# CAN INTERNATIONAL LAW PROVIDE EXTRA-CONSTITUTIONAL PROTECTION FOR EXCLUDABLE ALIENS?

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By its very nature, since its very beginning the United States has been a nation of immigrants, first from Europe, later from other parts of the world. Among them were many refugees, escaping, like the Pilgrims and Quakers, religious persecution, or from countries ruled by domestic or foreign tyrants, or in which most inhabitants were mired in perpetual poverty. Between 1820 and 1985 over 94 million immigrants were admitted.[1] Until the 1920s, the United States' doors were open to almost all of them,[2] but after the First World War one immigration law after another established various restrictions. Some additional restrictions were imposed after the Second World War. The basic immigration legislation of 1917 and 1921 was revised frequently (especially in 1924, 1952, 1965, 1976, 1978), sometimes for the worse, but more often for the better, and in 1980 a Special Refugee Act[3] was adopted, which was designed to implement the United States' acceptance of the 1967 Protocol Relating to the Status of Refugees.[4] More than 500,000 persons per year have been admitted to the United States in recent years, many of whom were

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[1] Michael S. Teitelbaum, Intersections: Immigration and Demographic Change and Their Impact on the United States, in WORLD POPULATION AND U.S. POLICY 133, 139-47 (J. Menken, ed. 1986).

[2] *But see* the decision of the U.S. Supreme Court in Chae Chan Ping v. United States (the Chinese Exclusion Case), 130 U.S. 581 (1889) (upholding the validity under international law of U.S. statutes designed to stem the flow of Chinese immigrants after the California Gold Rush), and the comment thereon in Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

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

[4] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

in fact refugees, though they were able to qualify for admission without having to rely on their refugee status. As Adlai Stevenson, then U.S. representative to the United Nations stated in 1961 during a discussion on Cuban refugees in the General Assembly, "[s]o long as Americans remain a free people, just so long will they uphold the right of asylum as a fundamental human right."[5]

This paper focuses on the problems of those who do not qualify for a regular admission as refugees, but are detained at the entrance point, or are detained in the United States after being released on temporary parole or pending repatriation. The thesis I shall try to defend is that these persons must be treated according to basic rules of humanitarian law; that they are entitled to be treated as human beings, regardless of any particular legislation or administrative regulations depriving them of basic legal protection granted to citizens and regular residents of the country. Justice Stevens pointed out a few years ago that

> [n]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. . . .[I]t [is] self-evident that all men were endowed by their Creator with liberty as one of the cardinal inalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.[6]

It is for liberty that the people of the United States fought the War of Independence, and the whole history of the United States centers on the sacredness of this basic freedom.

Nevertheless, the position in the United States of some refugees (or—as the United States calls them—"detainees") does not reflect this historic imperative. I would like to explore in some detail how the United States got itself into this unhappy situation. I shall discuss in this connection two cases, one involving the Haitian refugees, and one relating to the Cuban ones.

Traditionally, persons trying to enter the United States and stopped at the border have had no right to contest the ruling of the immigration authorities that they are not admissible. When a German "war bride" of an American soldier tried to enter the United States under a special

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[5] 44 DEPT. ST. BULL. 681, 684 (1961); 8 Whiteman, Dig. Int'l L. 670-71 (1976); for a critical view of the INS's role in asylum adjudication, in particular, since passage of The Refugee Act of 1980, *see* Michael P. Brady, *Asylum Adjudication: No Place for the INS*, 20 COLUM. HUM. RTS. L. REV. 129 (1988).

[6] Hewitt v. Helms, 459 U.S. 460, 483 (1983) (Stevens, J. dissenting).

War Brides Act of 1945,[7] which authorized admission of any such alien spouse, not physically or mentally defective and "otherwise admissible,"[8] the Supreme Court held that she could be excluded from the United States without a hearing, solely upon the finding by the Attorney General that her admission would be prejudicial to the interest of the United States. The Court pointed out that "an alien who seeks admission to this country may not do so under any claim of right"; that such admission "is a privilege granted by the sovereign United States Government . . . only upon such terms as the United States shall prescribe."[9] It was not within the province of any court to review the determination of the political branch of the Government to exclude a given alien, and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[10] The Attorney General was exercising in the instant case "the discretion entrusted to him by Congress and the President."[11] His decision was based on confidential information, and he denied the petitioner "a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security."[12]

In *Shaughnessy v. United States ex rel. Mezei*, the Attorney General excluded an alien who was detained on Ellis Island.[13] Seeking a writ of habeas corpus, after several months of detention, the alien claimed that his continued detention violated the due process clause of the Constitution. The Federal District Court authorized his temporary admission on bond, and the Circuit Court affirmed the action.[14] The

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[7] 59 Stat. 659.

