Indefinite Detention of Cuban Aliens: Is the End in Sight?

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Indefinite Detention of Cuban Aliens: Is the End in Sight?

... Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, the tempest-tost to me, I lift my lamp beside the golden door!

Greeting on Statue of Liberty

I. Introduction

Does the Statue of Liberty’s inscription mean what it says? As a sovereign nation, the United States has the inherent power to control immigration. Under the U.S. Constitution, this power is vested in the United States Congress. Congress has used this grant of authority to establish grounds and procedures to aid in the determination of an alien’s admissibility to the United States. The President, through the Immigration and Naturalization Service (INS), enforces the legislative discretion of Congress. In essence, it is the INS that captures an alien and determines his excludability. Once deemed excludable, the alien is either deported, detained or paroled. If the


2. The United States has historically set itself out as a place of refuge for the underprivileged. However, as Patrick Burns, assistant director at the Federation for American Immigration Reform (FAIR), points out, “America is no longer the land of milk and honey ... We, too, are finite. If we can’t feed, house, and clothe our own, how can we start to feed, house, and clothe everybody else?” McBride, Thousands Held by U.S. Would be Freed if They Would Go Home, Christian Sci. Monitor, Dec. 29, 1987, at 5, col 1.

3. 1. BROWNLIE, PRINCIPLE OF PUBLIC INTERNATIONAL LAW 505 (1973) [hereinafter 1. BROWNLIE].

4. U.S. CONST. art. I, § 8, cl. 4 provides that Congress may establish a uniform Rule of Naturalization.

5. See 1 C. GORDON & ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 1.32 (1984). Congress works with the Executive branch, through the Immigration and Naturalization Service (INS), to determine whether an alien is admissible. See infra note 25.

6. An apprehended alien is placed in exclusion or deportation proceedings and is under the jurisdiction of an immigration officer. Any alien who may appear to the examining officer to be excludable is temporarily excluded. The case is then reported to the Attorney General who makes the final determination on permanent exclusion. 8 U.S.C. § 1225(a)-(c) (1982).


8. Once found excludable, an alien is subject to immediate deportation § 1225(c). If an alien’s excludability is not readily determinable, the alien is put into a detention center pending further inquiry. (8 U.S.C. § 1225(b) (1982)). An alternative to the detention of aliens who
alien is deported and leaves the United States, no problem exists. If, however, the alien cannot be deported for some reason, problems arise.

Recently, a novel twist to immigration and deportation problems has developed. On November 20, 1987, the United States and Cuba signed an accord calling for Cuba to take back approximately 2,700 Mariel excludables in exchange for the United States' promise to resume annual issuance of preference immigrant visas to Cuban nationals residing in Cuba. Cuba's willingness to accept back these excludables appeared to be the aspirin needed to ease a U.S. headache; however, the aspirin did not work. Cuba's willingness to accept these excludables only made the headache worse.

In response to the news of the immigration accord, Cuban detainees rioted in federal prisons in Oakdale, Louisiana and Atlanta. The rioters took hostages in an effort to reveal their plight. They believed that only through drastic measures could they open the eyes of the world to their treatment by the United States Government.

have been refused legal entry into the United States is "parole." The statutory source for the parole power provides:

The Attorney General may, except as provided in subparagraph (8), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.


10. Id.
11. Mariel excludables are Cubans who came to the United States in May 1980, during the Mariel boatlift. Shortly thereafter, and for a variety of reasons, they were deemed to be excludable aliens. Kneeland, U.S. Admits Problems on Refugees; 14,000 Cubans Remain in Camps, N.Y. Times, Aug. 30, 1980, at 1, col. 3.
12. Agreement on Immigration Procedures and the Return of Cuban Nationals [hereinafter Agreement on Immigration Procedures]. Nov. 20, 1987, United States-Cuba. The actual text of this agreement has not been officially reported. Nevertheless, the Agreement is nothing more than a re-ratification of the December 14, 1984 Agreement, which is reported in 24 I.L.M. 32 (1985). Although the Cubans did agree to take back all of the 2,700 excludables, they agreed to do this over a period of years. The terms of the agreement called for Cuba to take back no more than 150 per any month. 24 I.L.M. 32, 33 (1985). The accord also provided for the issuance of preference immigrant visas up to 20,000 Cuban Nationals each year. Id.
13. Cuban Detainees Are Said to Riot At a Federal Center in Louisiana [hereinafter Detainees Riot], N.Y. Times, Nov. 22, 1987, at 26 col. 1. As a result of Cuba's willingness to take back the Cuban detainees, the United States discovered that the Cuban detainees were not content to go back to Cuba. In fact, the Cubans rioted in prisons in Oakdale, Louisiana and Atlanta, Georgia. The United States went from thinking that the current immigration accord would help alleviate the problem of indefinite detention of Cuban aliens to pondering how to control the prison riots. Id. at 26, col. 1.
15. See Smother, supra note 14, at B14, col. 3.
After nearly two weeks of tension-filled negotiating, the Cuban detainees in each of the two federal prisons and the U.S. Government reached similar agreements that guaranteed each individual prisoner a fair and equitable hearing to determine parole status before any deportation proceedings would begin.\textsuperscript{16}

\textsuperscript{16} The text of the agreement ending the Oakdale riots reads in its entirety as follows:

\begin{quote}
Upon the release of all remaining officers being held on the compound at FDC, Oakdale, the following agreement will immediately be enforced.

1. Cuban detainees with families and/or sponsors who have already been approved for parole will not have an arbitrary change made in their release decision.

2. The release of the Cuban detainees with no family or sponsor, who have already been approved for parole, will be reviewed and a decision made within a reasonable time. This will permit a full, fair, and equitable review within the laws of the United States of each individual's status with respect to eligibility to remain in the United States.

All Cuban detainees at FDC, Oakdale who have not been reviewed yet, will receive an expeditious review of their status and those eligible for release will be given the same consideration as No. 1 and No. 2, above.

3. All Cuban detainees at FDC, Oakdale with medical problems will be sent immediately to medical facilities for evaluation and treatment. Once these detainees are cleared medically, they will be given the same considerations as No. 1 and No. 2, above.

4. Cuban detainees at FDC, Oakdale will be given I-94 and other INS documents including work permit, when they are released. No Cuban detainee will be held by INS without an appropriate charge.

5. No Cuban detainees will be held liable for any damage, to this date, sustained by the institution during the hostage situation at this facility.

6. It is understood that the American Cadre at FDC, Oakdale did not have any part in this situation and can be removed immediately.

7. Those Cuban detainees who have been accepted for entrance to another country will be expeditiously reviewed.

The text of the agreement ending the Atlanta riots reads in its entirety as follows:

Upon the release of all remaining officers being held on the compound at the USP, Atlanta, the following agreement will immediately be enforced.

1. Cuban detainees with families and/or sponsors who have already been approved for parole will not have any arbitrary change made in their release decision.

