No. 90-55447

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS ALVAREZ-MENDEZ,

Petitioner-Appellant,

v.

FRED J. STOCK, WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
Central District of California
Honorable Irving Hill, District Judge Presiding

OPENING BRIEF FOR PETITIONER-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Does the Immigration and Nationality Act authorize the Attorney General to incarcerate an excludable alien in a federal prison indefinitely, when the alien is not serving a criminal sentence and the Attorney General cannot return the alien to his or her native country?

2. Does the confinement in a federal prison for over two years of a person who is neither serving a sentence nor pending trial constitute punishment without a criminal trial, in violation of the fifth and sixth amendments?

3. Does the Attorney General violate an excludable alien's right to due process of law by revoking his or her immigration parole without a hearing of any kind?

4. Does the Attorney General violate an excludable alien's right to due process of laws by not affording him or her sufficient procedures to seek his or her release from immigration custody?

5. Does confinement of a person, who is neither serving a sentence nor pending trial, in a federal prison constitute indefinite and arbitrary detention, in violation of principles of customary international law, enforceable in the United States?

STATEMENT OF JURISDICTION

I. SUBJECT MATTER JURISDICTION OF DISTRICT COURT.

The United States District Court for the Central District of California had subject matter jurisdiction to review the petition for a writ of habeas corpus under 28 U.S.C. § 2241(a).

II. BASIS OF APPEALABILITY AND JURISDICTION OF THE COURT OF APPEALS.

The district court's final judgment was filed on March 19, 1990. [R.26; ER.49].[1/] The judgment is appealable to this court, pursuant to 28 U.S.C. § 1291, in that it is a final order.

III. STATEMENT OF TIMELINESS.

The notice of appeal was filed on March 29, 1990. [R.27; ER.50]. This was within the sixty-day period given for filing a notice of appeal when an officer of the United States is a party, pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

Luis Alvarez-Mendez is a citizen of Cuba. He was ordered excluded from the country and deported back to Cuba. Cuba, however, will not accept him back and our government will not release him. Instead, he has been incarcerated for over two years in federal prisons by our Immigration and Naturalization Service.

On August 2, 1989, Mr. Alvarez filed a pro se petition for a writ of habeas corpus in the United States District Court for the Central District of California, challenging the authority of the Attorney General to detain him indefinitely.

[1/] "R.__" refers to document __ in the clerk's record. "ER.__" refers to the Appellant's Excerpts of Record, at page __.

[R.1]. On March 19, 1990, the district court adopted the Magistrate's revised Report and Recommendation denying Mr. Alvarez's petition. [R.25]. On March 24, 1990, Mr. Alvarez timely filed his notice of appeal from the judgment. [R.27]. The district court's decision has been published at 746 F.Supp 1006 (C.D. Cal. 1990).

STATEMENT OF THE FACTS

I. ARRIVAL IN THE UNITED STATES.

Luis Alvarez-Mendez is a Cuban citizen who arrived at Key West, Florida in the United States by boat from Mariel, Cuba on May 20, 1980. [R.25; ER.29]. Mr. Alvarez arrived as part of the Freedom Flotilla, a boatlift of approximately 114,000 Cuban refugees who left from the Mariel harbor and arrived in Florida. [R.25; ER.29]. This group of Cubans are collectively known as "Mariel Cubans" or "Marielitos," after the harbor from which they left.

Shortly after his arrival in the United States, Mr. Alvarez was granted immigration "parole," pursuant to section 212(d) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5). Upon release from custody, he went to Mineola, New York and then to Miami, Florida. [R.9; ER.2-3]

II. THE CRIMINAL CASE.

Mr. Alvarez remained at liberty until July 13, 1984, when he was arrested on state charges in Miami, Florida. [R.7]. A co-defendant and Mr. Alvarez entered an apartment, intending to burglarize it. They tried to silence the tenant, but instead caused his death. [R.25; ER.30]. The co-defendant and Mr. Alvarez took a television and/or a stereo from the apartment. [R.25; ER.30].