[8] *Id.*

[9] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[10] *Id.* at 544.

[11] *Id.*

[12] *Id.* Originally, this authority to refuse a hearing could be used only during a war or a national emergency proclaimed by the President, but later statutes allow the exclusion of aliens on grounds connected with subversion, on the basis of confidential information and without a hearing. *See* 1952 Immigration and Nationality Act, § 235(c), 8 U.S.C. § 1225(c) (1988); for comment critical of the view advanced in *Knauff* that courts owed extreme deference to whatever procedures Congress and the Executive Branch decided on, *see Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322-24 ("the Court [in Knauff] deviated sharply from fifty years of doctrinal development. The Court relied on its earliest exclusion cases and disregarded its own more recent precedents in which it had come to recognize a judicial responsibility to ensure that aliens seeking admission not be subjected to unrestrained official discretion.").

[13] Shaughnessy v. Unites States *ex rel.* Mezei, 345 U.S. 206 (1953).

[14] *Id.* at 209.

Supreme Court held, however, that courts cannot retry the determination of the Attorney General. The Court held that the Congress authorized temporary removal of aliens from ship to shore, pending determination of their admissibility, but such shelter ashore "'shall not be considered a landing' nor relieve the vessel of the duty to transport back the alien if ultimately excluded."[15] Such temporary arrangement does not affect an alien's status; "he is treated as if stopped at the border."[16] In particular, the Court decided that the Attorney General's continued exclusion of the alien for a period of 21 months at Ellis Island without a hearing did not constitute an unlawful detention and he was not entitled to be released on bond; and that such continued exclusion did not deprive him of any statutory or constitutional right.[17] Four judges dissented, Justices Jackson and Frankfurter pointing out that "[b]ecause the respondent has no right of entry, does it follow that he has no rights at all?"[18] They concluded that the alien's detention could be enforced only through procedures "which meet the test of due process."[19] Justices Black and Douglas also thought that such "continued imprisonment without a hearing violate[d] due process of law."[20] They pointed out that "individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts."[21]

Similarly, the *Mezei* decision was heavily criticized in legal commentaries thereon. For instance, Professor Davis, a leading authority on administrative law, stated that the holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered.[22] Similarly, Professor Martin remarked that this case propounded "a rather scandalous doctrine, deserving to be distinguished, limited or ignored."[23]

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[15] *Id.* at 215 (construing 8 U.S.C. §§ 151, 154).
[16] *Id.*
[17] *Id.* at 209, 215.
[18] *Id.* at 226.
[19] *Id.* at 227.
[20] *Id.* at 217.
[21] *Id.* at 218.
[22] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 11:5 at 358 (2d ed. 1979).
[23] David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983). The reason for

To facilitate the admission to the United States of some undocumented aliens, the Immigration and Nationality Act was amended to provide that "[e]very alien. . .who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer."[24] To avoid undue hardships, the Attorney General was authorized "in his discretion" to parole into the United States any such alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."[25] The statute made clear, however, that such parole shall not be regarded as an admission of the alien, and that the alien has to be returned to custody when in the opinion of the Attorney General the purposes of the parole have been served.[26]

As was noted by the Supreme Court in the *Jean v. Nelson* case, the Immigration and Naturalization Service (INS) had followed a policy of general parole for most undocumented aliens (largely from Eastern Europe, Middle East and Southeast Asia) until the late 1970s, when large numbers of such aliens started arriving from Haiti and Cuba.[27] The Attorney General became concerned about this influx and ordered the INS to detain without parole any immigrants who could not present a prima facie case for admission. Without any new statute or regulations, this policy was put immediately into operation. A group of Haitians, incarcerated and denied parole, filed a suit seeking a writ of habeas corpus under 28 U.S.C.§ 2241 and asking for declaratory and injunctive relief. They claimed that the change in parole policy was made in violation of the Administrative Procedure Act (APA), as the rulemaking procedure requiring notice and time for comments was not observed. They also alleged that they were

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this scandalousness, according to Professor Martin, is that the doctrine

> affronts the tradition that our Constitution extends rights to aliens and citizens alike. This broad reach is one of the proudest elements of our constitutional heritage . . . . Moreover, we usually assume, for good reasons brought home to us by the Court's attempt to hold otherwise in 1857 [the Dred Scott decision], that mere membership in the human species, combined with physical presence, is enough to call our constitutional protections fully into play.

