation would have resulted in a better-reasoned and equitable decision. Instead, the Eleventh Circuit found that *Paktorovics* was *sui generis* and must be limited to its facts.[66] The facts presented in *Paktorovics*, however, were essentially identical to the facts of *Garcia-Mir*. Although the Second Circuit's opinion is only persuasive authority, the Eleventh Circuit should have more thoroughly considered the application of the *Paktorovics* reasoning in this situation. The Eleventh Circuit misinterpreted the *Paktorovics* decision and, as a result, failed to see that the President's proclamation had in effect admitted Appellees to the United States. This error ultimately resulted in the denial of Appellees' constitutional rights.

The Eleventh Circuit misinterpreted *Paktorovics* as holding that a presidential proclamation created a nonconstitutionally-based liberty interest to benefit an excludable alien.[67] The court distinguished *Paktorovics* by stating that in *Paktorovics*, Congress had subsequently enacted legislation endorsing the President's action. The Eleventh Circuit ruled that the REAA did not satisfy the standard set forth in *Paktorovics* because the REAA was not enacted to endorse President Carter's proclamation.[68]

The Eleventh Circuit should have interpreted *Paktorovics* as holding that the President's invitation to a class of refugees to come to the United States changes their status from excludable to admitted aliens.[69]

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[66] *Garcia-Mir*, 788 F.2d at 1451, n.5. A *sui generis* decision is "[o]f its own kind or class." BLACK'S LAW DICTIONARY 1286 (5th ed. 1979). The court in *Paktorovics* considered that their decision was *sui generis*, but this does not preclude the Eleventh Circuit from utilizing the Second Circuit's reasoning when presented with analogous facts.

[67] *Id.*

[68] *Garcia-Mir*, 788 F.2d at 1452. The trial court in *Fernandez-Roque* had identified creation of a special immigration classification as the legislative enactment to support the President's act. The Eleventh Circuit rejected a similar holding because Congress did not enact the REAA to specifically endorse the President's proclamation. The REAA can be viewed as a tacit endorsement of the President's act, however, because of its substance and its timing. If the Eleventh Circuit had utilized the reasoning first set out in *Paktorovics*, thus taking the view that the President's act had admitted the aliens, it would not be necessary to look to a legislative enactment. *See supra* notes 63-64 and accompanying text.

[69] The author's view is that a presidential act can alter the status of an alien. As a result of the inherent executive power over immigration and broad delegations of discretionary authority set forth in the Act, the separation-of-powers doctrine places few restrictions on executive officials dealing with aliens seeking admission to the United States. *See* 8 U.S.C. §§ 1182(d)(5)(A), (f), 1185(a)(1) (1982); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985); Executive Order No. 12172, 1-101 et. seq., 8 U.S.C. § 1182 note (1982). Although this proposition would more directly apply to the acts of the Attorney General, it can be extended to apply to all executive officials, including the President.

Such a change creates substantial constitutional due process rights in Appellees.[70] The court was justified in reviewing the INS decision to exclude the aliens, just as other circuits have reviewed INS decisions.[71] The Eleventh Circuit, however, did not address the threshold question of whether Appellees' status was that of excludable or admitted aliens and thus deprived Appellees of constitutional protection. This was a poor way to address the problem in light of public policy that prohibits an individual's unnecessary, prolonged detention.[72] The Eleventh Circuit's reasoning was faulty for not addressing the vital threshold question of Appellees' status, and this faulty reasoning will have great impact on the nearly two thousand Mariel Cubans being detained in the Atlanta Federal Penitentiary.[73]

Appellees were not seeking a grant of freedom from the Eleventh Circuit, only an opportunity to be heard as the first step toward that freedom.[74] Parole revocation hearings would give Appellees the chance to present their cases and provide the INS the opportunity to determine the feasibility of releasing each individual Appellee. Such a process diminishes the possibility that Appellees, if released from prison, would endanger themselves or the community.[75] If any of these aliens

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[70] *See supra* note 60 for authority illustrating the constitutional due process rights vested in admitted aliens.

[71] 8 U.S.C. § 1105(a) (1982). The Eleventh Circuit had the power of judicial review over the Attorney General's classification of Appellees as excludable aliens. *See supra* notes 44-49 and accompanying text for discussion of how various circuits have defined their power to review INS determinations.

[72] Although the Eleventh Circuit found that international law is not applicable where controlling legislative or executive acts exist, *see supra* note 9, one may look to general principles of international law to find examples of public policy promulgated by our nation and others. *See The Paquete Habana*, 175 U.S. 677 (1900). *The American Convention on Human Rights*, 77 DEPT. STATE. BULL. 28 (1977) provides that no one shall be subject to an arbitrary arrest or imprisonment. Likewise, *The Universal Declaration of Human Rights*, U.N. Doc. A/801 (1948), provides that no one shall be subject to an arbitrary detention. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1953), provides that one deprived of his liberty shall be entitled to a prompt determination of the lawfulness of the detention.

[73] In *Paktorovics* the Second Circuit evaluated equitable considerations in reaching its conclusion. The court reasoned that to rule against Appellant would have disastrous effects on the whole class of Hungarian refugees.