On January 23, 1985, Mr. Alvarez pled guilty to second

degree murder, armed burglary with an assault with a dangerous weapon, to wit: a rock, and armed robbery with a deadly weapon, to wit: a rock. [R.25; ER.30]. He was sentenced to a term of twelve years for each count, with all three counts to run concurrently. [R.25; ER.30]. On August 10, 1988, Mr. Alvarez completed his Florida sentence. [R.25; ER.30].

III. IMMIGRATION PAROLE REVOCATION AND CUSTODY.

When Mr. Alvarez completed his Florida sentence, he was immediately taken into custody by the Immigration and Naturalization Service ("INS"), pursuant to a detainer filed with Florida officials after his conviction. [R.7; ER.1]. The INS had unilaterally decided to revoke Mr. Alvarez's immigration parole. [R.7; ER.1]. The INS has created a procedure called the Cuban Review Plan to administer the parole of Mariel Cubans. 8 C.F.R. § 212.12.[2]/ (Section 212.12 is reproduced in the Statutory Addendum to this Brief). The Plan does not provide for revocation hearings, § 212.12(h), thus Mr. Alvarez did not receive a hearing of any kind before his parole was revoked. [R.7; ER.1].

On October 6, 1988, an immigration judge ordered that Mr. Alvarez be excluded from the United States and deported to

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[2]/ The INS has also set out an appeal procedure, codified at 8 C.F.R. § 212.13. Under that section, Mariel Cubans who were in INS custody as of December 28, 1987 can file an appeal from the denial of parole release. Because Mr. Alvarez was not in INS custody on that date, this procedure is not available to him.

Cuba. [R.25; ER.31]. The Board of Immigration Appeals summarily dismissed Mr. Alvarez's appeal. [R.25; ER.31].

Although Mr. Alvarez has been found to be an excludable alien, the INS is unable to deport him; Cuba will not take him back. Cuba agreed in December, 1984 to take back only 2,746 Mariel Cubans. Their names are on a list which the INS compiled. [R.25; ER.33]. Cuba agreed in December, 1984 to accept Mariel Cubans on that list at a rate of 100 persons per month. [R.17; ER.14]. Only the United States government knows who is on the list or how many Mariel Cubans from the list have been successfully deported. The government will neither release the list nor state whether Mr. Alvarez is on the list. [ER.18]. In any event, it is unlikely that Mr. Alvarez would be on the list, since he had not been convicted of any crime or ordered excluded from the country at the time the list was compiled.

Mr. Alvarez is currently incarcerated at the Federal Correctional Institution at Terminal Island, California. [R.25; ER.29]. While at Terminal Island, he has had no disciplinary infractions. He has worked as a maintenance man and he has enrolled in several classes. [R.20; ER.21,25]

IV. IMMIGRATION REPAROLE PROCEEDINGS.

Under the Cuban Review Plan, each incarcerated Mariel Cuban supposedly has his or her status reviewed on an annual

basis. § 212.12(g)(2). Two INS officers (the "Panel") review the Mariel Cuban's file. § 212.12(d)(4)(i). Upon review, the Panel determines either to interview the Mariel Cuban or recommend him or her for release. Id. The INS regulations do not give the detainee the right to counsel at the interview, but the Mariel Cuban is permitted to be accompanied by a person of his choice, who may assist in answering any questions. § 212.12(d)(4)(ii). In the interview, the burden is on the Mariel Cuban to prove to the Panel that he or she is suitable for release. To recommend release, the Panel must conclude that: (1) the detainee is presently a non-violent person; (2) the detainee is likely to remain nonviolent; (3) the detainee is not likely to pose a threat to the community following his or her release; and (4) the detainee is not likely to violate the conditions of his parole. § 212.12(d)(2).

After the interview, the Panel recommends either release or continued detention. § 212.12(d)(4)(iii). The Panel's recommendation is then reviewed by the INS Associate Commissioner for Enforcement (the "Commissioner"). The Commissioner, who sits in Washington, D.C., does not personally interview the Mariel Cuban, but makes the final determination based on the record alone. Id. INS regulations permit the Commissioner, who has never met the detainee, to

overturn a release recommendation made by a Panel, which has met and had an opportunity to determine first-hand the credibility and character of the detainee. Id.

