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United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea

Cover Page Footnote

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UNITED STATES IMMIGRATION POLICY: DETAINING CUBAN REFUGEES TAKEN FROM THE SEA

MATTHEW A. PINGETON*

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I. INTRODUCTION

Every year hundreds of Cuban refugees take to the sea on a journey for freedom. Using makeshift boats, rafts, and even inflated tire tubes these Cubans risk their lives to cross the treacherous Straits of Florida en route to the promised land. Only an estimated one in four "rafters" survives the journey.¹ The United States Coast Guard plucks the remainder from the sea and subsequently detains them at the naval base at Guantanamo Bay, Cuba. These Cubans' fates remain in the hands of the United States and its policy towards Cuban refugees. This article examines this policy and its history, then addresses the United States' implementation of asylum procedures and international law in regard to refugees. It concludes that the

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1. See *Havana Nights: American-Cuban Relations*, ECONOMIST, Aug. 31, 1991, at 20.

United States policy would withstand an argument of governmental abuse and human rights violations.

A. *The Mariel Boatlift*

In 1980, Fidel Castro, the president of Cuba, opened the Cuban port of Mariel where approximately 125,000 Cuban refugees headed for the United States.² This incident heightened concern in the United States about illegal immigration and became known as the Mariel boatlift.³ Although the majority of "Marielitos" are hard-working and peaceful, an estimated 10,000 to 15,000 of them are former mental patients and violent criminals forced by Castro to leave the country.⁴

Thereafter, the United States and Cuba agreed in 1984 that the United States would return to Cuba persons ineligible to remain in the United States. The agreement affected approximately 2700 Cubans who either admitted to committing serious crimes in Cuba or the United States, or who suffer from severe mental disorders.⁵ A majority of the "Marielitos" have nevertheless assimilated themselves into the American way of life.

B. *A Second Refugee Crisis*

On August 8, 1994, Fidel Castro initiated a new policy whereby the Cuban government would no longer prevent emigration from Cuba by boat.⁶ This policy caused another refugee crisis in which an estimated 30,000 Cubans boarded flimsy rafts and boats and sailed for the United States.⁷ To prevent an immigration crisis similar to the Mariel boatlift, and possibly to save the lives of thousands of rafters, President William Clinton ordered the United States Coast Guard to intercept any Cuban watercraft bound for the United States.⁸ The Cubans were sent to the American naval base at Guantanamo Bay, Cuba, where they were detained.⁹

2. See Michelle A. Satin, Note, *From Mariel into the Twenty-First Century: The Indefinite Detention of Cuban Excludable Aliens in the United States*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 139 (1996).

3. See At a Glance, *The U.S. and Cuba: A Tense History*, N.Y. TIMES, Aug. 22, 1994, at A10.

4. See Susan Tift, *Working Hard Against an Image: for America's Marielitos, the Adjustment has been No Easy Trip*, TIME, Sept. 12, 1983, at 24.

5. See United States-Cuba Agreement on Immigration and Refugee Matters, 20 WEEKLY COMP. PRES. DOC. 1902 (Dec. 14, 1984).

6. Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1417 (11th Cir. 1995).

7. *More than 560 Cuban refugees returned by U.S. since May 1995*, DEUTSCHE PRESSE-AGENTUR, Jan. 9, 1997.

8. See *Christopher*, 43 F.3d at 1417.

9. This military base is leased from the sovereign Cuba. The lease agreement was negotiated in 1903 and provides that the United States has control and jurisdiction over the leased

Following this incident, the United States began negotiations with Cuba to stop the flow of immigrants attempting to enter the country. In an accord reached one month later, the United States agreed to allow Cuban migrants to enter only by applying for immigrant visas or refugee admittance at the United States Interests Section in Havana, Cuba.¹⁰ In addition, a minimum of 20,000 persons are allowed to immigrate legally into the United States each year but no Cubans who accepted safe haven in Guantanamo Bay or Panama can apply for asylum or a visa from their location.¹¹ Cubans who reached the United States and attempted illegal entry are detained while their application for asylum is assessed.¹²

The aim of this policy is to make asylum less appealing and thus discourage Cuban immigration via this dangerous method of (often flimsy) sea craft. As Attorney General of the United States Janet Reno stated: "The odds of ending up in Guantanamo are going to be very, very great. The odds of ending up in the United States are going to be very, very small."¹³

The Cuban migrants have few options with respect to their residence. One option is to remain in safe haven, another is to repatriate to Cuba voluntarily, and a third is to travel to another country that would accept them.¹⁴ If a migrant repatriates to Cuba voluntarily, he or she may apply for asylum through the previously discussed method, commencing at the United States Special Interests Section in Havana. The fate of Cuban migrants unwilling to return to Cuba for fear of persecution, or unable to travel to another country that would accept them, remains in the hands of the United States and its policy makers.

