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Is the United States Government Justified in Indefinitely Detaining Cuban Exiles in Federal Prisons?

Hector Sanchez, a Cuban citizen, is currently confined in the United States Penitentiary at Terre Haute, Indiana, under the custody of the United States Immigration and Naturalization Service (INS).¹ If asked for what crime he is currently serving time, his response would yield nothing.² Mr. Sanchez is indefinitely being detained in federal prison yet he presently does not stand convicted of a crime for which he must serve a prison sentence.³

Upon his arrival to the United States from the port of Mariel, Cuba, Sanchez was labeled an excludable alien and originally released on parole.⁴ After having fully served prison sentences for felonies committed in the United States (U.S.), he filed a habeas corpus petition to obtain his release from continued detention in a federal prison.⁵ The U.S. District Court for the Southern District of Indiana denied his petition for release, stating that the U.S. Attorney General has the authority to continue to detain an alien when deportation is not practicable or proper,⁶ particularly when the government has implemented annual reviews of an alien's immigration status.⁷ The court further noted that even if detainment of an excludable alien is continuous, the detention does not invoke the protections of the fifth amendment of the Constitution⁸ or of international law.⁹ Although the fact scenario above has varied slightly from case to case, the results in several of the recent cases involving Mariel Cubans' petitions for habeas corpus relief have been similar. Thus, the question arises: Is the United States justified in denying Cuban

1. Sanchez v. Kindt, 732 F. Supp. 1419, 1422 (S.D. Ind. 1990).

2. *Id.*

3. *Id.*

4. *Id.* at 1422. See also *id.* at 1423 n.5. Excludable aliens are persons who seek entry into the United States but are deemed ineligible to receive visas, and therefore, are excluded from admission. Even if they are physically present in the U.S., they are legally considered detained at the border. *Id.* This note will refer to excludable Cuban aliens as Cuban aliens and exiles interchangeably.

5. *Id.* at 1422.

6. *Id.* at 1423, 1426, 1427, 1433.

7. *Id.* at 1427, 1433.

8. *Id.* at 1427, 1428. See also U.S. CONST. amend. V. "No person shall be . . . deprived of life, liberty or property, without due process of law . . ." *Id.*

9. *Id.* at 1432.

exiles' requests for release from indefinite detention?

This note examines whether those Cuban exiles who are categorized as excludable aliens may be *indefinitely* detained in custodial settings within the United States pending review of their status by the INS. Specifically, this note concentrates on those Cubans who have fully served prison sentences in the U.S. and presently face no additional charges, as well as those who have never been charged with a crime in the United States. This note contends that the United States government is not justified in depriving Cuban aliens of their fundamental right to liberty when the duration of the detainment is undefined.

The sequence of events that led to the influx of Mariel Cubans to the United States was instigated in April 1980 when six Cubans drove a bus through the gates of the Peruvian embassy in Havana.¹⁰ After Peru granted asylum to the Cubans, the Cuban government ordered its guards to be removed from the embassy's gates and declared the embassy was open to all.¹¹ When 10,800 Cubans subsequently attempted to access the embassy grounds, Fidel Castro opened up the port of Mariel and "invited Cubans in the United States to come and get their relatives."¹²

Meanwhile, President Carter announced an open arms policy with respect to the entry of Cubans into the United States.¹³ The original plan was to encourage the immigration of 20,000 Cubans, particularly political prisoners and Cubans with relatives already living within the United States.¹⁴ Unfortunately, six times the aforementioned amount, among them criminal prisoners and mental patients, arrived in Florida between April and November 1980.¹⁵ Of the 125,000 Mariel Cubans who arrived, 2,650 were being detained by the U.S. government in 1990, pending review of their immigration status.¹⁶

In 1984 Cuban signed a pact accepting the return of 2,500 detained Cubans named on a specific list.¹⁷ It later suspended the agreement when it became angered by U.S. sponsored broadcasts in

10. *They Seized the Moment and Came to America*, The Los Angeles Times, May 29, 1990, at A14, col. 1.

11. *Id.*

12. *Id.*

13. *See U.S. Refugee Programs: Hearing on S. 96-79 Before the Committee on the Judiciary, 96th Cong., 2nd Session (1980)* [hereinafter *Programs*].