Mr. Alvarez received his first Panel review on November 1, 1988. [R.9; ER.2]. The Panel recommended that Mr. Alvarez continue in detention. [R.9; ER.3]. The Commissioner agreed. On November 7, 1989, fifty-three weeks after the interview, Mr. Alvarez received final notice of the Commissioner's decision. [R.17; ER.17].

On January 10, 1990, Mr. Alvarez went before another Panel. This time, both Panel officers determined that Mr. Alvarez should be released. They noted that he was "very candid in regards to his criminal activities." [R.20; ER.21]. They found he was credible on key issues. [R.20; ER.22]. They concluded that Mr. Alvarez "appears at this time to be rehabilitated, seems non-violent and appears to remain non violent." [R.20; ER.22]. Nevertheless, on March 2, 1990, the Commissioner reversed the Panel's recommendation and denied Mr. Alvarez parole. [R.20; ER.20]. Without meeting Mr. Alvarez, the Commissioner found that "[i]t cannot be concluded that [Mr. Alvarez] will remain non-violent or honor the conditions of parole if released." [R.20; ER.20].

V. THE HABEAS CORPUS PETITION.

On August 2, 1989, Mr. Alvarez filed a petition for a

writ of habeas corpus in the United States District Court for the Central District of California, challenging the authority of the Attorney General to continue detaining him. On March 19, 1990, the petition was denied. [R.26]. The district court made four key rulings. First, the court ruled that the Attorney General has the statutory authority to detain Mr. Alvarez. [R.25; ER.39-40]. Second, the court found that any international law prohibition of arbitrary and prolonged detention was inapplicable to the case. [R.25; ER.43]. Third, the court determined that Mr. Alvarez has no liberty interest protected by the fifth amendment. [R.25; ER.45]. Finally, the court decided that Mr. Alvarez's incarceration was civil, not criminal, and that the sixth amendment was inapplicable. [R.25; ER.47].

This appeal follows.

STANDARDS OF REVIEW

I. AS TO THE GRANT OR DENIAL OF A HABEAS CORPUS PETITION GENERALLY.

The decision whether to grant or deny a habeas corpus petition is reviewed de novo. Weygandt v. Ducharme, 774 F.2d 1491, 1492 (9th Cir. 1985); Chatman v. Marquez, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 474 U.S. 841 (1985).

None of the historical facts relating to this appeal are in dispute. The issues in this appeal involve the legal authority of the executive. The district court's decisions on

legal questions and on mixed questions of law and fact which implicate constitutional rights are reviewed de novo. Wood v. Sunn, 865 F.2d 982, 986 (9th Cir. 1988).

II. AS TO THE ISSUE WHETHER MR. ALVAREZ'S DETENTION IS INDEFINITE.

There is one issue that may appear, at first blush, as a question of fact. The district court ruled that the government had met its burden of showing that Mr. Alvarez's detention was not simply incarceration as a temporary alternative to departure. [R.25; ER.39]. Based on that finding, the court then ruled that Mr. Alvarez's detention was not "indefinite." [R.25; ER.39-40]. However, closer examination shows that this is a ruling of law, and the district court's decision should be reviewed de novo.

This court has held that where the standard of review is not clear, the key to resolving the question is the nature of the inquiry. United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). If the inquiry is purely factual, then review is under the clearly erroneous standard. Id. at 1200. If, on the other hand, the inquiry involves legal concepts which mix fact and law and demand analysis into the underlying values, review should be de novo. Id. at 1202. If the inquiry touches constitutional questions, then the need for de novo review is even more compelling. Id. at 1203.

A functional analysis of this issue must lead to de novo review. The facts in this case are not in dispute. Mr. Alvarez is incarcerated by the INS in a federal prison. He has no release date. He has two opportunities for release. First, pursuant to his annual review under the Cuban Review Plan, the INS can release him on parole, as indeed recommended by the last reviewing panel. Second, the United States government can, in theory, attempt to return Mr. Alvarez to Cuba. It is undisputed that there are presently no plans to return Mr. Alvarez to Cuba.