*Id.*, 176-77.

[24] 66 Stat. 163, 199 (codified as amended at 8 U.S.C. § 1225(b) (1988).

[25] 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)(A) (1988).

[26] *Id.*

[27] Jean v. Nelson, 472 U.S. 846, 849 (1985).

being discriminated against on the basis of race and national origin, because they were black and Haitian.[28] The District Court held that the new policy was not promulgated in accordance with the APA, declared it "null and void," and ordered that some 1,700 incarcerated Haitians be released.[29] The INS released them all on parole and, as requested by the court, promulgated promptly a new rule that required even-handed treatment and prohibited the consideration of race and national origin in the parole decision.[30] Some 100-400 Haitians continued to be held in detention, either because they violated the terms of their parole, or arrived in Florida after the court's judgment.[31] The INS officers appealed the decision on the APA and the petitioners appealed on the discrimination issue.[32]

A panel of the Court of Appeals for the Eleventh Circuit affirmed the decision concerning the APA claim, and held that the Fifth Amendment's equal protection guarantee applied to parole of unadmitted aliens, and that the lower court's finding of no invidious discrimination was erroneous (*Jean I*).[33] The panel ordered continued parole for the Haitians, an injunction against discriminatory enforcement of INS parole policies, and any further relief necessary "to ensure that all aliens, regardless of their nationality or origin, are accorded equal treatment."[34] The Eleventh Circuit granted a rehearing en banc, and held that the APA claim was moot as the Government was no longer detaining any original class members under the stricken incarceration and parole policy (*Jean II*).[35] It also held that the Fifth

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[28] *Id.*

[29] Louis v. Nelson, 544 F. Supp. 973, 1003-04 (S.D. Fla. 1982), *stay denied*, Jean v. Nelson, 683 F.2d 1311 (11th Cir. 1982), *aff'd in part and rev'd in part*, 711 F.2d 1455 (11th Cir. 1983). For background information on the evolution of this situation, and the role the 1980 Refugee Act played in its advent, *see* David P. Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUM. RTS. Q. 382, 395-400 (1987); for further review of the 1980 Refugee Act, and more focused criticism on the limits the Act placed on entry for the Haitians, *see* Animesh Ghoshal & Thomas M. Crawley, *Refugees and Immigrants: A Human Rights Dilemma*, 5 HUM. RTS. Q. 327 (1983); for a related case, in which the U.S. Coast Guard, acting pursuant to a Presidential proclamation, interdicted a Haitian vessel on the high seas for carrying illegal aliens, *see* Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.C. Cir. 1985).

[30] Jean v. Nelson, 472 U.S. 846, 850-51.

[31] *Id.* at 851.

[32] *Id.*

[33] Jean v. Nelson, 711 F.2d 1455, 1509 (11th Cir. 1983).

[34] *Id.* at 1509-10.

[35] Jean v. Nelson, 727 F.2d 957, 962 (11th Cir. 1984), *reh. denied*, 733 F.2d 908 (11th Cir. 1984), *aff'd* 472 U.S. 846 (1985).

Amendment did not apply to the consideration of unadmitted aliens for parole, as the Attorney General was granted by the statute discretionary authority to discriminate on the basis of national origin in parole decisions.[36] Nevertheless, on the basis not of the law but of the revised INS parole regulations which require parole decisions to be made without regard to race or national origin, the en banc court remanded the case to the District Court to ascertain whether lower-level INS officials "have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors."[37] The District Court was to ensure that the INS had exercised its broad discretion in an individualized and nondiscriminatory manner.[38]

Before the Supreme Court, the petitioners contended that this case did not implicate the authority of the Congress, the President, or the Attorney General, but was limited to challenging the power of low-level politically unresponsive government officials whose actions violated not only federal statutes but also the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement (*Jean III*).[39] The petitioners asked for "declaratory and injunctive relief," to be ordered by the Supreme Court on the basis of the Fifth Amendment.[40] The Supreme Court held that there was no need to consider the constitutional issues, as the matter could be solved through the application of the relevant statutes and regulations, and affirmed the en banc judgment mandating the District Court to determine whether the lower INS officials have made individualized determinations and exercised their broad discretion under the statutes and regulations without regard to race or national origin.[41]

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[36] *Id.* at 963.