II. UNITED STATES LEGISLATION IN REGARD TO REFUGEES

A. *The Cuban Adjustment Act*

On November 2, 1966, Congress passed the Cuban Adjustment Act. This Act states:

land while Cuba retains sovereignty over the land. The United States recognizes the continuance of the ultimate sovereignty of Cuba over the leased land, and Cuba consents that the United States shall exercise complete jurisdiction and control over the land during occupation. *See id.* at 1417 n.1.

10. *See id.* at 1418.

11. *See id.*

12. *See Clinton Pulls Welcome Mat from Cubans*, DES MOINES REG., Aug. 20, 1994, at 1.

13. *Id.*

14. *See Christopher*, 43 F.3d at 1418.

[N]otwithstanding [any other] provision . . . of the Immigration and Nationality Act, the status of any alien who is a native or citizen of Cuba, and who has been inspected and admitted, or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General in his discretion, and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence¹⁵

This Act allows Cubans to come to the United States, even for economic reasons, and to resettle.¹⁶ Cuban nationals who have been living in the United States under any circumstances for one year may become permanent U.S. residents.¹⁷ With no questions asked, these Cubans are automatically on their way to citizenship.¹⁸ Further, any Cuban national who arrives in the United States and can manage to stay in the United States can become a permanent resident even if the person does not meet the definition of "refugee" or satisfy the legal immigration preferences. This position is unlike the United States' policy toward any other country.¹⁹

The Cuban Adjustment Act was established during the cold war to give a safe haven to anyone anxious to flee communism.²⁰ The Act was also designed to respond to human rights abuses that forced thousands of Cubans to flee their homeland. In combating communism, the Act aimed to send a message to Cuba.²¹

However, the message was never heard, and the Act has proven counterproductive.²² Because the Act has helped thousands of Cubans to gain permanent resident status in the United States, the majority of Cubans who oppose Fidel Castro relocated to and reside in the United States. Consequently, the Act may have prolonged the Castro regime by allowing Castro's opposition to flee to the United States rather than remain in Cuba and develop a political effort to overthrow him.²³

15. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C.A. § 1255 (West 1997)).

16. See 140 CONG. REC. H8601 (1994).

17. See 140 CONG. REC. H476-01 (1994).

18. See 140 CONG. REC. H8702 (1994).

19. See *id.*

20. See Ana Radelat, *Bienvenido, No More: After 30 Years of Privilege, Cubans Find the Welcome Mat Rolled Up*, WASH. POST, Nov. 6, 1994, at C3.

21. See 140 CONG. REC. H476 (1994) (Introduction of legislation to repeal the Cuban Adjustment Act).

22. See *id.*

23. In addition, because the Act allows Cubans to easily attain residence in the United States, thousands of Cubans have perished while trying to obtain the benefit the Act offers.

Thus, the Cuban Adjustment Act has been conditionally repealed.²⁴ The Act is fully repealed only upon a determination by the President of the United States under the standards of the Cuban Liberty and Democratic Solidarity Act of 1996 that a "democratically elected government in Cuba is in power."²⁵ If there is indeed ever a democratic government in Cuba, the need for the Cuban Adjustment Act will cease and the Act therefore will be repealed. But until democracy reigns in Cuba, the Cuban Adjustment Act will remain the law of the United States.