What is in dispute is whether these facts constitute "indefinite detention," or merely a temporary alternative to deportation. That decision is a question of law, or, at the very least, a mixed question of law and fact. In the context of this case, the term "indefinite detention" serves as a proxy for a finding that Mr. Alvarez's incarceration is sufficient to trigger certain constitutional and statutory protections. If the court finds the incarceration indefinite, the court will have to inquire whether, for example, the incarceration amounts to punishment in violation of the fifth and sixth amendments.

Because the district court's holding that Mr. Alvarez's incarceration is not "indefinite" is a question of law, this court should review that holding de novo.

ARGUMENT

I. THE ATTORNEY GENERAL HAS NO STATUTORY AUTHORITY TO DETAIN MR. ALVAREZ, BECAUSE THE ATTORNEY GENERAL CANNOT ACCOMPLISH MR. ALVAREZ'S IMMEDIATE DEPORTATION.

The Immigration and Nationality Act of 1952 ("the Act"), 8 U.S.C. §§ 1101, et seq., delegates substantial power in immigration matters to the Attorney General. The Act provides that excludable aliens may be temporarily detained during admission proceedings and while deportation arrangements are made. After that period passes, however, the Attorney General's power to continue to detain is questionable. Courts agree that the Act does not expressly authorize the Attorney General to detain excludable aliens when those aliens cannot be deported immediately. The courts of appeals are split on whether the Act implicitly authorizes the Attorney General to detain those aliens. As explained below, the Attorney General does not have the implied authority to detain Mr. Alvarez.

A. The Act Does Not Give The Attorney General Explicit Authority to Confine Mr. Alvarez.

On October 6, 1988, an immigration judge declared Mr. Alvarez to be an excludable alien. Excludable aliens are to be deported immediately. Nothing in the Act expressly authorizes the Attorney General to incarcerate excludable aliens who cannot be deported immediately.

The statutory scheme is fairly straightforward. An alien who appears at a port of entry into the United States, and who

is not clearly entitled to land, shall be detained for further inquiry. 8 U.S.C. § 1225(b). The alien may, in the meantime, be released on immigration parole. Parole release does not alter an alien's immigration status. 8 U.S.C. § 1182(d)(5). (Section 1182(d)(5) is reproduced in the Statutory Addendum to this Brief). Following further inquiry, the alien "shall be allowed to enter [the country] or shall be excluded and deported." 8 U.S.C. § 1226(a). When an alien is deemed excludable, the Act provides for immediate deportation. 8 U.S.C. § 1227(a)(1).[3]/ If the Attorney General concludes that immediate deportation is "not practicable or proper," deportation may be stayed. Id.

In the case at hand, the district court applied to Mr. Alvarez the "not practicable or proper" exception to immediate deportation. The court ruled that Mr. Alvarez's deportation was impracticable, implying that immediate deportation was thus correctly stayed. [R.25; ER.37-38].

The district court erred in applying the "not practicable or proper" exception to Mr. Alvarez. Only logistical concerns about deporting the alien in "accommodations of the same class in which he arrived" determine whether deportation is "not practicable or proper." 8 U.S.C. § 1227(a)(1); see House Rep.

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[3]/ Most deportations occur so soon after aliens' arrival at the border that a regulation was adopted to protect aliens from being deported sooner than 72 hours. See 8 C.F.R. § 237.2 (1989).

No. 1365, 82nd Cong., 2d Sess., 135, reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1720 (discussing the economic and logistical concerns motivating the passage of this provision).[4]/ The problem of deportation when a foreign country refuses to take its own citizens back is covered specifically in another portion of the statute, 8 U.S.C. § 1227(a)(2).

Section 1227(a)(2) was enacted in 1981. Prior to 1981, the Act only authorized deportation of an alien to the country from which he or she came, and only on the vessel or aircraft that brought the alien to the United States. In 1981, in response to the Cuban Freedom Flotilla, Congress expanded the range of countries to which excludable aliens could be ordered deported.[5]/ Significantly, with full knowledge that some of

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[4]/ The limited scope of this exception to "immediate deportation" is reflected in the INS's own regulations. See, e.g., 8 C.F.R. § 237.5 (1989) ("An excluded alien shall, immediately or as promptly as the circumstances permit, be offered for deportation to the master, commanding officer . . . of the vessel or aircraft on which the alien is to be deported . . .").