[37] *Id.*

[38] *Id.* at 978-79.

[39] Jean v. Nelson, 472 U.S. at 853.

[40] *Id.* at 854.

[41] *Id.* at 857. The Court's reluctance to deal with any constitutional aspects is indicative of its traditional reticence in the immigration field. For explanation, *see* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984)

> Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. In a legal firmament transformed by revolutions in due process

Justice Marshall (in a dissenting opinion, in which Justice Brennan joined) severely criticized this opinion for refusing to decide the basic issue whether unadmitted aliens who were detained at various federal facilities pending the disposition of their asylum claims "may invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause to challenge the Government's failure to release them temporarily on parole."[42] In his view, the Court should have held that the petitioners had "a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin."[43] He pointed out that in a brief filed by the Government when the case was before the en banc Court of Appeals, the contention was made that "the Executive is not precluded from drawing nationality-based distinctions, for Congress has delegated the full breadth of its parole and detention authority to the Attorney General," and the argument was also made that "Congress knows how to prohibit nationality-based distinctions when it wants to do so. In the absence of such an express prohibition, it should be presumed that the broad delegation of authority encompasses the power to make nationality-based distinctions."[44] Justice Marshall also pointed out that there was no evidence that the Attorney General had in any fashion narrowed the discretion of lower INS officials to take race and national origin into account in making parole decisions.[45]

Justice Marshall emphasized the need for excludable aliens to enjoy Fifth Amendment protections.[46] Ironically, when an alien detained at the border is criminally prosecuted, he enjoys at trial all of the protections that the Constitution provides to criminal defendants, but as soon as he has completed serving the sentence for his crime, he is supposed to lose such protections.[47] He also pointed out that the Court made clear in *Plyler v. Doe* that under a parallel provision of the Fourteenth Amendment an alien, whatever his status under the immigration laws, "is surely a 'person' in any ordinary sense of that term," and is entitled under that Amendment to be protected against

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and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.

[42] *Id.* at 858.
[43] *Id.*
[44] *Id.* at 863.
[45] *Id.* at 863-64.
[46] *Id.* at 873.
[47] *Id.*

any deprivation of "life, liberty or property."[48] Justice Marshall pointed out that in some early cases on which the Government relied, security considerations were involved and a temporary parole could have resulted in a renewed threat to national security (e.g., sabotage or espionage), but that the petitioners were being detained only because the government had "not yet performed its statutory duty to evaluate their applications for admission."[49] In performing that duty, the Government may not discriminate on the basis of race or national origin.[50]

While Justice Marshall relied here on the Constitution as the source of the non-discrimination and equal protection rules, it may be added that in recent years this broad interpretation of the rule has been strengthened by the acceptance by the United States of the Charter of the United Nations, in which it pledged to promote "respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[51] As the Court has done in other cases involving protection of human rights, it should be guided here by "civilized standards of decency,"[52] as evidenced by many international instruments relating to human rights generally or specifically to refugees and seekers of asylum. They provide useful guidelines for an enlightened interpretation of the Fifth Amendment's provision protecting a person's liberty.

The other case, which I would like to discuss, is even more pathetic than the case of the Haitians. It started with a great humanitarian gesture. On April 14, 1980, President Carter announced that, because of "great humanitarian needs," up to 3,500 Cubans would be admitted to the United States, if they otherwise qualify as refugees.[53] After an airlift of these refugees was suspended by Cuba, a flotilla of small boats (the "Freedom Flotilla") started to ply the sea between Mariel Harbor in Cuba and Florida, bringing over more than 100,000 Cubans, most of whom did not have the proper documents to enter

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[48] Plyler v. Doe, 457 U.S. 202, 210 (1982), *cited in* Jean v. Nelson, 472 U.S. at 875. For comment on *Plyler* and the development of constitutional jurisprudence with respect to undocumented aliens, *see Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1445-57 (1983).