B. Immigration and Naturalization

The United States also permits aliens to gain residency in the United States through asylum.²⁶ Any alien who is physically present in the United States or has been brought to the United States after interdiction in international waters may apply for asylum regardless of their status.²⁷ Asylum will be granted if the alien meets the United States' definition of "refugee,"²⁸ defined as:

[A]ny person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .²⁹

In addition, under the Refugee Act of 1980, "an alien physically present in the United States or at a land border or port of entry . . . may be granted asylum at the discretion of the Attorney General if the Attorney General determines that such alien is a refugee."³⁰ The applicant for asylum has the burden of proving that he or she is a refugee.³¹ To satisfy this burden without corroboration, the testimony of the applicant must be credible in light of general conditions

24. See Pub. L. No. 104-208, 110 Stat. 3009-695 (codified as amended at 8 U.S.C.A. § 1255 (West 1997)).

25. *Id.*

26. Another method by which an alien may subsequently gain residence in the United States is through *withholding of removal*. The requirements for obtaining withholding of removal are similar to those of asylum. See 8 C.F.R. § 208.16 (1998).

27. See 8 U.S.C.A. § 1158(a)(1) (West 1998).

28. See *id.* § 1158(b)(1).

29. *Id.* § 1101(a)(42)(A).

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act amended the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1158 (West 1998)).

31. See 8 C.F.R. § 208.13 (1998).

in the applicant's country or last habitual residence.³² An applicant may qualify as a refugee if he or she has suffered from past persecution or has a well-founded fear of future persecution.³³

1. Past Persecution

Applicants are refugees on the basis of past persecution if they can establish that they suffered persecution in their country of nationality or last habitual residence due to "race, religion, nationality, membership in a particular social group, or political opinion."³⁴ In addition, the applicant must be unable or unwilling to return to that country because of such persecution.³⁵ If the applicant establishes past persecution, the applicant is also presumed to have a well-founded fear of persecution unless, by a preponderance of the evidence, it can be established that conditions in the country have sufficiently changed such that the fear no longer exists.³⁶

2. Well-Founded Fear of Persecution

Applicants are found to have "a well-founded fear of persecution" if they can establish that they have a fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinion; there is a reasonable possibility of actually suffering such persecution if returned; and that they are unable or unwilling to return.³⁷ Applicants need not provide evidence that they would be singled out for persecution; they need only establish a pattern in their country of persecution of groups similarly situated, and establish their own inclusion and identification with such groups so that fear of persecution upon return is reasonable.³⁸ In addition, consideration is given to evidence that the government of the applicant's nationality persecutes its nationals if they leave the country without permission or seek asylum elsewhere.³⁹

The well-founded fear of persecution standard has a subjective and an objective component.⁴⁰ The subjective component can be satisfied by "an applicant's credible testimony that he genuinely

32. *See id.*

33. *See id.* § 208.13(b).

34. *Id.* § 208.13(b)(1).

35. *See id.*

36. *See* 8 C.F.R. § 208.13(b)(1)(i) (1998).

37. *See id.* § 208.13(2).

38. *See id.* § 208.13(b)(2)(i)-(ii).

39. *See id.* § 208.13(c)(2)(ii).

40. *See* Castillo-Ponce v. INS, 69 F.3d 543 (9th Cir. 1994) (Unpublished disposition, 1995 WL 540526).

fears persecution."⁴¹ In *Castillo-Ponce v. INS*, the Ninth Circuit Court held that the petitioner established a well-founded fear of persecution through evidence that the government of Cuba deliberately put her at an economic disadvantage after she filed an application to emigrate from Cuba.⁴² In fact, Cubans who do not participate in the communist party are labeled "dangerous" and often suffer from resultant persecution.⁴³ Thus, although the present definition giving favorable consideration to those who fear persecution is very vague, it preserves the rights of refugees if applied equitably.

3. Obtaining Asylum

An alien who qualifies as a refugee may be granted asylum either at the immigration judge or asylum officer's discretion.⁴⁴ Any alien found to be deportable⁴⁵ or excludable⁴⁶ will either be granted asylum or have their application referred to an immigration judge to adjudicate deportation or exclusion proceedings.⁴⁷ If asylum is granted, the alien after only one year may apply through an adjustment of status to become a permanent resident of the United States.

There are a number of mandatory grounds for denying asylum. For example, an alien convicted of a particularly serious crime in the United States⁴⁸ or reasonably believed to be a danger to the security of the United States will be denied asylum.⁴⁹ In addition, the alien will be denied asylum if before arrival in the United States he or she received some type of an offer of permanent resident status or

41. See *Shirazi-Parsa v. INS*, 14 F.3d 1424, 1427 (9th Cir. 1994) (quoting *Acewicz v. INS*, 14 F.3d 1424, 1427 (9th Cir. 1993)).