14. *Arson Suspect, Local Scholar Are Two Sides of the Mariel Boat Lift*, The Washington Times, March 28, 1990, at A1.

15. *Id.*

16. *New Rules May Lead to the Deportation of Mariels*, Miami Herald, Aug. 5, 1990, at B1.

17. *Cuban "Detainees" from Mariel Boatlift; 2,500 Prisoners of U.S. Face No Charges*, The Los Angeles Times, Aug. 27, 1989, at A14, col. 1. [hereinafter *Boatlift*].

Cuba.¹⁸ In 1987 incarcerated Cuban aliens initiated riots after the U.S. renewed its attempts to implement their deportation.¹⁹ In response to the uprisings, the Justice Department promised full, fair, and equitable reviews of the detainees' immigration status.²⁰ That same year, the United States and Cuban resumed the transfer of the Cuban exiles named on the 1984 list.²¹

The Mariel Cubans, who have been denied entry into the United States, are given the status of excludable aliens.²² As such, they are considered non-immigrants and "shall be ineligible to receive visas and shall be excluded from admission into the United States."²³ Even though they are physically present in the United States, they are legally considered to be detained at the border.²⁴

Congress has developed specific procedural guidelines with respect to the immigration of aliens determined to be excludable. The Immigration and Naturalization Act calls for the immediate deportation of excluded aliens unless the U.S. Attorney General in his or her discretion determines deportation is neither practicable nor proper.²⁵ In the alternative, Congress either grants an immigration officer the right to detain an alien for further inquiry,²⁶ or the Attorney General has the discretion to temporarily parole an alien into the U.S. for emergent or public interest reasons.²⁷ A policy announced by the United States government in 1981 favors employing detention over parole when an immigrant is unable to show a prima facie case for admission into the United States.²⁸ Interestingly enough, no rules or guidelines were drafted to effectuate the purpose of the new policy.²⁹ As a result, enforcing detention as an alternative to parole was an attempt by the U.S. government to implement a new policy and to achieve a desired outcome absent the backing of an officially drafted rule.

The focus of this note is not to question the authority of the United States government to regulate its admission procedure or to safeguard its borders. This note also does not question the authority of the government to temporarily detain excludable aliens pending

18. *Id.*

19. *Id.*

20. *Id.*

21. *Justice Kennedy Clears Way for Deportation of 5 Cubans*, The Los Angeles Times, Dec. 1, 1988, at 2, col. 1.

22. *Most Who Left Mariel Sailed to a New Life, a Few to Limbo*, The N.Y. Times, April 15, 1990, at A1, col. 4.

23. *Sanchez v. Kindt*, 732 F. Supp. 1419, 1423 (S.D. Ind. 1990), (citing Immigration and Nationality Act, 8 U.S.C. § 1182(a) (1982)). See also *id.* at 1423 n.5.

24. *Id.* at 1423 n.5.

25. 8 U.S.C. § 1227(a) (1982).

26. 8 U.S.C. § 1225(b) (1982).

27. 8 U.S.C. § 1182(5)(A) (1982).

28. *Jean v. Nelson*, 711 F.2d 1455, 1469, 1470 (11th Cir. 1983).

29. *Id.* at 1470, 1472, 1473.

immigration review. However, it does challenge the U.S. government's practice of indefinitely detaining the aforementioned aliens in custodial settings. A close reading of Section 1225(b) of the United States Code (USC)³⁰ an immigration procedure discloses that the wording of the provision does not authorize the indefinite detention of an excludable alien or set a specific time limit within which the INS must complete its inquiries into the status of an alien. It follows that the words "shall be detained for further inquiry" as found in Section 1225(b),³¹ do not explicitly authorize or prohibit indefinite detention. Yet, they invoke the termination of detainment at such a time when all inquiries are completed. Subsequently, it is fair to conclude that the wording of the relevant code provision implicitly favors temporary over permanent detainment.