[49] Jean v. Nelson, 472 U.S. at 877.

[50] *Id.* at 881-82.

[51] U.N. CHARTER Arts. 55-56.

[52] For the evolution of this doctrine, *see* Louis B. Sohn, *Keynote Address [Human Rights:] Proposals for the Future*, 20 GA. J. INT'L & COMP. L. 413 (1990).

[53] 45 Fed. Reg. 28,079 (Apr. 14, 1980).

the United States legally.[54] Nevertheless, after being screened by U.S. government officials, most of them were immediately paroled into the United States by the Attorney General.[55] Some 1800 Cubans were, however, refused parole and were finally detained in the Atlanta Federal Penitentiary; others were detained in various penitentiaries around the country.[56] Some of these Cubans were never paroled because they were mentally incompetent or were guilty of serious crimes committed in Cuba before the boatlift.[57] A second group consisted of persons who were originally paroled but whose parole was subsequently revoked, usually because they had been convicted in the United States of a felony or serious misdemeanor.[58] Those in the second group, after having served their sentence, were sent to the Atlanta Penitentiary for further detention.[59] Some of them, however, were guilty only of minor offenses, such as driving under the influence; some were only charged with a crime; others had their parole revoked for noncriminal parole violations.[60] As many of them had lived for several years in American society, on entering the penitentiary they often left behind wives and children who were American citizens.[61]

Two groups of cases, one in Kansas and one in Georgia, reached different results with respect to the right of the detained Cubans to be freed.[62] Pedro Rodriguez-Fernandez, prior to arrival in the United States, was convicted in Cuba several times by a military tribunal for minor thefts and an attempted burglary.[63] After an immigration judge determined that he was excludable, he was detained, pending

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[54] *See* Fernandez-Roque v. Smith, 622 F. Supp. 887, 891 (N.D. Ga. 1985).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 893.

[58] *Id.* at 895.

[59] *Id.*

[60] *Id.* at 895 n.12.

[61] *Id.*

[62] Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980), *aff'd sub. nom.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir 1984), later proceeding Fernandez-Roque v. Smith, 600 F. Supp. 1500 (N.D. Ga. 1985), later proceeding Garcia-Mir v. Smith, 469 U.S. 1311 (1985), *and rev'd* Garcia-Mir v. Smith, 766 F.2d1470 (11th Cir. 1985), later proceeding Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985), *stay granted* in part, *stay denied* in part, *motion denied* Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986), later proceeding 788 F.2d 1446 (11th Cir. 1986), *cert. denied* Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986), and *cert. denied* Marquez-Medina v. Meese, 475 U.S. 1022 (1986).

[63] Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980).

deportation, at the United States Penitentiary at Leavenworth, Kansas, a maximum security prison, where more than 200 Cubans were confined in more severe conditions than the other inmates.[64] The United States authorities (INS and the Department of State) were unable to carry out the order of deportation and were even unable to speculate as to a date of departure. Cuba did not respond to U.S. diplomatic notes on the subject and no other country had been contacted about possibly accepting the petitioner.[65] His attorneys contended that this confinement without bail and without having been charged with or convicted of a crime was cruel and unusual punishment in contravention of the Eighth Amendment to the U.S. Constitution, and a violation of the Fifth Amendment's Due Process Clause.[66]

The court felt obliged to follow the precedents that made clear that excludable aliens, "due to a time-honored legal fiction are not recognized under the law as having entered our borders"; and that "these nonentrants customarily have not enjoyed the panoply of rights guaranteed to citizens and alien entrants by our Constitution."[67] On the other hand, "it has also long been established that the discretionary judgment of a political branch of government is judicially reviewable in a federal court on a writ of habeas corpus for abuse of discretion."[68] While temporary detention has long been approved by the Supreme Court, "the issue actually before the Court is whether or not an excluded alien may be detained in a maximum security prison indefinitely awaiting deportation by the INS or the State Department."[69] Indeterminate detention of an excludable alien was not authorized by statute or federal regulation, the court pointed out,[70] and in the parallel case of deportable aliens, a statute limited detention to six months, which indicated Congressional disapproval of detention "beyond the reasonable time necessary to execute a final order of deportation."[71] In several cases, the courts have held that "approximately two to four months was a reasonable period to detain an alien pending deportation efforts."[72] The court declared that "in-