2. The release of the Cuban detainees with no family or sponsor, who have already been approved for parole, will be reviewed and a decision made within a reasonable time, the process to be completed by June 30, 1988.

All Cuban detainees at USP, Atlanta, who have not been reviewed yet, will receive an expeditious review of their status and those eligible for release will be given the same consideration as those covered by points No. 1 and No. 2 above.

3. All Cuban detainees at USP, Atlanta, with medical problems will be sent immediately to medical facilities for evaluation and treatment. Once these detainees are cleared medically, they will be given the same considerations as those covered by points No. 1 and No. 2 above.

4. Cuban detainees at USP, Atlanta, who are approved for parole, will be given I-94 and other INS documents, including work permit, when they are released. No Cuban detainee will be held by INS without an appropriate charge.

5. No Cuban detainees will be held liable for any damage, to this date, sustained by the institution during the hostage situation at this facility. There will be no physical reprisals against the detainees. There will be no prosecution, except for specific acts of actual, assaultive violence against persons or major misconduct. This does not include mere active participation in the disturbance, failing to depart Atlanta Penitentiary during the...
After laying a historical foundation, this Comment will discuss the problem of the indefinite detention of Mariel Cubans from the United States Government's perspective. It then will look at indefinite detention and discuss the possible deprivations of human rights that accompany this practice. In turn, this Comment will focus its inquiry on the possible deprivations of human rights within the framework of international law by using the situation of those detained in the U.S. Federal Penitentiary in Lewisburg, Pennsylvania as a case example. Further, this Comment will offer suggestions as to how the United States might alter its current policy toward the Cuban detainees so as to foster compliance with international law. Finally, this Comment will hypothesize with respect to the future of the Cuban Detainees in the United States.

II. The Exclusion of Aliens

A. Principles of International Law

According to international law, a sovereign nation has the prerogative to deny entry to any individual deemed to be a threat to that country. In essence, a sovereign nation must be able to protect its citizens and borders in the manner that it deems best and most appropriate. It follows that no alien has the absolute right to gain disturbance, or acts causing property damage.

6. It is understood that the American Cadre at USP, Atlanta, did not have any part in this situation and can be removed immediately.

7. Cuban detainees who desire to go to a third country and who are accepted by a third country will be reviewed very quickly, and will be permitted to depart, with proper documentation, and barring criminal action pending. It is the option of any detainee to apply for acceptance by a third country, and any detainee will be given the opportunity to make such an application. Such an application should be made quickly after the disturbance is resolved, if a detainee does not have such acceptance already.

8. As previously stated by the U.S. Attorney General, a moratorium has been declared on the return of the Cuban nationals to Cuba, with reference to those Cubans who came to the United States in 1980, via the Port of Mariel. This moratorium includes all Cubans detained in the U.S., and will insure a fair review of each Cuban status, with respect to his eligibility to remain in the U.S.

In the course of the negotiations the Government's basic offer was to delay all deportations until each detainee's case could be individually reviewed on its merits. The rioters were hard pressed to believe that the Government would follow through with the offer. It was only when Roman Catholic Bishop Agustin Roman of Miami guaranteed Cuban rioters that Cuban exiles, including himself, would have a voice in designing the hearing process that the rioters decided to end the sieges. Ingwerson, Progress on Prison Sieges as Cubans Mull U.S. Offer, Christian Sci. Monitor, Nov. 30, 1987, at 3, col. 1.

17. Deportation and exclusion are two methods that the United States uses to deny aliens residence in the United States. Deportation occurs once an alien is already in the country; exclusion occurs when the alien is outside the country and seeking entry into the United States. Joan v. Nelson, 727 F.2d 957 (11th Cir. 1984). See also Landon v. Plasencia, 459 U.S. 21, 25 (1982); see also Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

18. I. Brownlie, supra note 3, at 505.

entry into a foreign State. Rather, a State may grant him the privi-
lege of entrance.20 Thus, a State has much discretion in determining
who may stay and who must go.21

B. Constitution, Congress and Narrow Judicial Review: Factors
Contributing to U.S. Exclusion of Aliens

Historically, the United States Government has fully utilized its
sovereign prerogative to exclude aliens.22 Exclusion of aliens is possi-
ble under the United States Constitution, which gives Congress the
power to enact laws that control which aliens may enter the United
States. Within Congress' power is the ability to enact laws that con-
trol the classes of aliens already in the United States.23 For example,
the Immigration and Nationality Act24 has given the Attorney Gen-
eral virtually unlimited authority to regulate immigration.25 Thus,
the Executive branch, within the parameters of congressional intent,
sets U.S. immigration policy.

Another element which contributes to the power to exclude
aliens is the fact that judicial review of federal enactments regarding
alienage and immigration is narrow.26 Since the Supreme Court de-
cision in The Chinese Exclusion Case,27 which held that the political
branches of the federal government share plenary authority to gov-

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20. See Landon v. Plasencia, 459 U.S. at 32.
21. I. BROWNLIE, supra note 3, at 505.
had restricted alien migration in any way. Kleindienst v. Mandel, 408 U.S. 753, 761
(1972). In 1889 the Supreme Court recognized that the political branches of the federal
government share plenary authority to govern the admission of aliens to the United States.
The Chinese Exclusion Case, 130 U.S. 581, 609 (1889); see Landon v. Plasencia, 459 U.S. at 21
(1982) (power to admit or exclude aliens is a sovereign prerogative); also Knauff v. Shaugh-
nessy, 338 U.S. 437, 542 (1950) (the right to exclude an alien stems from legislative power
and is inherent in executive power to control foreign affairs).
25. 8 U.S.C. §§ 1103(a), 1225(c), 1182(d)(5) (1982). Section 1103(a) provides that:
The Attorney General shall be charged with the administration and en-
forcement of this chapter and all other laws relating to the immigration and
naturalization of aliens, except insofar as this chapter or such laws relate to the
powers, functions, and duties conferred upon the President, the officers of the
Department of State, or diplomatic or consular offices: Provided, however, that
determination and ruling by the Attorney General with respect to all questions
of law shall be controlling.
8 U.S.C. § 1225(c) (1982) provides that, "If the Attorney General is satisfied that the alien is
excludable . . . he may in his discretion order such alien to be excluded and deported without
any inquiry or further inquiry by a special inquiry officer. Id.
into the United States temporarily under such conditions as he may prescribe for emergent
reasons or for reasons deemed strictly in the public interest any alien applying for admission to
the United States." Id. at § 1182(d)(5).
legislative power of Congress more complete than in immigration matters).
ern the admission of aliens to the United States, the judiciary has accepted the proposition that Congress has plenary power in matters of exclusion. The fact that an excludable alien only has the rights that Congress or the Attorney General chooses to give him continues to go unquestioned in the courts. Under accepted U.S. immigration doctrine, an alien who lacks a visa or other necessary documentation, who has a record of prior criminal acts, or who fails to meet health, economic, or numerous other criteria, may be denied admission.