[74] These aliens have been living freely in American society since their arrival in the United States. Consequently, when they entered the penitentiary, many left behind wives and children who are United States citizens. *See Fernandez-Roque*, 622 F. Supp. at 895, n.12.

[75] The Eleventh Circuit's chosen analysis led to a conclusion that was not wholly improper. The court justifiably found that absent a limitation on the Attorney

were, in fact, a danger to themselves or society, a parole hearing would bring this fact to light, and the alien would not be released.

The Act provides for the exclusion of aliens with a history of criminal conduct or mental incompetence,[76] but most Appellees had no such record.[77] Although the fact that many of these aliens had committed crimes in the United States could be considered by the INS for parole purposes, it does not affect the fact that the President's actions initially admitted Appellees. The Eleventh Circuit should have seen these aliens as admitted, and as such, the aliens would be entitled to the protections that are afforded by our Constitution to all persons convicted of crimes.[78]

General's discretion to grant parole, excludable aliens could not claim a nonconstitutionally-based, protected liberty interest in parole. Furthermore, policy considerations regarding the feasibility of granting parole hearings, and ultimately parole, to thousands of refugees provided strong reasons for rejecting Appellees' claims. It is this author's contention, however, that the Eleventh Circuit's chosen analysis was not the best approach to the situation, and that the policy considerations of administrative feasibility are secondary to the protection of Appellees' basic human rights.

[76] 8 U.S.C. § 1182(a)(1)-(4), (9), (10), (23) (1982).

[77] According to Judge Shoob, there are only 300 to 400 Mariel Cubans in the Atlanta Federal Penitentiary who had criminal records in Cuba or a history of mental incompetence which resulted in their never being paroled into the United States. *Fernandez-Roque*, 622 F. Supp. at 891. The rest of the Mariel Cuban inmate population of over 1,800 consists of those who were initially paroled into the United States and subsequently had their paroles revoked. *See supra* note 2 for an explanation of how the district court divided the class into two sub-classes. *See supra* note 6 for the Attorney General's reasons for revoking Appellees' parole.

[78] One charged with a crime in the United States has numerous rights under the United States Constitution. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 13-27 (1974). The fifth amendment guarantees an accused individual the right to a grand jury indictment, the right not to be placed in double jeopardy, the right not to incriminate one's self, and the right not to be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. The sixth amendment guarantees an accused individual the right to a speedy trial, the right to an impartial jury, the right of notice, the right to confront adverse witnesses, and the right to an attorney. U.S. CONST. amend. VI. The seventh amendment grants the accused the right to a trial by jury. U.S. CONST. amend. VII. The eighth amendment guarantees an accused criminal the right to bail and the right to be free from cruel and unusual punishments. U.S. CONST. amend. VIII. These rights are granted to an admitted alien charged with a crime in the United States, regardless of whether he entered the country legally or illegally. *See Wong Wing*, 163 U.S. at 228 (due process clause of fifth amendment applicable to aliens); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (equal protection of the laws to all persons, including aliens). The courts have found that excludable aliens are not entitled to these constitutional protections. *See supra* note 51.

The United States Supreme Court has denied *certiorari* in this case,[79] and as a result, the ramifications of the Eleventh Circuit's decision will be far-reaching and damaging to the Mariel Cubans being detained in this country. The government detains virtually all Cuban refugees in the Atlanta Federal Penitentiary,[80] and therefore, the Eleventh Circuit will hear any future actions brought by these aliens. The Eleventh Circuit, however, in dismissing this action, ruled that Appellees had exhausted all the legal possibilities in their attempt to regain their freedom.[81] Although the decision does not preclude the Mariel Cubans from bringing future actions, in light of the Eleventh Circuit's position in *Garcia-Mir*, it is unlikely that such actions will be successful.

The Eleventh Circuit's decision answers the question of whether the Constitution affords safeguards to excludable Cuban refugees. The decision, however, does not provide any hope for the Cubans being indefinitely detained in Atlanta. Appellees' only hope for freedom at this point lies in the new INS release program.[82] Attempting to gain parole through this program, however, will be a slow if not futile process applicable only to a small number of Appellees.[83] If

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[79] *Cert. denied*, 107 S. Ct. 289 (1986).

[80] There are approximately 1,300 Cuban aliens being held in INS detention centers and county jails nationwide, but under a new INS release program, these aliens are in the process of being moved to Atlanta. Atlanta Journal-Constitution, Nov. 8, 1986, at 1A, col. 1 (hereinafter Journal-Consitution). For a discussion of the INS's new release program and its possible effects on Appellees, *see infra* notes 82-83 and accompanying text.

[81] *Garcia-Mir*, 788 F.2d at 1455.

[82] The INS's new release program, announced Friday, November 7, 1986, provides that between 500 and 700 Cuban detainees at the Atlanta Federal Penitentiary will be moved to a minimum-security detention center for rehabilitation and eventual parole. Journal-Constitution at 1A, col. 1. These aliens will receive educational and vocational training at a detention facility in Oakdale, Louisiana, and then will be evaluated for possible parole to halfway houses. *Id.* Only 45 Cubans, however, are initially being moved to Oakdale, and the population of Cuban detainees in Atlanta will remain constant in the foreseeable future because as eligible Cubans are moved out, detainees from other institutions will be transferred to Atlanta. *Id.* at 20A, col. 6.