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 790.
[68] *Id.* at 791.
[69] *Id.*
[70] *Id.* at 792.
[71] *Id.* at 793 (construing 8 U.S.C. § 1252(c)).
[72] *Id.* at 793.

determinate detention of petitioner in a maximum security prison pending unforeseeable deportation constitutes arbitrary detention."[73] It pointed out also that "international law secures to petitioner the right to be free of arbitrary detention and that his right is being violated."[74] It held, accordingly, that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory law, it is judicially remedial as a violation of international law."[75] The court decided that the petitioner should be released in ninety days, and if the arbitrary detention was not terminated by then, the court would "grant the writ of habeas corpus and order petitioner released on parole."[76]

On appeal, the United States Court of Appeals for the Tenth Circuit noted that the petitioner by that time had been confined in a maximum security prison, some of the time in solitary confinement, for more than a year, under conditions as severe as those applied to the worst criminals.[77] The court agreed that the petitioner could invoke no constitutional protection against his exclusion from the United States.[78] As deportation was not penal, normal criminal rights were not applicable and he could be arrested by administrative warrant issued without the order of a magistrate. The situation of the petitioner would have been quite different if he had been accused of a crime against the laws of the United States, as he would have been entitled to the constitutional protections of the Fifth and Fourteenth Amendment.[79]

The court analogized detention pending deportation to incarceration pending trial; it was justifiable only as a necessary, temporary measure.[80] The court pointed out that "[d]ue process is not a static concept, it undergoes evolutionary change to take into account current notions

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[73] *Id.* at 795.

[74] *Id.*

[75] *Id.* at 798.

[76] *Id.* at 800.

[77] Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981). For comment on this case and on the possible use of international customary law (in particular, human rights law), *see* Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1 (1981); *see* also David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988); Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851 (1989).

[78] Rodriguez-Fernandez, 654 F.2d at 1386.

[79] *Id.*

[80] *Id.* at 1387.

of fairness."[81] As the Supreme Court has relied on principles of international law in its decisions upholding the plenary power of Congress over exclusion and deportation of aliens, it seemed proper to the court "to consider international law principles for notions of fairness as to propriety of holding aliens in detention."[82] It pointed out that no principle of international law is more fundamental than "the concept that human beings should be free from arbitrary imprisonment," and cited as evidence several international instruments.[83] When some 3,000 aliens from iron-curtain countries could not be deported to their countries of origin in the 1950s, Congress inserted several provisions which insured that they could not be detained longer than six months.[84] The court found that it would be consistent with these provisions, to read the provision for temporary detention in the exclusion statutes as permitting detention only "during the proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin or to the transporter that brought them here."[85] After such time, upon the application of the incarcerated alien, he should be released.[86] The court added that this construction would be "consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment."[87] The main finding of the court, however, was that, without relying directly on international law, it could dispose of the appeal by construing the applicable statutes to require the petitioner's release at this time.[88]

It may be noted that before this case was finished, Rodriguez-Fernandez was transferred to the Atlanta Penitentiary,[89] and it was there that the fate of a large number of detained Cubans had to be decided.[90] After a series of decisions disposing of various issues both jurisdictional and substantive, the Court of Appeals for the Eleventh Circuit decided that these aliens did not have a constitutionally-protected liberty interest in parole arising from the due process clause

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[81] *Id.* at 1388.
[82] *Id.* (construing Fong Yue Ting v. United States, 149 U.S. 698 (1893)).
[83] *Id.*
[84] *Id.* at 1389.
[85] *Id.*
[86] *Id.* at 1389-90.
[87] *Id.* at 1390.
[88] *Id.*
[89] *Id.* at 1384-85.
[90] Fernandez-Roque v. Smith, 734 F.2d 576, 578 (11th Cir. 1984).

of U.S. Constitution (i.e. a "core" liberty interest).[91] On further remand, Judge Shoob was asked to consider whether these plaintiffs had a federally created liberty interest in parole, and whether their continued detention violated international law.[92] On the first issue, the court held

> that those class members who were not mental incompetents and who had not committed serious crimes in Cuba came to this country in response to an invitation from the President of the United States; that this invitation created for them a protected liberty interest in continued parole; and that because of this liberty interest, each member of this class may be detained only if a finding is made. . .that the person 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.[93]