In recent years the issue of continued detention of an excludable alien has been a subject of interest in case law. The courts that have reviewed Cuban detainees' petitions for habeas corpus relief have generally been in agreement that Congress is authorized to detain excludable aliens pending deportation, but their views on the permissible duration of detainment have varied. The decisions range from finding that the Immigration and Naturalization Act permits indeterminate detainment as in the case of *Sanchez v. Kindt*,³² to finding that the aforementioned act prohibits indefinite detention when such confinement amounts to impermissible imprisonment as in the case of *Rodriguez-Fernandez v. Wilkinson*.³³ Regardless of the courts' final dispositions on the issue of permissible duration of detainment, courts have either carefully reflected on whether the government, as a party in a case, has shown that the detainment is temporary pending expulsion rather than an alternative to incarceration,³⁴ or whether the government has proven the temporary condition of the confinement.³⁵

Allocating the burden of proof to the U.S. government to show the duration of detainment of aliens places little pressure on the government. In order to establish the temporary nature of detainment of a Cuban exile, the government merely has to show that it reviews the petitioner's case annually.³⁶ In short, as long as the government can

30. 8 U.S.C. § 1225(b) (1982).

31. *Id.*

32. *Sanchez v. Kindt*, 732 F. Supp. 1419, 1424, 1427 (S.D. Ind. 1990).

33. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1389, 1390 (10th Cir. 1981). The 10th Circuit held that detention is permissible during proceedings for admission into the U.S. and during a reasonable period thereafter to allow for negotiations for a detained alien's return to the country of origin or to the initial transporter. *Id.*

34. *Sanchez v. Kindt*, 732 F. Supp. 1419, 1425, 1426, 1427 (S.D. Ind. 1990).

35. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1390 (10th Cir. 1981).

36. *Alvarez-Mendez v. Stock*, 746 F. Supp. 1006, 1012 (C.D. Cal. 1990); *Sanchez v. Kindt*, 732 F. Supp. 1419, 1427 (S.D. Ind. 1990).

show that a Cuban alien is subject to the Cuban Review Plan, which provides for continual review of detention cases,³⁷ no further proof of the temporary nature of the confinement is necessary. Since the plan automatically applies to Mariel Cubans,³⁸ the government's burden of proof amounts to little more than a fiction.

Since courts have relied on the effectiveness of immigration procedures and of the Cuban Review Plan to sanction the continued detention of aliens, it is reasonable to question whether these procedural measures have been equitably implemented. Both parole and review hearings on the immigration status of Mariel Cubans have been criticized as unfair, particularly when aliens' lawyers have not been permitted to call and cross-examine witnesses or even to see the full contents of their clients' files.³⁹ Similarly, although detained Cubans are said to have been given multiple opportunities to be heard, critics contend that the appeal process is slow and leaves little room for effective legal counseling.⁴⁰ Furthermore, even though an alien is entitled to exclusion hearings before an immigration judge and may seek the right to counsel at such hearings, the right to free legal services is not guaranteed by the government.⁴¹ Therefore, if no free legal aid is available for a particular hearing, a detainee is disadvantaged by having to fend for himself or herself. It is inequitable that an excludable alien, who may be imprisoned as the most violent of criminals, is denied fundamental procedural protections of the law such as the right to counsel. Regardless of whether a person is a citizen, a criminal, an alien, or a non-immigrant, basic fairness and regularity in proceedings should not vary with the determined status of that person,⁴² particularly when such proceedings are used as a method for proving permissible temporary detention of an alien.

It is uncontradicted that an excludable alien does not have the status of a legal immigrant.⁴³ As an excludable alien, he or she stands at the threshold of the United States border, without the same constitutional protections as persons legally present within the territory of the United States.⁴⁴ Consequently, the recent case deci-

37. 8 C.F.R. § 212.12 & § 212.13 (1990).

38. *Id.*, § 212.12.

39. *Boatlift*, *supra* note 17.

40. *Id.*

41. *Gallego v. Immigration and Naturalization Service*, 674 F. Supp. 280, 286 (W.D. Wis. 1987), (citing 8 U.S.C. § 1226(a), § 1362). *See also id.* at 286 n.9.

42. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (2nd Cir. 1952). No distinction should be drawn in the application of the due process guarantees between an alien and a resident alien in the United States. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 n.3 (10th Cir. 1981). It is ironic that if an excludable alien commits a crime in the United States, he or she would then be entitled to the protections of the Fifth and Fourteenth Amendments. *See also id.* at 1386, *citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

43. *Sanchez v. Kindt*, 732 F. Supp. 1419, 1423 (S.D. Ind. 1990), (citing 8 U.S.C. § 1182(a)). *See also id.* at 1423 n.5.