C. Excludable and Paroled Aliens

An alien who is refused entry is termed an “alien in exclusion.” After being denied entry, the alien in exclusion is detained by the INS pending a special hearing to determine whether to exclude or deport this particular alien from the United States. Once an alien is formally labeled an excludable alien, the U.S. prefers deportation. If this option is unavailable, the INS has the power to detain the alien until deportation is available. A different option open to the INS is “parole.” A paroled alien is allowed physically to enter the United States even though he has not yet been admitted, in the legal sense, as an immigrant. In other words, the parolee remains subject to deportation at any time, and is still without constitutional protections.

D. The Facts

In April 1980, approximately 10,000 Cubans sought refuge in, and ultimately gained control over, the Peruvian embassy in Havana,

29. Judicial opinions that have confronted this proposition have agreed with it. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972); Glavan v. Press, 347 U.S. 522 (1954).
30. See Jean v. Nelson, 727 F.2d 957, 961, 965, 967 (11th Cir. 1984). In this case, the United States Court of Appeals for the Eleventh Circuit considered whether Haitian aliens, detained at facilities of the INS, possessed any constitutional rights to challenge the Government’s refusal to grant them parole. The court concluded that the Haitian detainees did not possess equal protection under the fifth amendment with respect to their requests for admission, asylum or parole.
32. See id.
33. General classes of excludable aliens are provided by statute. See 8 U.S.C. § 1182 (1982); see also supra note 7.
34. See F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 358-59 (1961).
35. Although the United States prefers immediate deportation, sometimes the political realities dictate that this option will not be immediately available. Therefore, Congress has given the President power to “impose on the entry of aliens any restrictions he may deem to be appropriate.” 8 U.S.C. § 1182(f) (1982).
36. See supra note 8.
38. See supra note 8.
Soon thereafter, Prime Minister Fidel Castro advised those Cuban citizens and anyone else who wanted to leave Cuba to prepare themselves for travel to the United States. Presented with an immigration problem of unequaled proportions, the United States responded that it would welcome the Cubans. As a result, the “Freedom Flotilla” eventually deposited 117,000 refuge-seeking Cubans onto U.S. shores. However, unlike earlier Cuban refugees that had fleed the Castro regime, these Cubans were not welcomed with open arms.

Until sponsors could be found, most of the 117,000 Cubans were placed in detention facilities. By August of 1980, only 14,201 remained in detention. As of June 1982, between 1300 and 1800 refugees remained in detention. Eventually, all but 200 of the Mariel Cubans were released on immigration parole. Those that were not released were determined to be hard core criminals or mentally ill. Those Mariel Cubans who remain in detention today were at one point freed in this country on immigration parole, but were convicted of either a misdemeanor or felony offense. Any conviction automatically led to revocation of their immigration parole status. As a result, upon completion of their criminal sentences they were immediately “rearrested” by the INS and held pending deportation to Cuba. These Cubans were among those who rioted in Oakdale and Atlanta in November 1987, in response to the news of the new immigration accord.

E. Application of Immigration Law to the Cubans

At a minimum, the Mariel Cubans reasonably expected to be treated as refugees under the Refugee Act of 1980. The United

41. During the initial stages of the Cuban Revolution, Cuban refugees were warmly received in the United States. See R. Welch, Jr., Response to Revolution: The United States and the Cuban Revolution, 1959-1961 25-26 (1985).
42. What Became of the Cubans, Newsweek, Feb. 1, 1982, at 28. No clear guidelines or regulations describe the criteria the INS uses to determine whether an individual or organization is eligible as a sponsor for a detainee. 8 C.F.R. § 207.2(d) (1988) requires that “[e]ach applicant must be sponsored by a responsible person or organization.” 8 C.F.R. § 207.2(d) (1988).
43. Kneeland, supra note 11, at 1, col. 3.
44. See supra notes 42 and 28.
45. S. Donziger, Project Due Process 3 (1987) (unpublished manuscript) (available by writing to the Coalition to Support Cuban Detainees, P.O. Box 935, Decatur, Georgia 30030).
46. Id.
47. Id.
48. Id.
49. See “Open Arms”, supra note 40.
States Government, however, was wary of granting refugee or asylum status to all 117,000 Cubans because of the government’s duty to protect its citizens from dangerous aliens. Until a means of verifying the acceptability of each Cuban became available, the Government thought it would be necessary to detain the Mariel Cubans who did not have visas or other appropriate papers. Eventually, a majority of these Cubans were released to sponsors. Nevertheless, as of September of 1988, many of these Cubans continue to be detained because of a lack of sponsors. Others remain in detention because government officials believe that they might pose a threat to the public.

III. The United States Perspective

The use of indefinite detention to solve the problem of mass migration into the United States poses interesting and challenging questions of international law. On the one hand, national sovereignty militates in favor of allowing the United States to protect its borders by closely monitoring immigration. On the other hand, indefinite detention of the Cubans seems to violate basic precepts of fundamental human rights. Striking a balance between these competing interests poses a difficult task for the leaders of the United States.

Even though the U.S. Government is one of the foremost proponents of human rights in the world, it nevertheless detains Cubans

sections of 8, 22 U.S.C.). If the Mariel Cubans would have been treated as refugees, they would have been given asylum in the United States and would have been given rights similar to those that U.S. citizens possess. See 8 U.S.C. § 1101(a)(42)(A).

51. I. BROWNLIE, supra note 3, at 505. A basic tenet of international law is that a sovereign nation has the prerogative to deny entrance within its borders to any individual deemed a threat to that country’s well-being. Id. at 505.

52. Kneeland, supra note 11, at 1, col. 3.

53. Beague, Conditions for 175 Cuban Detainees Called Inhumane, Harrisburg Patriot-News, Feb. 28, 1988, at A17, col. 1. 8 C.F.R. § 212.12(f) (1987) and 8 C.F.R. § 212.13(h) (1987), which both specifically pertain to Mariel Cubans, identically read as follows:

Sponsorship. No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.


55. See infra text accompanying notes 154-172.

56. Examples of the United States as a proponent of international human rights are abundant. See, e.g., M. CRAHAN, HUMAN RIGHTS AND BASIC NEEDS IN THE AMERICAS 1-19 (1982). During the 1970s, the U.S. Congress and Department of State, the Inter-American Commission on Human Rights of the Organization of American States, and Amnesty International, among others, reported serious rights violations in the following countries: Argentina, Bolivia, Brazil, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Uruguay. Id.
without guaranteeing them any meaningful rights. How can the United States justify its strong advocacy of fundamental human rights, while simultaneously violating the basic human rights of Cubans detained within U.S. borders? In responding to this rhetorical question, the United States would first reply that its treatment of the Cuban detainees does not violate international law, and second, even if violative, U.S. treatment would be justified as a necessary measure to protect its borders. From a policy perspective, the United States is in a difficult situation. For instance, if the Cubans continue to be cautiously detained, proponents of fundamental human rights may complain that the rights of the Cubans are being violated. In contrast, if the United States opts to more liberally release these detainees into the American community, giving rise to societal problems because of their release, the United States may be charged with negligently releasing these Cubans.