[5]/ 8 U.S.C. § 1227(a)(2) now provides:

"If the government of the country [from which the alien came] will not accept the alien into its territory, the alien's deportation shall be directed by the Attorney General, in his discretion and without necessarily giving any priority or preference because of their order as herein set forth, either to-

(A) the country of which the alien is a subject, citizen or national;

(B) the country in which he was born;

(C) the country in which he has a residence; or

(D) any country which is willing to accept the alien into its

the Mariel Cubans allegedly had criminal records in Cuba,[6]/ Congress did not authorize the Attorney General to detain excludable aliens in the event that immediate deportation was not practicable or proper.

Congress explicitly limited the Attorney General's authority to withhold deportation and detain an alien to the situations specified in section 1227. Any reading of the "not practicable or proper" phrase as giving the Attorney General broad authority to detain an alien indefinitely pending deportation would make the carefully delineated provisions of section 1227 superfluous.[7]/ Zardui-Quintana v. Richard, 768 F.2d 1213, 1217 n.12 (11th Cir. 1985).

Courts which have examined the Attorney General's power under the Act generally agree that the Act does not grant the express authority to detain excludable aliens who cannot be immediately deported. See Palma v. Verdeyen, 676 F.2d 100,

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territory, if deportation to any of the foregoing countries is impracticable, inadvisable, or impossible."

[6]/ See Oversight Hearings on Caribbean Migration: Hearings before the Subcomm. on Immigration, Refugees, and International Law, 96th Cong., 2d Sess., Serial No. 84; U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary, 96th Cong., 2d Sess., Serial No. 96-79.

[7]/ Although 8 C.F.R. § 243.4 (1988) gives the district director great latitude to stay deportation generally, section 237.1 expressly restricts that authority with regard to excludable aliens, limiting the district director's authority to those powers enumerated in section 1227(a) and (d). A broad reading of the "practicable or proper" clause would render meaningless the limits to the power to stay deportation in exclusion cases.

104 (4th Cir. 1982); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122 (N.D. Ga. 1983), rev'd on other grounds, 734 F.2d 576 (11th Cir. 1984).

B. The Act Does Not Give The Attorney General Implicit Authority To Incarcerate Mr. Alvarez.

The district court ruled that the Attorney General is implicitly authorized under section 1227 to detain excludable aliens who cannot be deported. The court also read a Supreme Court decision, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), to require such authority. Further, the district court saw the delegation of power from the legislature to the Attorney General under 8 U.S.C. § 1103 as encompassing that authority. The district court was wrong on all three grounds.

1. Section 1227 Does Not Allow The Attorney General To Hold Mr. Alvarez Indefinitely.

a. The Tenth Circuit correctly held that the statutory scheme does not give the Attorney General such implicit authority.

The Act does not give the Attorney General the implied authority to detain excludable aliens indefinitely. The cases which hold that there is implied authority to detain excludable aliens indefinitely, Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir. 1982) and Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122-25 (N.D. Ga. 1983), aff'd on that ground, 734

F.2d 576, 580 n.6 (11th Cir. 1984), rely upon a comparison between the statutory detention provisions for deportable aliens, 8 U.S.C. § 1252(c), and excludable aliens, 8 U.S.C. § 1227(a).[8]/ (Both sections are reproduced in the Statutory Addendum to this Brief). Under section 1252(c), deportable aliens may only be detained for six months. There is no similar statutory limitation upon the detention of excludable aliens. The absence of a statutory limitation in section 1227 does not, however, grant the Attorney General unlimited power to detain excludable aliens.