This program does not provide adequate resolution of the plight facing Appellees because the process is slow, taking up to two years to process all eligible Cuban detainees. Moreover, the program only applies to a small percentage of Appellees. *Id.* at 1A, col. 1. The plan does not appear to provide for preliminary hearings at which a detainee can present a case for his eligibility to the program. Furthermore, the program will not provide eligible detainees with total freedom because eventual parole will be to halfway houses. *Id.* at 1A, col. 1.

[83] The program simply does not provide Appellees with the opportunities that

the Eleventh Circuit had found that Appellees were admitted aliens, Appellees would have been eligible for parole revocation hearings as well as other constitutional protections.[84] This would provide a more practical means of protecting Appellees.

Unfortunately, it is unlikely that Congress will take any action to alleviate Appellees' situation in light of the passage of the Immigration Reform and Control Act of 1986.[85] This new Act is inapplicable to excludable Cuban aliens, including Appellees, following the Eleventh Circuit's decision in *Garcia-Mir*. Appellees have been singled out as a class, and it is inconsistent with United States ideals of fairness and democracy that they should remain in jail indefinitely, long after they have served the sentences for any crimes committed in the United States.[86]

IV. CONCLUSION

Appellees came to the United States in reliance on President Carter's public pronouncement that the United States Government would wel-

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constitutional protection would provide. The only possibility for Appellees to receive constitutional protection is for a court to determine that presidential action altered their status to that of admitted aliens.

[84] *See supra* note 60 for authority that illustrates the constitutional due process rights vested in admitted aliens.

[85] S. 1200, 99th Cong., 2d Sess., 132 CONG. REC. H10068-91 (daily ed. Oct. 14, 1986). The new law provides for the legalization of status of illegal aliens who entered the United States before January 1, 1982, to that of persons admitted for lawful residence. *Id.* at H10076. Although it is not known how many aliens are eligible for legalization through the new provisions, *see* Lauter, *Immigration Law's New Sweep*, Nat'l L.J., Nov. 3, 1986, at 3, col. 1, it is clear that excludable aliens being detained in the Atlanta Federal Penitentiary are not eligible. The new law states that "any alien . . . who is a national of Cuba or Haiti, who arrived in the United States before January 1, 1982" is eligible for adjustment of status "to that of an alien lawfully admitted for permanent residence if . . . the alien is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence . . . ." 132 CONG. REC. at H10078. In this way Congress makes the new law inapplicable to excludable Cuban entrants. The law makes an exception for those aliens who are excludable under 8 U.S.C. § 1182(a)(20) (1982) for lack of proper entry documents, as well as seven other excludable classes inapplicable to Appellees. *Id.* While the new law grants legally admitted status to the majority of Mariel Cubans who came to the United States in the Mariel boatlift prior to 1982, Appellees have been considered excludable aliens, and as such they are not affected by the new law. By presuming Appellees were excludable aliens, and thus not addressing the issue of whether executive action changed Appellees' status, the Eleventh Circuit has denied Appellees the opportunity to be granted "amnesty" with regard to their status under the new law.

[86] *See supra* note 6 for a discussion of the different crimes and violations Appellees have committed which led the Attorney General to revoke their parole.

come them into the country.[87] Appellees were excluded from entry but paroled into the United States by the Attorney General. The Attorney General subsequently revoked Appellees' parole and has been detaining them indefinitely in the Atlanta Federal Penitentiary pending Cuba's decision to take them back.[88]

The government's detention of Appellees without due process hearings is unfair in light of policy considerations[89] and case authority enabling the Eleventh Circuit to consider their status.[90] The Eleventh Circuit should have addressed the issue of whether President Carter's actions had admitted Appellees, thus providing Appellees with certain constitutional protections. Not only would this have resulted in a better-reasoned opinion, but also it would have been a more equitable solution to the problem of Cuban detention.[91] In the *Garcia-Mir* decision, the Eleventh Circuit addressed the problem meekly, declining to put an end to the detained Marielitos' desperate situation.

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[87] *See supra* note 3.

[88] *See supra* notes 7, 37 and accompanying text for discussion of the government's indefinite detention of excludable aliens. *See supra* note 7 for discussion of the United States efforts asking Cuba to readmit the aliens.

[89] *See supra* note 72 for explanation of the United States and other countries' public policies that prohibit indefinite detention of excludable aliens.

[90] *See supra* notes 44-49 and accompanying text for discussion of how various circuits have defined their scope of judicial review over INS determinations. *See also* notes 61-65 and accompanying text for a discussion of the *Paktorovics* decision, demonstrating how another circuit handled a situation with facts similar to those presented in *Garcia-Mir*.

[91] *See supra* note 73 for an explanation of the Second Circuit's consideration of equitable ramifications when presented with a case factually similar to that of *Garcia-Mir*.