In an effort to transcend this policy dilemma, the United States, in November 1987, signed an accord with Cuba that called for Cuba to take back these detainees. By deporting these Cubans to their native country, the United States would no longer be compelled to balance the vice of continued detention against the need to protect its citizens. Moreover, the United States would no longer have to bear the financial burden of detention.

A. U.S. Policy

1. “Free Ride Home Policy” Thwarted.—In dealing with aliens, the United States employs what has been labeled as the “free ride home policy.” Once the U.S. Government determines that an alien does not have a right to be in the United States, and assuming the alien’s home country is willing to take him back, the United States will give him a free ride home. By signing the November 1987 immigration accord, the United States believed that it had

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57. As support for its reply to the rhetorical question, the U.S. might have cited Brownlie, supra note 3, at 505.
58. See infra text accompanying notes 154-72.
59. The Attorney General is vested with the final authority to determine whether the release of an alien into American society would be “prejudicial to the public interest, safety, or security” of the United States. (8 U.S.C. § 1225(c) (1982)).
60. See Agreement on Immigration Procedures, supra note 12. The United States was trying to eliminate the problem of the Cuban detainees by entering into this accord. Moreover, the United States was trying to open immigration channels to Cubans still in Cuba who had families in the United States. Thus, family reunification was another objective of the immigration accord. 25 I.L.M. 32, 32-33 (1985).
62. McBride, supra note 2, at 5, col. 1. According to INS officials, all the Cubans who were held in the Atlanta and Oakdale, Louisiana facilities could be released if they would “go home.” The problem for the United States is that these Cubans are either afraid to go home or do not want to go home. Id.
overcome the major obstacle that was keeping these Cubans from their "free ride home." What was not anticipated, however, were the riots that the signing precipitated. With the riots at least temporarily foreclosing the opportunity for wholesale deportations, the United States once again found itself facing the all too familiar dilemma of what to do with the detainees. Unless the United States radically changes its policy, it appears as if indefinite detention will continue to be the temporary stop-gap.

2. Detention of Cubans.—Detention of aliens was first used in the United States in the late 19th and early 20th centuries. Prolonged detention, however, has never seemed to be the American way. In 1954, Ellis Island, which had been used for holding and processing illegal immigrants, was closed. This closing was part of a more relaxed U.S. detention policy, under which only those believed to be adverse to national security or public safety were detained. In 1981, however, the Reagan administration determined that the policy of "fluid borders" was "just not flying anymore." Currently, the United States views detention as a necessary deterrent. In essence, it is a punitive measure taken to discourage people from illegally coming to the United States.

This U.S. policy of detention is supported by longstanding Supreme Court precedents under the Immigration and Nationality Act and the Constitution. In fact, courts have generally upheld the Reagan Administration’s view that Mariel Cubans convicted of

63. In 1984 the United States and Cuba came to an agreement concerning the Cuban detainees in the United States. This agreement, however, was shortlived. In 1985, when the United States began broadcasting Radio Marti (a Spanish-speaking Voice of America) into Cuba, the Castro regime reneged on the agreement. The 1987 Immigration Accord is a re-ratification of the 1984 plan. Detainees Riot, supra note 13, at 26, col. 1.

64. Other options open to the United States will be discussed later in this Comment. See infra text accompanying note 172.

65. McBride, supra note 2, at 5, col. 1.

66. Id.

67. Id.

68. Id. See also Jean v. Nelson, 711 F.2d 1455, 1469-70 (11th Cir. 1983). President Reagan issued a statement on July 30, 1981, emphasizing the need to "establish control over immigration" to guarantee that aliens are admitted to the United States "in a controlled and orderly fashion." Jean v. Nelson, 711 F.2d 1455, 1469-70 (11th Cir. 1983).

69. McBride, supra note 2, at 5, col. 1.

70. See supra note 24.


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

Id. at 659.

See also Galvan v. Press, 347 U.S. 522, 529-32 (1954) (The power to determine the aliens who could enter extended to include the power to enact laws that control the classes of aliens already in the United States that should be deported).
crimes can be imprisoned indefinitely, pending efforts to deport them. A closer inspection of these legal precedents is necessary to understand the United States’ rationale underlying its new policy.

B. U.S. Legal Position

The United States Supreme Court recognized in 1889 that the legislative and executive branches of the federal government share plenary authority to govern the admission of aliens to the United States. The Immigration and Nationality Act of 1952 granted complete responsibility for immigration matters within the Executive branch to the Attorney General and his delegates. In *Nishimura Ekiu*, the Court assessed the constitutional rights of aliens to challenge immigration decisions. By holding that an excludable alien did not receive the protection of the Fifth Amendment, the Court created a distinction between the legal status of excludable or unadmitted aliens and aliens who had already entered the country. In 1953, the Court refined this distinction; now mere physical presence in the territorial jurisdiction of the United States did not guarantee constitutional rights to an excludable alien. This distinction supplied the major premise for the “entry doctrine” fiction that has become an important aspect of U.S. immigration policy. Under the “entry doctrine” fiction, an alien’s legal status remains as though he had been stopped at the border in spite of the fact that he is physically present within U.S. boundaries. Pursuant to this legal fiction, the

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73. The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

74. 8 U.S.C. § 1103(a) and (b). See infra note 24.

75. Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

76. In *Nishimura Ekiu*, the Supreme Court conceded that resident aliens, regardless of their legal status, received limited due process rights, yet aliens who had neither been naturalized nor admitted into the United States pursuant to law, did not possess such rights. Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

77. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1952). The *Shaughnessy* decision determined whether an alien immigrant affected a legal entry into the United States by way of his harborage at Ellis Island. Id. at 207-08. The Supreme Court in finding that harborage at Ellis Island did not constitute an entry stated: “It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. (Citations omitted.) But an alien on the threshold of initial entry stands on different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien being denied entry is concerned.’” Id. at 212 (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

78. Taylor, supra note 71, at A1, col. 4.

United States is, therefore, justified in not affording the alien any constitutional rights.\textsuperscript{80} Without any rights guaranteed by the Constitution, an alien holds only those rights that Congress and the Attorney General choose to give him.\textsuperscript{81}

\section*{C. The Rights of the Excludable Alien}

Before the Cuban prison riots, the United States, through the use of parole, allowed for temporary harborage of an otherwise inadmissible alien, but did not grant the alien legal residence in the United States.\textsuperscript{82} In other words, an alien paroled into the United States was allowed physically to enter the country even though he had not yet been admitted in the legal sense an immigrant.\textsuperscript{83} If, however, the INS determined that the alien was not suitable for parole, the Government invoked its implied statutory authority to detain for indefinite periods excludable aliens who could not be returned. When deportation proved to be an unlikely event, indefinite detention seemed to become the only viable alternative open to the United States.