44. *Id.* at 1423. *See also id.* at 1423 n.5.

sions have denied a detained alien the right to invoke the due process protections of the fifth amendment against the deprivation of liberty.⁴⁵ This note favors the decision of the United States Court of Appeals for the Tenth Circuit in *Rodriguez-Fernandez v. Wilkinson* where the court asserted that an excludable alien, who is subject to physical custody, may invoke the substantive and due process guarantees of the fifth amendment.⁴⁶

In *Rodriguez-Fernandez* the petitioner, a Cuban exile, was placed in custody after admitting to U.S. immigration officers that he was serving a sentence for attempted burglary and escape when he left Cuba.⁴⁷ After a formal exclusion hearing Mr. Rodriguez-Fernandez was ordered deported from the United States and subsequently incarcerated in two maximum security prisons pending deportation attempts.⁴⁸ The court noted that even though the petitioner had not committed a crime against the United States by seeking entry into the U.S., his confinement in prison, partially in solitary confinement, constituted imprisonment under conditions as severe as those the worst of criminals encounter.⁴⁹ The Tenth Circuit held that when imprisonment is indefinite and continues beyond reasonable efforts to expel an alien, it amounts to impermissible punishment.⁵⁰ Under such circumstances an excludable alien is entitled to be released from custody.⁵¹

In short, detention of an excludable alien can only be justified as a temporary necessity to effectuate negotiations for deportation during a reasonable period of time or to further immigration proceedings. It follows, depriving a person of the right to liberty for an indefinite period of time without legitimate cause amounts to unjustified punishment and reduces that individual's life to nothing more than a mere existence. Furthermore, it mocks the notion of fairness and equality in our society. It is inequitable that an excludable alien, who is not convicted of a present criminal offense in the United States, may face the prospect of a life-long imprisonment without having received the fundamental substantive and procedural guarantees that a person charged with a crime in the U.S. is ensured. Due process is not so static a concept that it could not encompass the principle of fairness to apply to aliens within the United States and

45. *Id.* at 1428. See also U.S. CONST. amend. V.

46. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). See also U.S. CONST. amend. V.

47. *Id.* at 1384.

48. *Id.* at 1384, 1388.

49. *Id.* at 1385, 1387.

50. *Id.* at 1387, 1389, 1390. Deportable aliens who are held in custody for more than a few months should be released because at that time their detention constitutes imprisonment. *Id.* at 1387, citing *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925).

51. *Id.* at 1386, 1390.

to enable them to invoke the constitutional protections of the law.

The U.S. government may assert that it is justified in detaining Mariel Cubans because such detention is a mere continuation of exclusion pending review rather than a permanent confinement or deprivation of liberty.⁵² This reasoning, however, amounts to no more than a convenient fiction.⁵³ When an individual is held in a maximum security federal prison for an unknown duration, he or she is clearly physically bound and indefinitely confined; common sense dictates that when a person has no freedom of movement, no choice of what to eat, no decision as to whom to talk, and no perception of the duration of his or her detainment, that individual is *indefinitely* imprisoned.⁵⁴ Hence, the government's assertion that detention is a continuation of the exclusion process, amounts to little more than a pretense of temporary detainment.

Even though case law has been contradictory with respect to an alien's right to substantive and procedural guarantees of the fifth amendment, it is uncontested that an alien, regardless of his or her immigration status, is a full fledged member of the international community. It has been stated that no principle of law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.⁵⁵ Specifically, the Universal Declaration of Human Rights mandates that everyone has the right to life, liberty, and security of person,⁵⁶ and that no one shall be subject to arbitrary detention.⁵⁷ The declaration explicitly proclaims that its laws are applicable to all human beings without distinctions of any kind, including the distinction of status.⁵⁸ In the eyes of the international community, then, it makes no difference whether a person has the status of excludable alien, immigrant, or citizen. Rather, the emphasis is placed on the equality of human beings, regardless of nationality or social origin.⁵⁹ In short, "[e]veryone has the right to recognition everywhere as a person before the law."⁶⁰

As members of the human race, Mariel Cubans detained in the United States, even if labeled as excludable, are members of the same international community as United States citizens. Thus, they have the same right to be recognized as persons before the law and

52. *Id.* at 1387.