Prior to 1950, neither the provision relating to deportable aliens nor the provision relating to excludable aliens contained any specific limitation period for detention pending deportation or exclusion. A number of courts -- this one included -- had held that neither excludable nor deportable aliens could be detained beyond a "reasonable period of time," generally from one to four months. For example, in Petition of Brooks, 5 F.2d 238 (D. Mass. 1925), the court ordered the release of a Russian alien who had been incarcerated for nine weeks pursuant to an order of

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[8]/ In Amanullah v. Nelson, 811 F.2d 1, 5 (1st Cir. 1987), the First Circuit noted that detention for further inquiry "is not explicitly tantamount to a command that aliens may be held in quarantine pending the ultimate resolution of debarment proceedings. . . yet the language has been so interpreted." The court failed to explain who had "so interpreted" the language. On this point, the decision cites a hornbook, but no cases.

deportation, and whose deportation was not possible because of a break in diplomatic relations between the United States and Russia. As the court there explained:

> The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for a crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not a punishment for crime . . . He is entitled to be deported, or to have his freedom.

Id. at 239 (citations omitted). See also Wolck v. Weedin, 58 F.2d 928, 930-31 (9th Cir. 1932) (alien to be released if not deported within thirty days); Caranica v. Nagle, 28 F.2d 955, 957 (9th Cir.), cert. denied, 277 U.S. 589 (1928) (two months is a reasonable period to effect deportation); United States ex rel. Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922) (alien entitled to release if not deported within four months); United States ex rel. Janavaris v. Nicolls, 47 F. Supp. 201, 202-03 (D. Mass. 1942) (alien may not be detained pending deportation an "unreasonably long" time -- there 5 1/2 months); In re Hanoff, 39 F. Supp. 169 (N.D. Cal. 1941) (alien must be released if he cannot be deported within reasonable length of time); Ex Parte Perkov, 45 F. Supp. 864, 867 (S.D. Cal. 1942) (same).

In 1950, Congress enacted 8 U.S.C. section 1252(c), which essentially defined the "reasonable period" of detention in

deportation cases. That section actually expanded the government's power to detain deportable aliens. Cases had limited to one to four months the Attorney General's power to detain deportable aliens. Under section 1252, deportable aliens can now be held for up to six months. No similar expansion was enacted in the section pertaining to excludable aliens. The Fourth and Eleventh Circuits were incorrect in reading Congress' failure to extend similarly the power to detain excludable aliens as an implied grant of authority to detain them indefinitely.

The better view was taken by the Tenth Circuit in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). That court found that the Act does not implicitly authorize indefinite detention. When section 1252 was amended in 1952, Congress was aware that many deportable aliens could not be repatriated. There was no need to amend section 1227 because there was no evidence suggesting that excludable aliens had been physically detained for long periods of time. Id. at 1389. The Tenth Circuit concluded that section 1227 contemplates only temporary detention. Excludable aliens may only be detained during admission proceedings, and for a reasonable period of time for negotiations to return an alien to the country of origin, or to the initial transporter. After that, the alien is entitled to be released.

Additionally, when an alien in custody tests her or his detention by a writ of habeas corpus, "the burden is upon the government to show that the detention is still temporary pending expulsion and not simply incarceration as an alternative to departure." Id. at 1390.

b. Mr. Alvarez's confinement is indefinite, and is thus impermissible under Rodriguez-Fernandez.

The district court found that Mr. Alvarez's incarceration was permissible, even under Tenth Circuit authority. First, the court stated that the "INS has not determined that it cannot deport [Mr. Alvarez] to Cuba." [R.25; ER.33]. Second, the court noted that Mr. Alvarez is reviewed annually for release under the Cuban Review Plan. [R.25; ER.39]. Based upon these two factors, the district court concluded that the government has shown that Mr. Alvarez's confinement "is not simply incarceration as an alternative to departure." [R.25; ER.39]. The court was wrong. Neither the INS's "determination" nor the Cuban Review Plan alter the unlimited nature of Mr. Alvarez's confinement. By any definition, Mr. Alvarez's incarceration is indefinite. He has been in the custody of the INS since August 10, 1988. He has no release date, and has no prospect of obtaining his freedom in the foreseeable future.

The government cannot plausibly contend that Mr.