After the Cuban riots, U.S. policy regarding the Cuban detainees changed, but not significantly. As a part of the agreement to end the prison riots, the United States ensured that all detainees would receive full and equitable review of their cases.\textsuperscript{84} This review, however, only guaranteed a review of the inmate's file; the only definite assurance to those detained was the ability to submit a written statement addressing why the inmate thought he was parole worthy.

The Cuban detainees also were granted a right to counsel, but this right lacks substance. The vast majority of the detainees are indigents and have no access to the means to afford counsel.\textsuperscript{85} Moreover, the inmate's right to counsel is substantially limited. For example, the right of an inmate's representative to appear at the parole review, speak for the client, and to call and cross-examine witnesses is within the discretion of the reviewing panel.\textsuperscript{86} Nonetheless, this new review process goes beyond anything that U.S. law or the courts have previously required.\textsuperscript{87}

The new process gives Departmental Release Review Panels the last word on parole. The INS, however, still makes the initial deter-

\begin{flushright}
80. \textit{Id.}  \\
81. \textit{Id.}  \\
82. See Moret v. Karn, 762 F.2d 989 (3rd Cir. 1984).  \\
84. See supra note 16.  \\
86. \textit{Id.}  \\
\end{flushright}
mination on parole. If rejected, the new panels will provide one more opportunity, with advance notice, and with the advice and help of counsel, for obtaining parole. When determining whether a detainee will be released or repatriated, the Departmental Panel will likely consider whether the inmate has a history of serious crime that constitutes a threat to society, and whether he has family members in the U.S. or possesses job skills. However, no uniform criteria have been established for the Departmental Panels. This fact demonstrates that the United States still possesses unfettered discretion in granting parole.

D. Justification for the U.S. Position

All of the detainees affected by this new process came to the United States in 1980 during the so-called "freedom flotilla" from Mariel, Cuba. Of the original 125,000 people who entered the U.S. at that time, all but 212 were given the special "parole" status. After spending several months in special camps, the vast majority of Mariel Cubans were then released from detention. Persons given such parole status eventually may become eligible for citizenship. Thus, most of those who arrived in the flotilla have made smooth transitions into American society. Those who have not made a smooth transition, however, still remain in detention.

According to an INS spokesperson, the Cubans who remain in detention "have demonstrated repeatedly that they can't act as productive members of society." It is clear that even a misdemeanor offense violates a parolee's status, hence, some Cubans currently in detention have committed only petty offenses. By the same token, one-fourth of the 2,400 detainees who were housed at Oakdale and Atlanta had been convicted of violent crimes, and almost as many had been convicted of involvement with dangerous drugs. Whether these detainees will be reparoled or repatriated to Cuba is for the Justice Department to determine through its newly

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89. Each panel is composed of an associate attorney general, the assistant attorney general for civil rights, the director of the Justice Department's community relations service, or their designees. Id. at 3, col. 2.
91. McBride, supra note 85, at 3, col. 2.
93. McBride, supra note 85, at 3, col. 2.
94. Id.
95. Id. See 8 U.S.C. § 1422.
96. McBride, supra note 85, at 3, col. 2.
97. Solis, supra note 89, at 1, col. 1. Many aliens are detained even after serving prison terms. Id. at 1, col. 1.
98. McBride, supra note 85, at 3, col. 2.
established review panels. Ensuring public safety, a legitimate U.S. concern, requires that the panels weigh heavily the commission of crime. When one considers the possible adverse societal effects of granting parole status to these detainees, perhaps the United States’ cautionary parole policy is warranted. In the same breath, however, it is also true that many Cuban detainees are being unnecessarily detained because of the acts of a handful of their fellow detainees.

IV. Through the Eyes of the Cubans

A. Who are these Cuban detainees?

From the outset, it must be remembered that the United States and Cuba are not merely dealing with statistics; rather, they are dealing with living, breathing human beings who have the fundamental rights to be treated with respect and dignity. Thus, for a proper understanding of the problem, it is necessary to understand who these detainees are and how they feel. Many of the inmates are unsophisticated rural people in their twenties and early thirties who are hardened by years of imprisonment for major or even minor crimes, such as traffic ticket offenses. They view American society through a haze of cultural differences, and are mistrustful and frustrated by the feeling that they have been forgotten.

Many feel that the only difference between themselves and the Cubans already integrated into American society is luck; good luck for those now integrated, bad luck for themselves and others still detained. Although the detainees feel desperate, many still hold the hope of joining their fellow Cubans in American society.

B. Why the Riots?

Much insight into the Cuban detainees’ perspective may be gained by examining the reasoning for their rioting in November 1987. A significant reason for the riots was the prospect of returning to prisons in Cuba. The Cuban detainees simply did not want to be sent back to the country from which they had fled seven and one-half years earlier. The principal motivating force behind their decision to riot, however, was a feeling that they were being jilted by the U.S. Government. This feeling arose from the hope that, despite their being held in prisons for a number of years, eventually they

99. Id. Of the 2,400 Cuban detainees who were housed at Oakdale, Louisiana, and Atlanta, 81 had been convicted of murder, 16 of kidnapping, 56 of sexual assault, 299 of robbery, 201 of assault, and 12 of arson. Id.


101. Id.

102. Id.
would be integrated into American society. Essentially, many believed that this integration would occur if they remained well-behaved and if American sponsors could be found. Then, suddenly, the immigration accord usurped any chance or hope for parole that Cubans had fostered while in detention. As a result, they rioted.

These Cubans were neither unrealistic nor did they have distorted senses of justice. Rather, their realism allowed them to admit that not all detainees should be granted relief, and it was their sense of justice that caused them to argue that the United States should grant relief to those detainees who merit relief. The rioting Cubans were deaf to governmental excuses as to how administratively difficult the task would be to determine which detainees deserved a chance to become integrated into American society. They merely asked for what they believed was fair — equitable case-by-case parole review.

C. The Detainee's Rights

Upon the release of all remaining officers being held on the compound at FDC, Oakdale, the following agreement will immediately be enforced.

1. Cuban detainees with families and/or sponsors who have already been approved for parole will not have an arbitrary change made in their release decision.

2. The release of the Cuban detainees with no family or sponsor, who have already been approved for parole, will be reviewed and a decision made within a reasonable time. This will permit a full, fair, and equitable review within the laws of the United States of each individual's status with respect to eligibility to remain in the United States.

All Cuban detainees at FDC, Oakdale who have not been reviewed yet, will receive an expeditious review of their status and those eligible for release will be given the same consideration as No. 1 and No. 2, above. From the text of the agreement, it appears as if the rioters got exactly what they desired, a fair and equitable case-by-case parole review.
of a detainee's status. In actuality, however, no meaningful substantive rights were gained. Because the United States decided in 1980 to treat the Mariel Cubans as excludable aliens, those being detained are still considered excludable aliens; thus they have no guaranteed Constitutional rights. Therefore, the only rights they have are the rights conferred upon them by the immigration statutes. The immigration statutes, however, provide no guidance on the proper procedure for processing excluded aliens. As a result, the United States has opted for the indefinite detention of the Cubans, regardless of any of the international human rights that they may possess.