42. See *Castillo-Ponce*, 69 F.3d 543.

43. See *id.*

44. See 8 C.F.R. § 208.14(a)-(b) (1997); see also 8 U.S.C.A. § 1101(a)(42)(A) (West 1998) (defining refugee).

45. Aliens in, and admitted to, the United States upon an order of the Attorney General shall be removed if the alien is within one or more of the various classes of deportable aliens. Classes of deportable aliens include, but are not limited to, aliens that are inadmissible at time of entry or at time of adjustment of status or violates status, aliens in present violation of law, aliens that violated nonimmigrant status or a condition of entry, aliens whose conditional permanent residence has been terminated, aliens who have smuggled or attempted to smuggle other aliens into the United States, aliens who have engaged in marriage fraud, and aliens convicted of criminal offenses. See 8 U.S.C.A. § 1227 (West 1998).

46. Excludable aliens are aliens that are ineligible to be admitted to the United States. Examples of excludable aliens include aliens with particular health problems, aliens convicted of certain crimes, and aliens the Attorney General has reasonable grounds to believe are a threat to national security. See 8 U.S.C.A. § 1182 (West 1998).

47. See 8 C.F.R. § 208.14(b)(2) (1998).

48. For example, an alien who has been convicted of an aggravated felony. 8 U.S.C.A. § 1158(b)(2)(A)(ii) (West 1998).

49. See *id.* § 1158(b)(2)(A)(iv).

citizenship from another nation,⁵⁰ or if the alien can and will be deported to a country which the alien traveled from to get to the United States and the alien would have a full and fair procedure for obtaining asylum status in that country.⁵¹

4. Expedited Removal

In addition to the mandatory grounds for denying asylum, all aliens applying for admission to the United States must be inspected by immigration officers.⁵² Immigration officers then screen the aliens to determine whether they are admissible.⁵³ If the alien is determined inadmissible (either for misrepresenting material facts in immigration documents, falsely claiming U.S. citizenship, or failing to possess required documents)⁵⁴ the immigration officer orders the alien removed from the United States without further hearing or judicial review.⁵⁵ However, if the alien either indicates an intention to apply for asylum or a credible fear of persecution, he or she is referred for an interview by an asylum officer.⁵⁶ A credible fear of persecution is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."⁵⁷

Asylum officers can conduct interviews of aliens at a port of entry or any other place authorized by the Attorney General.⁵⁸ The asylum officer determines during the interview whether the alien has a credible fear of persecution.⁵⁹ If the officer determines that the alien does not, the alien is removed without further review,⁶⁰ but if the officer determines the alien does, he or she is detained for further consideration of the asylum claim.⁶¹

Aliens deemed not to have a credible fear of persecution can request an immigration judge to review the asylum officer's determination.⁶² The alien can be represented by counsel at this proceeding, however, the United States does not provide counsel to the

50. *See id.* § 1158(b)(2)(A)(vi).

51. *See id.* § 1158(2)(A).

52. *See* 8 U.S.C.A. § 1225(a)(3) (West 1998).

53. *See id.* § 1225(b)(1)(A)(i).

54. *See id.* § 1182(a)(6)(C), (a)(7).

55. *See id.* § 1225(b)(1)(A)(i).

56. *See id.* § 1225(b)(1)(A)(i)-(ii).

57. *Id.* § 1225(b)(1)(B)(v).

58. *See id.* § 1225(b)(1)(B)(i).

59. *See id.* § 1225(b)(1)(B)(ii).

60. *See id.* § 1225(b)(1)(B)(iii)(I).

61. *See id.* § 1225(b)(1)(B)(ii).

62. *See id.* § 1225(b)(1)(B)(iii)(III).

alien.⁶³ In fact, immigration judges actually discourage lawyers from participating at these review hearings.⁶⁴ In addition, the immigration statutes do not mandate guidelines for the admission of evidence or testimony of witnesses.⁶⁵ Because these immigration policies are extremely subjective and lack appropriate procedural safeguards, fundamental concerns of fairness and possible human rights violations are raised.