As far as international law was concerned, the court relied on the fact that "[e]ven the government admits that customary international law of human rights contains at least a general principle prohibiting prolonged arbitrary detention."[94] It noted also that customary international law prohibits "indefinite detention of plaintiffs, without periodic hearings establishing that the continued detention of each class member is reasonably necessary for early deportation or for the protection of society from one proven to be dangerous."[95] It accepted, however, the government's contention that an exception provided for in the *Paquete Habana* case allows a "controlling executive act" to prevail over a rule of customary international law;[96] that in this case it was the Attorney General who has directed the plaintiff's indefinite detention; that "the President has the authority to ignore our country's obligations arising under customary international law, and plaintiffs failed to establish that the Attorney General does not share in this power when he directs the detention of unadmitted aliens"; and that, therefore, customary international law did not apply in this case.[97]

On appeal, the Court of Appeals for the Eleventh Circuit noted the Supreme Court's decisions which have held that "excludable aliens

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[91] *Id.* at 582.
[92] Fernandez-Roque v. Smith, 622 F.2d 887, 890 (N.D. Ga. 1985).
[93] *Id.* at 901.
[94] *Id.* at 902.
[95] *Id.* at 903.
[96] *Id.* at 902 (citing The Paquete Habana, 175 U.S. 677, 700 (1900).
[97] *Id.* at 902-03.

are largely outside the mantle of the Due Process Clause of the Fifth Amendment." It decided that the plaintiffs had failed to demonstrate the existence of any significant restriction on the discretion of Executive Branch actions, and reversed to that extent the trial court's judgment.[98] As for the international law question, the court held that international law does not control here, because there was a controlling executive act "in the Attorney General's termination of the status review plan which envisaged a series of hearings and in his decisions to incarcerate indefinitely pending efforts to deport."[99] The court added that its previous decision in the *Jean v. Nelson* (*Jean II*) case[100] that an indefinitely incarcerated alien "could not challenge his continued detention without a hearing" constituted a "controlling judicial decision" meeting the test of *The Paquete Habana*.[101] Consequently the court held that "the appellees stated no basis for relief under international law because any rights there extant have been extinguished by controlling acts of the executive and judicial branches."[102]

This decision is, of course, disconcerting,[103] but as it disposed of the case by invoking a peripheral issue, it does not detract from the fact that in both series of cases discussed here there has been a partly successful attempt to use standards of international law to throw light on the need for more modern interpretation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution.

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[98] Garcia-Mir v. Meese, 788 F.2d 1446, 1450, 1453 (11th Cir. 1986).

[99] *Id.* at 1454.

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

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

[102] *Id.*

[103] For critical comments on the *Garcia-Mir* decision, *see* Agora: *May the President Violate Customary International Law*? 80 AM. J. INT'L L. 913, 936 (1986) ("[G]arcia-Mir misinterpreted and misapplied The Paquete Habana . . . It took the view that the President—and the Attorney General— had power 'to disregard international law in the service of domestic needs.' There is no such principle."); *see also Agora: May the President Violate Customary International Law? (cont.'d)*, 81 AM. J. INT'L L. 371 (1987). It may also be noted that as a result of prison riots by the Cubans in Oakdale, Louisiana, and in Atlanta, Georgia, in 1987, the U.S. Government set up new hearings and an appeals process to determine which of the 3,800 detainees will be paroled, further detained or deported. *See* 8 C.F.R. §§ 212.12-212.13 (1990). Nevertheless, in 1989 there were still about 2,500 detainees being held in 23 federal prisons throughout the country. Many of them have been detained for more than five years, and they still are treated more strictly than ordinary prisoners. *See* Miles Corwin, *Cuban 'Detainees' From Mariel Boat Lift; 2,500 Prisoners of U.S. Face No Charges*, LOS ANGELES TIMES, Aug. 27, 1989, Part I, at 1.

As Judge Rogers eloquently pointed out in *Fernandez v. Wilkinson*, "No country in the world has been more vocal in favor of human rights [than the United States]. It would not befit our history as a guarantor of human rights for our own citizens, to decline to protect unadmitted aliens against arbitrary governmental infringement of their fundamental human rights."[104]

[104] Fernandez v. Wilkinson, 505 F. Supp. at 799.