The United States believes that in order to comply with its immigration policy, the mechanism of indefinite detention must be used. However, to those Cubans affected, this use of indefinite detention means something quite different; it means that they exist in a state of "legal limbo." With very limited rights under U.S. law, these detainees realize that this legal limbo could last for a long time. This belief exists because although the governing statute apparently does not confer any authority on the INS to detain excluded aliens indefinitely, U.S. law recognizes detention as being permissible pending Governmental efforts to secure deportation. Since the United States has consistently made efforts to secure the deportation of these Cubans, it follows that indefinite detention, according to U.S. law, is permissive as long as efforts are being made to secure deportation.

Moreover, from the eyes of the detained, the proposition that the detention is no longer indefinite because an agreement has been reached to return some of the Cuban detainees to Cuba is invalid. Given the unpredictability of world events, coupled with the distinct

111. See text accompanying notes 68-69.
112. Taylor, supra note 71, at A1, col. 4.
114. 8 U.S.C. § 1227(a) (1982). Section 1227(a) provides that the Attorney General may detain an excludable alien if "immediate deportation is not practicable or proper." Id. at § 1227(a). In the case of the Cubans, it appears as if they can be detained indefinitely, according to U.S. law, because the U.S. has secured their deportation, but they are not willing to be deported.
115. See supra notes 12 and 63.
116. See supra note 114.
117. Regardless of how many Cubans will be returned, many will remain in the United States. The terms of the agreement required Cuba to take back no more than 150 detainees per any month. See supra note 12.
possibility that Cuba could renege on the agreement at any time, even those who are deemed to be deportable cannot be sure that they would find themselves back in Cuba. Thus, uncertainty as to the future seems to be the common thread connecting all the detainees. Consequently, more certainty in the review process, as well as in the length of detention were concerns of the rioting detainees.

D. Possible Source of Support for the Cuban Detainee's Cause

Although no U.S. court has directly attacked the U.S. policy of indefinite detention, a number of individuals have become more sympathetic to the position of those being indefinitely detained. Partly as a result of the riots, a number of advocates of the Cuban position have stepped forward. Most of these advocates agree that the Cuban riots have changed the climate of public opinion toward the detainees; no longer are they the forgotten few. Nevertheless, what significant progress the Cuban detainees made because of the riots is speculative.

For all intents and purposes, the gains of the riots now lie in the hands of the Justice Department; the Cuban detainees simply must trust the Justice Department to uphold the spirit of the agreements. If the Justice Department strays from the spirit of the agreements, the possibility of deportation remains great for the detainees. Thus, if the goal of the hearings is to decide the technical status of the Cubans, then almost all of them will remain deportable, even for minor crimes. If the reviews aim to weigh "dangerousness," then a majority of these Cubans may be paroled.

118. See supra note 63.
121. Ingwerson, supra note 109, at 3, col. 2. Among the advocates are U.S. Representative John Lewis (D) of Atlanta, who had been promoting thorough individual hearings for six months prior to the riots, and Federal Judge Marvin Shoob of Atlanta. Id. at 3, col. 2.
122. Id.
123. Id. A different, but nearly identical, agreement was signed by the rioters in Oakdale, Louisiana. The agreements are general and ambiguous enough, and of questionable enough legal authority, that the Cuban inmates must place their faith with the Justice Department to uphold the spirit of the agreements. Id. at 3, col. 2. See supra note 16.
124. Although the Cubans have won case-by-case reviews, the criteria for these reviews is still unknown. See supra note 109, at 3, col. 2.
125. Because the commission of any crime would make the detainees ineligible for parole, the inmates, in this technical status scenario, would be deportable. See 8 U.S.C. § 1182(a) (1-33) (1982).
126. Failing to report to a parole officer and possessing ten dollars worth of marijuana are technical crimes that could affect a detainee's ability to gain parole. Ingwerson, supra note 109, at 3, col. 2.
127. Id. Possessing small amounts of a controlled substance and failing to report to a
There simply is no guarantee as to how the hearings will be handled. Although there exists no guarantee as to the handling of the hearings, since 1981 the Government has taken the position that everyone in detention was or had the propensity to become a dangerous criminal. Sources close to the detainees believe this is a fallacy. In fact, one source estimated that between 500 and 600 of the 1100 inmates at the Atlanta facility "shouldn't have been out there at all." Only time will tell what the ultimate fate of these detainees will be.

E. Continued Detention — Case Study: The Lewisburg Federal Penitentiary

In an effort to decrease the possibility of prison riots in the future, the United States decided to transfer Cuban detainees to various federal detention centers around the United States. One such depository was The Lewisburg Federal Penitentiary in Lewisburg, Pennsylvania, which received 175 Cuban detainees. At this facility, the review hearings are proceeding, but their efficacy is questionable.

1. The Shortcomings of Review Hearings.—By the end of February, 1988, the INS had held approximately 150 hearings at Lewisburg, where it can be seen that rights granted to the detainees are insubstantial. According to the chairman of the Lewisburg Prison Project, Inc., the detainees were not entitled to an attorney during the INS hearing if they could not afford one. Moreover, they were not permitted to see their files before the INS hearing. Further, the interpreters provided for those who could not speak English were inexperienced. In addition to this adversity, the Cubans were handcuffed during their hearings.

Despite all these hardships, some help was available to these Cubans in the form of about 50 Prison Project volunteers from the parole officer are not "dangerous" crimes. Id.

128. *Id.*
129. *Id.*
130. For example, Carla Dudeck, Coordinator of the Coalition to Support Cuban Detainees emphasizes the fact that the vast majority of Mariel Cubans who remain in detention are nonviolent in nature and had their parole status revoked for misdemeanors or non-violent crimes. Telephone interview with Carla Dudeck, Coordinator of the Coalition to Support Cuban Detainees (Sept. 9, 1988).
131. *Id.* Federal Judge Marvin Shoob makes this estimate. Ingwerson, *supra* note 109, at 3, col. 2.
133. *Id.*
134. Stephen Becker is the chairman of the Lewisburg Prison Project, Inc., *Id.* at A17, col. 1.
135. *Id.*
136. *Id.*
Bucknell University community. These volunteers received permission to review files, to attend hearings and to make comments at their conclusion; however, they were not allowed to ask questions throughout the hearing. In addition, the Prison Project volunteers were successful in getting names of sponsors, job offers and letters of recommendation for the Cuban detainees. In spite of these efforts, only a handful of Cuban aliens have been awarded parole status. As of September 1988, the vast majority of remaining Cubans are merely waiting to be served with appeal notices, so that they can file a written appeal of their review hearings.