III. DUE PROCESS OF LAW

Nothing in the Cuban Adjustment Act or Immigration and Nationality Act requires the United States, upon having rescued Cubans from the sea, to bring them to the United States. Thus, interdicting Cubans on the open seas, and detaining them in Guantanamo Bay, Cuba, or any place outside the United States avoids triggering the Cuban Adjustment Act.⁶⁶ However, this may not avoid triggering a violation of the United States Constitution.

A. The Fifth Amendment

The Fifth Amendment of the United States Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁶⁷ This is the Due Process Clause, and guarantees both a person's substantive and procedural due process rights. Substantive due process limits the substantive power of states to regulate certain areas of human life. The substantive component derives mainly from interpretation of liberty. For example, certain types of state limits on human conduct have been held to so unreasonably interfere with important human rights that they amount to an unreasonable denial of liberty.⁶⁸ Procedural due process guarantees a person is given fair procedures when the state deprives a person of life, liberty, or property.⁶⁹

63. See *id.* § 1225(b)(1)(B)(iv).

64. See *id.*

65. See *Refugee Law Still Needs Fix*, NAT'L L.J., July 27, 1998.

66. See *supra* note 16.

67. U.S. CONST. amend. V. The Fifth Amendment Due Process Clause is binding on the Federal government and the Fourteenth Amendment Due Process Clause is binding on the states. See U.S. CONST. amends. V & XIV.

68. For example, if the government is taking away something considered "life," "liberty," or "property," this may violate an individual's substantive interest in life, liberty, or property.

69. The first question to ask is whether a person's life, liberty, or property has been taken. If so, then it must be asked what process was due the person prior to the taking. The *Matthews* balancing test is used to determine if one's procedural due process rights have been violated. The strength of one's interest in receiving the procedural safeguard is weighed against the government's interest in avoiding extra burdens. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

Whether the detention of Cuban immigrants constitutes a violation of the Due Process Clause of the Fifth Amendment is uncertain. The United States Supreme Court has held that an alien has no claim of right to seek admission into the United States, but rather, admission is a privilege that the sovereign United States government may grant, and only upon such terms as it shall prescribe.⁷⁰ In addition, the Court emphasized that for an alien who is denied entry into the United States, Congress authorizes the procedure of due process.⁷¹ The Attorney General has the power to exercise her discretion in determining whether to admit or detain an alien through the power entrusted to that office by Congress and the President.⁷² Thus, a court cannot retry the determination of the Attorney General.

B. Case Law

In *Shaughnessy v. United States ex rel Mezei*, an alien who was excluded and detained for several months claimed that his detention constituted a violation of the Due Process Clause.⁷³ The Supreme Court held that detention of the alien for almost two years without a hearing did not deprive him of any statutory or constitutional right.⁷⁴ The Court reasoned that Congress had authorized the temporary removal of aliens while determining their admissibility and the Court cannot retry the Attorney General's determination. However, four Justices dissented, reasoning that the respondent still has rights (even though he has no right of entry) and that his continued detention without a hearing violates due process of law.

It was later held that the detention constitutes a violation of due process only if it amounts to punishment.⁷⁵ To determine if detention constitutes punishment, a court must determine whether the detention is an incident of a legitimate government objective or merely imposed for punishment.⁷⁶ Without showing an express intent to punish, the court used a rational basis analysis to come to its conclusion.⁷⁷

70. *United States v. Shaughnessy*, 338 U.S. 537, 542 (1950).

71. *See id.* at 544.

72. *See id.*

73. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

74. *See id.* at 215.

75. *See Schall v. Martin*, 467 U.S. 253, 269 (1984).

76. *See id.*

77. The court will use a rational basis analysis where non-fundamental rights are generally concerned, such as economic and social welfare regulation. The state objective must be legitimate (i.e., health, safety, general welfare), and the means must be rationally related to the objective (i.e., must not be arbitrary or irrational).

C. Rational Basis

Courts thus employing a rational basis analysis often hold that the detention of excludable aliens does not constitute illegal punishment in violation of the due process clause. The rationale for detainment is protection of society from potentially dangerous aliens. This protection requires the separation of aliens from society and, because in many instances an alternative is not available, detention may not be an excessive means to accomplish the governmental objective. However, only aliens who truly appear to represent a danger to society should be detained.