53. *See id.*

54. *See* *Shaugnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 220 (2nd Cir. 1952).

55. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981). *See also Universal Declaration of Human Rights*, art. 3, 3 U.N. GAOR (Restitutions, Part 1) at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949).

56. *Universal Declaration of Human Rights*, 3 U.N. GAOR (Restitutions, Part 1) at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949).

57. *Id.*, art. 9.

58. *Id.*, art. 2.

59. *Id.*

60. *Id.*, art. 6.

to invoke the protections of the Universal Declaration of Human Rights. It logically follows that a Cuban alien is entitled to the same right to liberty as any American citizen is guaranteed through the substantive and procedural protections of the law. No country may, without legitimate cause, subject a fellow member of the international community to arbitrary detention. Certainly, the desire to seek entry into the United States cannot be considered a legitimate cause for indefinite imprisonment. By having adopted the Universal Declaration of Human Rights in December of 1948,⁶¹ the United States pledged to honor the provisions of the declaration. Unless the United States ceases to arbitrarily confine Mariel Cubans in violation of their documented right to liberty, the U.S. will continue to defy international law.

Undoubtedly, it is in the best interest of the United States to adhere to the strongly encouraged laws and regulations established by the international community. Not only should the United States assess the potential detriment a defiance to universal laws may have on the nation's image and status within the international realm, but it should also seek to strengthen the U.S. posture on humanitarian rights. By welcoming the remaining Cubans into the American society, the U.S. would hold true to its political ideology of offering freedom from oppression to people from countries under dictatorships and communist regimes such as Cuba.⁶² Furthermore, it should not be overlooked that President Carter invited Cubans to the United States in words that can be interpreted as a warm welcome.⁶³

It is, simultaneously, only fair to recognize the difficult situation that the United States faces as a result of the influx of the Mariel Cubans. The purpose of this note is not to belittle the U.S. dilemma in balancing its interest against the fate of excludable aliens to whom Cuba has refused reentry. It is understandable that the U.S. government seeks to protect its citizens through effective control of its borders. However, although the government's concerns are valid, they do not justify the continued detention of persons in federal prisons who are not serving criminal sentences. Since this note only pertains to those individuals who have either never been touched by the U.S. criminal justice system or who have already been fully rehabilitated by it, the detainees in question can neither be classified as a danger to the community, nor can they be considered a security risk to the country.⁶⁴ Therefore, once deportation attempts have become

61. *See id.*

62. *See* Kurzbaum, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 877 (1982).

63. *Programs, supra* note 13.

64. *Rodriguez-Fernandez v. Wilkinson*, 654 F. Supp. 1382, 1388 (10th Cir. 1981).

futile, an alien should be released from detention, and alternatives to incarceration should be analyzed.

This note does not request that the U.S. grant the Mariel Cubans residency or citizenship, but rather that it release them from indefinite custody. Alternatives to granting resident status and to indefinitely detaining Cubans in prison are available and can be implemented. The government, for example, could develop a new and stricter parole program as an option to needless incarceration while administrative proceedings are conducted. Accordingly, greater efforts could be made to find suitable citizen sponsors for the Cuban aliens or to increase the number of halfway houses to accommodate an expanded parole program. Furthermore, releasing Cuban detainees may prove to be economically beneficial to the United States. In 1980 the cost of maintaining Cubans in custody was assessed at between \$8,000 and \$12,000 a year per person.⁶⁵ Thus, even from a more practical point of view, it is in the best interest of the United States to release the Cuban detainees. Finally, since this is a situation of international concern, another alternative would involve urging international organizations such as the United Nations to pressure Cuban to accept the return of its citizens.⁶⁶

Not only from an ideological, political, and practical standpoint, but foremost from a humanitarian point of view, the United States should release the Cuban refugees who are currently trapped within the U.S. prison system. Even though the Mariel Cubans may be classified as excludable aliens, they are human beings with fundamental rights of liberty. No country should have the power to take away such precious rights from anyone.

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65. *Programs, supra* note 13.

66. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386, 1390 (10th Cir. 1981). Another alternative would entail returning an excludable alien to the vessel that transported the alien to the United States or sending the alien to a third country; the petitioner in *Rodriguez-Fernandez* testified that he would be willing to go anywhere in the world where he would not be held as a prisoner unjustly or unfairly. *Id.*