2. The Living Conditions of the Detainees.—Even more disturbing than the review process are the conditions under which the 175 Cubans are being housed at the Lewisburg facility. The Prison Project labels them “inhumane.” The detainees are confined to their cells twenty-three hours a day and handcuffed when permitted out for a brief recreation period. Among other complaints the Prison Project lodges against the treatment of Cubans include: three detainees living in one cell designed for only two; not permitting detainees to mingle with other inmates or obtain jobs in the prison; and some detainees being confined to their cells for no reason and without a hearing. A spokesman for the prisoner rights group claims, if American citizens were treated like the Cubans, “we’d be in court in a minute.”

Thus, the question must be asked if the fact that the Cuban detainees are not American citizens is enough to warrant their treatment. It is apparent that the Cubans do not enjoy U.S. Constitutional rights, but that does not mean that they possess no rights at all. A right does not cease to exist simply because the source of that right is not found in the U.S. Constitution.

V. The Cuban Detainee’s Rights Under International Law

Shortly after the riots, Vernon A. Walters, chief American delegate to the United Nations, told the Security Council that the riots by the Cuban prisoners were “actions of despair” that described,

137. Id.
138. Id.
139. Id.
140. Letter from Carla Dudeck to Professor Gary Gildin (Sept. 1, 1988) (discussing the possibility of Dickinson School of Law students helping the Cuban detainees in Lewisburg with the appeal process).
142. Id.
143. Id.
144. Stephen Becker made the cited quote. Id. at A17, col. 1.
145. For example, the Declaration of Independence provides that “all men . . . are endowed . . . with certain unalienable rights.” DECLARATION OF INDEPENDENCE.
“louder than any words,” the poor human rights situation in Cuba. The accuracy of Walter’s assessment of the situation may cause the United States to cease deporting the prisoners but this is not to say that the United States may ignore these same precepts of human rights in its own treatment of the Cubans. Thus, the United States, in order to be true to international law, ought not to impose conditions of detention that impinge upon conventional standards of morality.

A. International Agreements

Among the international agreements that address the issue of fundamental human rights are the United Nations Charter, the Universal Declaration of Human Rights, the Convention Relating to the Status of Refugees, the Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights, and the Geneva Convention. When viewed collectively, these agreements demonstrate that every person is entitled to certain basic human rights. When analyzed individually, it is clear that the United States has impliedly and expressly agreed to uphold these tenets of basic human rights.

1. The U.N. Charter.—The United States, as a signatory to the United Nations Charter, reaffirmed “faith in fundamental human rights, in the dignity and worth of the human person.” Although no specific duties or obligations are imposed upon the signatory countries, each member nation is required to work toward the establishment of universal respect for human rights and fundamental freedom for all persons. As evidenced by its general treatment of the Mariel Cubans, as well as its specific treatment of the Cuban

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147. J. BROWNIE, supra note 3, at 505.
148. U.N. CHARTER.
155. The U.N. Charter states that the members of the United Nations are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” Id.
detainees in the Lewisburg Federal Penitentiary, the United States would be hard pressed to state with confidence that in its treatment of the Mariel Cubans it has worked toward the establishment of universal respect for human rights and fundamental freedom for all persons.

2. The Universal Declaration of Human Rights.—In addition to the U.N. Charter, the Universal Declaration of Human Rights evinces a strong concern for the recognition of fundamental human rights. It provides every human being with the “right to life, liberty and the security of person.” The Declaration also entitles every human being to recognition “as a person before the law,” and prohibits arbitrary “arrest, detention or exile.” The Universal Declaration aids in the understanding of the current status of international custom and provides a standard by which all nations can be judges. In light of this standard, the indefinite detention of aliens contradicts established principles of human rights.

By deliberately refusing to give the detained Mariel Cubans any constitutional rights, the United States appears to be violating the Universal Declaration in that it is failing to recognize these detainees as persons before the law. Moreover, by detaining Mariel Cubans who have already served their prison terms, is not the United States again violating the Universal Declaration by arbitrarily arresting and detaining these particular Mariel Cubans?

3. The Convention and Protocol Relating to the Status of Refugees.—Currently, more than seventy nations are parties to the Convention and Protocol Relating to the Status of Refugees. These international agreements speak to the fundamental right to leave one’s country to seek and join asylum. The Protocol provides that persons who have a “well founded fear of being persecuted” in their own country on account of “race, religion, nationality, membership of a particular social group or political opinion” will be

156. See supra text accompanying notes 134-144.
157. Universal Declaration, supra note 149, art. 3.
158. Id., art. 6.
159. Id., art. 9.
160. See supra text accompanying notes 81-84.
161. See supra text accompanying note 48.
163. See supra notes 150 and 151.
164. Protocol, supra note 151, art. 1(A)(2).
granted rights in the host country that are similar to the rights enjoyed by nationals of the host country.  

Under the Protocol standards, it is apparent that many members of the Freedom Flotilla should have been given refugee status. Upon arriving, many Mariel Cubans requested asylum and completed asylum applications, but the INS decided not to process most of these applications. The deliberate inaction by the INS seems to disregard the Protocol, as well as the Refugee Act of 1980, in violation of the prospective refugees' rights.

4. The International Covenant on Civil and Political Rights.—The International Covenant on Civil and Political Rights contains provisions that apply to the question of detention. The Covenant recognizes that beyond the impairment of individual liberties, detention prevents free expression, work, exchange of ideas, education, and other fundamental rights that are often taken for granted. Although the Covenant provides that an alien who is lawfully within a country may be expelled, expulsion may occur only after the alien receives the opportunity to present his case. Moreover, only individuals who have been duly convicted of crimes, or whose exclusion can be justified as a means of protecting national security and preserving the public order may be deprived of the full complement of the internal rights under the Covenant, including the right to be free from arrest and detention.

It seems that the manner in which the Cubans are being detained in the Lewisburg Federal Penitentiary is not in accord with the spirit of the International Covenant on Civil and Political Rights; put simply, the Cuban detainees in Lewisburg are prevented from freely expressing themselves, and exchanging ideas, as well as prevented from developing a job skill or obtaining an education, both of which would make these detainees more suitable for parole. More generally, the United States seems to be violating the Covenant by detaining Mariel Cubans who have already paid their debt to society by serving their prison terms, and who pose no serious threat to national security.

165. Id.
167. INS regulations state that: "[u]pon receipt of Form I-589, the district director shall in all cases request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State." 8 C.F.R. § 208.7 (1987). Nevertheless, no action was taken on the Cuban refugees' asylum applications. See supra text accompanying note 166.
168. ICCPR, supra note 152, art. 1, 6 and 9. See also The International Covenant on Economic, Social and Cultural Rights (ICSCR), art. 8.
169. ICCPR, supra note 152, art. 13.
170. Id., art. 9. See also id., art. 6 and 7.
171. See text accompanying notes 141-44.
5. **The Geneva Convention of 1949.**—The Geneva Convention of 1949 provides additional international support for an understanding of the rights available to the Cubans in detention. The Convention maintains a general policy against the detention of civilian noncombatants by allowing internment only when a civilian presents a risk to national security or voluntarily appears for internment.\(^{172}\) Because the Cuban detainees are civilians, and because they have not been deemed national security risks, they appear to fall within the definition of civilian noncombatants, and thus their detention is inconsistent with the Geneva Convention.