D. Strict Scrutiny

Perhaps the courts should use a much stricter test, thereby giving less deference to Congress. Where fundamental rights are concerned, a strict scrutiny test historically has been and should be implemented. For governmental regulation to pass constitutional muster under such a test, the governmental objective must be compelling and the means which the government uses to achieve its objective must be narrowly tailored to achieve the objective. In addition, the government must show that the objective is compelling. If indeed a Cuban national's right to liberty is considered fundamental, then the United States government must balance its compelling interest against the interest of refugees, and choose the least obstructive method for achieving its objective.

E. Parole

To accomplish this goal and thereby facilitate the admission of some aliens into the United States, the Immigration and Nationality Act was amended to provide admission to aliens that do not pose a serious threat to society.⁷⁸ This Amendment provides that to avoid undue hardships the Attorney General is authorized, in her discretion, to parole into the United States any alien applying for admission. This parole is not regarded as admission, but rather the alien must be returned to custody when the purpose of the parole has been served.⁷⁹ For an alien to be paroled, two elements must be satisfied. The alien must be a nonviolent person likely to remain

78. See Refugee Act of 1980, Pub. L. No. 82-414, 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1158).

79. See *id.*

nonviolent and must be unlikely to pose a threat to the community upon release or violate the conditions of his or her parole.⁸⁰

F. Detainment of Aliens

Although parole is beneficial to those aliens not considered a threat to society, other aliens are detained at the mere discretion of an immigration officer. Courts that have decided Cuban detainee's petitions for habeas corpus⁸¹ are in general agreement that Congress is fully authorized to detain excludable aliens while their applications for admission are reviewed or while they are pending deportation. However, the permissible duration of the detainment is unclear. The plain language of Section 1225(b) of the United States Code does not authorize the indefinite detention of an excludable alien nor give a specific time limit in which an alien's status must be determined. Rather, it permits an alien to be "detained for further inquiry."⁸² Thus, indefinite detainment is neither authorized nor prohibited, and should be limited to temporary detainment where there is a compelling government interest and no viable alternative.

Thus, the United States is justified in detaining an excludable alien only if it is reasonable, for a temporary period of time, and necessary to carry out immigration proceedings. A person who is deprived of his right to liberty for an unspecified amount of time and for an illegitimate cause is unjustifiably punished. An excludable alien in the United States who has not been convicted of any offense should not face indefinite imprisonment without being afforded the substantive and procedural due process guarantees afforded a person charged with a crime in the United States.⁸³

G. Conclusion

The rights of those Cuban immigrants plucked from the sea en route to Florida are markedly dissimilar to those immigrants already in the United States. These refugees trying to sail to the United States are intercepted on the sea and detained while immigration officials review their cases. Although these aliens are "persons" within any

80. See 8 C.F.R. § 212.12(d)(2) (1993).

81. Literally means "you have the body." The primary function is to release from unlawful imprisonment. It is not to determine a prisoner's guilt or innocence, but rather it presents the issue of whether a prisoner's due process rights are violated through a denial of liberty. The writ is directed to the person detaining the other, and commands him or her to produce the body of the detainee. See BLACK'S LAW DICTIONARY 709 (6th ed. 1991).

82. 8 U.S.C. § 1225(b) (1982).

83. See Birgitta I. Sandberg, *Is the United States Government Justified in Indefinitely Detaining Cuban Exiles in Federal Prisons?*, 10 DICK. J. INT'L L. 383, 389-91 (1992).

meaning of the term, they are denied protection from deprivation of "life, liberty or property" under the Fifth Amendment of the United States Constitution.⁸⁴ These aliens should be afforded the same procedural and substantive protections under the Due Process Clause of the Constitution that citizens of the United States enjoy.

IV. RIGHTS OF IMMIGRANTS UNDER INTERNATIONAL LAW

International law is the law that governs legal relationships between nations.⁸⁵ The two most important sources of international law are international customs and treaties.⁸⁶ Customary international law is law derived from general and consistent state practices and is generally referred to as *implied* international law.⁸⁷ A sense of legal obligation mandates a state follow such customs, and therefore customary international law binds all nations, as opposed to merely binding parties to a particular treaty.⁸⁸ Conversely, *express* international law includes treaties, covenants, and documents.⁸⁹ International law is a great moral force and is instrumental in the combat of abuses of governmental power and human rights violations.