**B. The Effect of the International Agreements**

When viewed collectively, the international agreements demonstrate that every individual, whether civilian or prisoner of war, is entitled to certain basic human rights. Among the most basic are the rights of life, liberty, and freedom from inhuman or degrading punishment, all of which are currently recognized by the international community.\(^{173}\) Against this background, it is alarming that the United States has kept the Cubans in detention in disregard of their international human rights.

Although the United States claims that the prior criminal acts of many of the Cuban aliens justifies their detention,\(^{174}\) this contention is not consistent with the idea of proper punishment. Generally, an individual’s conviction for a criminal offense is the critical factor which allows a state to punish the individual. Deprivation of liberty is the normal form of punishment for criminal acts in the United States. Further, in the United States, an alleged criminal is deprived of his liberty only after a careful trial process that results in a conviction. Excluded aliens in indefinite detention do not possess these rights because of the legal fiction that constitutional protections do not apply to aliens in exclusion.\(^{175}\) A persuasive argument is that international legal restraints should prevent the United States from violating the basic rights of Cubans. Most certainly the United States has a right to protect its borders, but it should not attain this goal to the exclusion of basic rights guaranteed to the Cubans through international law.

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172. *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, art. 42 and 43. Apparently, a detainee does not present a risk to national security if (i) the detainee is presently a nonviolent person; (ii) the detainee is likely to remain nonviolent; (iii) the detainee is not likely to pose a threat to the community following his release; and (iv) the detainee is not likely to violate the conditions of his parole. 8 C.F.R. § 212.12(d)(2)(i-iv) (1987).

173. See text accompanying notes 154-72.

174. See text accompanying notes 95-96.

175. See text accompanying notes 79-80.
VI. Proposed U.S. Courses of Action

Any resolution of the question of what to do with the Cuban aliens who face indefinite detention requires a balancing of individual and national interests. The Cuban detainees desire the opportunity to be integrated into American society. The main interest of the Government is the protection of the public at large from real dangers. With a new President and Attorney General coming into power in the spring of 1989, possible U.S. courses of action should be examined.

A. Case by Case Review

The current policy of case-by-case parole review is a feasible policy so long as the Cuban detainees are given fair and equitable hearings. As the case example of Lewisburg Penitentiary illustrates, the fairness and equity of the current hearings is questionable at best. To become more consistent with international law, the United States should not only provide the detainees with a right to counsel, but also establish and publish uniform standards to be applied by the review boards when rendering their decisions. Moreover, the United States should attempt to expedite matters for those detained. Keeping the Cubans in a state of legal limbo does not speak well for the United States in international circles.

B. Asylum Status

Another option open to the United States is granting eligible detainees asylum status. Pursuant to current United States law, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible... as an immigrant under this act.176

Since improper detention of an alien seems to be a special humanitarian concern to the United States, granting the Cuban detainees the opportunity to be considered for asylum status might be a possible solution for the United States.

C. Seek Sponsors

One of the problems with incorporating the Cuban detainees into American society is the lack of available sponsors. A greater effort by the United States to seek sponsors for those detainees not

posing a serious threat to the United States, may obviate the problem of indefinite detention to a certain extent. Another manner of eliminating the relative paucity of sponsors would be for the United States to set up Government sponsored halfway houses or use existing criminal probation programs to sponsor the Cubans for parole.\textsuperscript{177}

\textbf{D. Deportation to Another Country}

It is evident that the Cuban detainees do not want to be deported back to Cuba. Nevertheless, this fact does not mean that they would be unwilling to begin a new life in some other Spanish-speaking country. The primary obstacle to this proposal, however, is finding a country willing to take these Cubans.\textsuperscript{178}

\textbf{E. If Detention, Then Better Treatment}

The physical treatment of the Cuban detainees at Lewisburg Penitentiary is abhorrent.\textsuperscript{179} Even if the aliens in detention are criminals, they are entitled to treatment comparable to the treatment of other law breakers, and they do not deserve to be treated worse than other criminals. If they are mentally ill, then they should be sent to a mental institution, but they do not deserve to be wholly ignored. Moreover, it only makes sense to let these Cuban detainees acquire job skills. One of the probable requirements of receiving parole is the possession of a job skill. If these Cuban detainees are not given an opportunity to acquire a job skill, they may never be released merely because the United States would not let them become marketable. In sum, if indefinite detention remains the U.S. policy, these detainees should, at the very least, be treated with dignity.

\textsuperscript{177} 8 C.F.R. § 212.12(f) (1987) states:

(f) Sponsorship. No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child or sibling who is a lawful permanent resident or a citizen of the United States.

By sponsoring a halfway house for paroled Mariel Cubans, the Government would not have to worry about finding a halfway house suitable to accommodate the Spanish speaking detainees, and would not penalize parole worthy detainees merely because they do not have blood relatives in the United States.

\textsuperscript{178} Paragraph 7 of the agreement ending the Atlanta riots states:

Cuban detainees who desire to go to a third country and who are accepted by a third country will be reviewed very quickly, and will be permitted to depart, with proper documentation, and barring criminal action pending.

\textsuperscript{179} See supra note 16 for the full text of the Atlanta and Oakdale agreements.

\textsuperscript{179} See text accompanying note 141-44.
VII. Conclusion

For seven years many of the Mariel Cubans have faced U.S. ambivalence toward their fate, as well as ambiguities in the administration of immigration law. Despite an initial welcoming, a number of these Cubans are being detained in apparent violation of their fundamental rights to be free from arbitrary arrest. Although the riots in Oakdale and Atlanta revealed their problem to the public, it does not appear as if any substantive rights have been gained through their efforts. The Cuban detainees' fate still rests largely with the discretion of the U.S.

Thus, the U.S. must face the question of what should be done with the Cuban aliens who face indefinite detention. Any resolution of this question requires a balancing of individual and national interests. On the one hand, the Cuban detainees desire the opportunity to be incorporated into American society. Moreover, at a minimum, international law dictates that they be free from arbitrary arrest. On the other hand, the primary interest of the U.S. Government is the protection of its citizens from dangers. However, the Government must realize that this duty to protect runs only to real, not imagined, dangers. Thus, the United States is justified in detaining or deporting any Cuban alien who is a real danger to American society. By the same token, the United States' detention of Cubans who pose no real threat to American society is an abrogation of fundamental human rights, and a violation of international law that should be corrected.

As for predictions as to what the future holds for the Cuban detainees, its does not appear that any major policy changes will be made during the Reagan Administration. Most likely, the case-by-case reviews will proceed at a consistent pace, but the Cuban detainees will probably not enjoy any enhancement of rights. However, with a new administration in 1989, it is possible that the Cuban detainees might be treated in a manner more consistent with international law, in a manner that respects their dignity as human beings.

Francis G. Troyan