A. *The United Nations*

The United Nations was created upon the idea that every human being possesses certain fundamental human rights that go beyond national boundaries.⁹⁰ On October 24, 1945, the United States accepted the Charter of the United Nations. With this acceptance, the United States agreed to promote "universal respect for, and observance of, human rights and fundamental freedoms for all."⁹¹ The United States further pledged to "reaffirm faith in fundamental rights, [and] in the dignity and worth of the human person."⁹²

B. *The United Nations Human Rights Committee*

The United Nations' General Assembly subsequently declared that the principles of the United Nations Charter embodied in the

84. See U.S. CONST. amend. V.

85. See BLACK'S LAW DICTIONARY 816 (6th ed. 1991).

86. See *id.*

87. See Tamela R. Hughlett, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 170-71 (1992).

88. See *id.*

89. See *id.* at 171.

90. See Richard Bilder, *The Status of International Human Rights Law: An Overview*, INT'L HUM. RTS. L. & PRAC. 1 (1978).

91. U.N. CHARTER art. 55.

92. See U.N. CHARTER preamble.

Universal Declaration of Human Rights constitute basic principles of international law.⁹³ After analyzing both Article 9 of the Universal Declaration of Human Rights and Article 9 of the proposed draft of the International Covenant of Civil and Political Rights, the United Nations Human Rights Committee drafted a very authoritative definition of "arbitrary detention."⁹⁴ The committee concluded that:

'[A]rbitrary' is not synonymous with 'illegal' and . . . the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary. The Committee, therefore . . . has adopted the following definition: an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.⁹⁵

In addition, the Committee stated that "arbitrary" was not equivalent to "against the law," but rather must be interpreted more broadly to include such elements as "inappropriateness," "injustice," and "lack of predictability."⁹⁶

Under this definition of arbitrary, the United States could maintain that its detention of Cuban refugees is not arbitrary because the detention is in accordance with law. As previously discussed, the United States has the power to exclude any alien that it deems may pose a threat to society. Thus, the United States could argue that detaining the Cuban refugees en route to the United States was its only alternative. The rationale for this alternative may be the United States' interest in protecting its citizens from possible violent criminals; that other nations may be unwilling to accept these refugees; and finally, that under domestic and international law, the United States is prohibited from returning these refugees to Cuba where they may be persecuted. Detaining these Cubans may be the least restrictive alternative available, and therefore, may be in accordance with United States and international law.

93. See Creola Johnson, *Quarantining HIV Infected Haitians: United States' Violations of International Law at Guantanamo Bay*, 37 HOW. L.J. 305, 313-314 (1994).

94. See *id.* at 307.

95. *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, at 7, para. 27 (1964), U.N. Doc. E/CN.4/826/Rev.1 [hereinafter 1964 UN Study] (emphasis omitted) (quoted in Johnson, *supra* note 93, at 307).

96. *Van Alpen v. Netherlands*, Communication 305/1988, U.N. Doc. CCPR/C39/D305/1988, (quoted in Johnson, *supra* note 93, at 307).

C. Case Law

In *Alvarez-Mendez v. Stock*, a Cuban who came to the United States during the Mariel boatlift had his parole revoked after he was convicted of several crimes committed in the United States.⁹⁷ Under the authorization of the Immigration and Nationality Act, the Attorney General could not release any alien convicted of an aggravated felony unless it could be determined that the alien did not pose a threat to the community.⁹⁸ Thus, the alien was given a deportation order and detained in federal custody because Cuba did not accept his repatriation.⁹⁹

The alien argued that his detention violated the international prohibition against arbitrary detention.¹⁰⁰ However, the court concluded that the Attorney General had the express power to detain the alien if it was determined that the alien was a threat to the safety of the people and property of the United States.¹⁰¹ In addition, the court held that the detention was not arbitrary because the detainment was in accordance with a legislative grant of authority.¹⁰² Thus, the court in this case used the term "arbitrary" synonymously with "against the law." This narrow interpretation reinforces the government's power to detain Cuban refugees because the detainment must merely be in accordance with United States law to be non-arbitrary.

D. Express International Law

The United States also has an obligation under *express* international law not to arbitrarily detain anyone. Express international law includes treaties, covenants, and documents. The United States Constitution provides that "[a]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."¹⁰³ Although treaties do not become United States law unless they are self-executing or implemented by Congress, they are routinely viewed as important policy with which statutory law should comply.¹⁰⁴

97. See *Alvarez-Mendez v. Stock*, 941 F.2d 956, 958-59 (9th Cir. 1991).

98. See *id.* at 959.

99. See *id.* at 958.

100. See *id.*

101. See *id.* at 963.

102. See *id.*

103. U.S. CONST. art. VI.

104. See *Johnson, supra* note 93, at 312-13.

The United States has signed and ratified at least two treaties that prohibit the United States from detaining people arbitrarily: The International Covenant on Civil and Political Rights and the United Nations Protocol Relating to the Status of Refugees.¹⁰⁵ Article 9 of the United Nations International Covenant on Civil and Political Rights states that:

[n]o one shall be subjected to arbitrary arrest or *detention*. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹⁰⁶

In addition, Article 12 of the United Nations International Covenant on Civil and Political Rights declares that "[e]veryone . . . shall . . . have the right to liberty of movement and freedom to choose his [or her] residence."¹⁰⁷ Freedom from arbitrary detention and freedom of liberty of movement are among the many international rights that the United States has pledged to observe and protect.¹⁰⁸

Although the United Nations Protocol Relating to the Status of Refugees does not expressly prohibit arbitrary detention, this prohibition can be inferred.¹⁰⁹ The United States accepted the Protocol without hesitation and the Protocol incorporated by reference the substantive provisions of the United Nations Convention Relating to the Status of Refugees.¹¹⁰ The Convention prohibits the contracting states from restricting the movement of refugees unless it is

105. *See id.* at 312.

106. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., art. 9 (1966).

107. *Id.* art. 12.

108. Several multinational instruments recognize these rights.

The existence of . . . fundamental human rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on every state to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights, and portions of the International Covenant on Civil and Political Rights

37 HOW. L.J. 305 n.62 (*quoting* Memorial of the United States (U.S. v. Iran), 1982 I.C.J. Pleadings (*Case Concerning United States Diplomatic and Consular Staff in Tehran*) 182 (Jan. 12, 1980)).

109. *See Johnson, supra* note 93, at 312.

110. The United States ratified the United Nations Protocol Relating to the Status of Refugees on October 4, 1968. *See* 114 CONG. REP. 29,607 (1968). The Protocol went into force in the United States on November 1, 1968. *See* 19 U.S.T. 6223, T.I.A.S. 6577. The United States did not become a party to the United Nations Convention Relating to the Status of Refugees itself because it was essentially designed to address the post war refugee problem in the European Community. *See* S. Exec. Rep. No. 14, 90th Cong., 2d Sess., at 6, 9 (1968); 37 How. L.J. 305 n.50, 51.

necessary, and the restrictions are only applied until their status in the country is determined or the refugee is admitted into another country.¹¹¹ The United States could easily illustrate that the detention of the Cuban refugees is necessary not only for the national security of the United States, but for the safety of the refugees as well. Thus, these treaties do not provide a strong argument that the United States' policy of detaining Cuban refugees violates express international law.

V. CONCLUSION

The United States has long been a country comprised of races and nationalities from around the globe seeking to achieve the "American dream." However, to immigrants, this dream is fading. The policy and law of the United States toward refugees such as Cuban nationals seeking to escape tyranny illustrate this erosion.

The United States has a compelling, or at least a legitimate, interest in protecting its citizens. The only viable alternative for carrying out this interest is the temporary detainment of aliens while they are screened to determine whether they are eligible for entry. Aliens found ineligible must be detained while preparations are made to return them to their home country or another country that may accept them. In fact, the policy of the United States to interdict and detain Cuban refugees on the open seas is beneficial because the policy makes asylum less appealing, thereby deterring Cubans from risking their lives by boarding flimsy sea craft and heading for Florida. In addition, the reasonable temporary detention of these aliens is in accordance with customary and express international law. The United States policy complies with the moral force international law affords, and therefore, withstands an argument of governmental abuse and human rights violations.

111. See Protocol, art. 31.2 (quoted in Johnson, *supra* note 93, at 312).