Alvarez's incarceration is temporary pending deportation or that he is being held for a reasonable period of time for negotiations to return him to his country of origin. It is undisputed that the Attorney General can only deport those 2,746 Mariel Cubans whom Cuba agreed in 1984 to accept. The government did not submit any evidence to the district court that it was currently negotiating for the deportation of other Mariel Cubans. The government did not even submit any timetable for further negotiations. True, as the district court noted, the United States "has consistently taken the position that the Cuban government will be expected to accept the return of non-listed Mariel Cubans." [R.25; ER.33]. Posturing, however, is not enough to satisfy the Rodriguez-Fernandez test. The government's hope that it may eventually send Mr. Alvarez to Cuba does not equal a concrete plan to deport him. Mr. Alvarez's continued incarceration is nothing more than the government's alternative to deportation.

Nor does annual review for release make Mr. Alvarez's confinement any less indefinite. Mr. Alvarez has twice been denied parole under the Cuban Review Plan. There is no date for his release. He does not know when, if ever, he can satisfy the Commissioner that he meets the criteria for release under the Plan. In the last review, the Panel recommended Mr. Alvarez for release. After meeting him, the

Panel members found him credible on key issues. They determined that he was neither violent nor likely to become violent. [R.20; ER.22]. In their report, they noted, "[Mr. Alvarez] appears at this time to be rehabilitated." [R.20; ER.22]. Nevertheless, the Commissioner, who did not meet or speak with Mr. Alvarez, overturned their findings. The government cannot plausibly argue that this sort of arbitrary "review" may definitely result in Mr. Alvarez's release.

2. Mezei does not hold that the Attorney General has the authority to detain aliens indefinitely.

The district court relied upon a Supreme Court decision, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1952), to find implicit power to detain excludable aliens indefinitely. Mezei, however, does not stand for that proposition. Mezei stands for the principle that excludable aliens have only those due process rights pertaining to admission which are given to them by Congress. Thus, they may be found to be excludable without a hearing when national security is involved.

Mr. Mezei lived in the United States for twenty-five years. He then went behind the "Iron Curtain" for nineteen months. He came back to the United States and was denied entry. Because he was gone so long without getting departure papers, on return his status was as if he had never lived in the United States. He was found excludable, without a

hearing, based upon information which the Attorney General would not release. The Attorney General claimed that release of the information would threaten national security. Id. at 208. Mr. Mezei was held for twenty-one months at Ellis Island while the government attempted to deport him. Id. He asserted that his exclusion and subsequent detention were illegal because the Attorney General lacked the authority to find him excludable as a threat to national security without an exclusion hearing. Id. at 207. The primary issue was thus whether an alien had a constitutionally protected right in the admission process, not whether his prolonged detention was constitutional.

The Supreme Court held that Mr. Mezei could be excluded without a hearing; the Court believed that releasing him into the country would have annulled Congress' sovereign power to exclude aliens who pose a risk to national security. Id. at 216. Pursuant to regulations promulgated expressly under the Passport Act, aliens who pose a security risk could be excluded without a hearing. Id. at 214-15. The Korean War was then in progress. "[S]ecurity risks and enemy aliens during wartime have always been treated specially." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); see also Jean v. Nelson, 472 U.S. 846, 877-79 (1985) (Marshall, J. joined by Brennan, J., dissenting)

(finding Mezei distinguishable from the situation presented by detained Haitian refugees, particularly in that Mr. Mezei was detained as a security risk; majority did not reach the issue).

Mezei was the third of a line of decisions establishing what due process rights individuals may assert upon being denied entry to the United States. When seen in context, it becomes even clearer that Mezei was a case about the right to an exclusion hearing, and was not a case about detention.

The first of the three cases was United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Ellen Knauff married a naturalized American citizen abroad, and sought to enter the United States. The Court upheld the authority of the Attorney General to exclude her without a hearing, on the grounds of national security. Because Ellen Knauff had not previously lived in the United States, she was not entitled to a hearing to challenge her exclusion.

The second case narrowed the holding of Knauff. Kwong Hai Chew was a permanent resident who served as chief steward of an American registry vessel. When the vessel returned to New York, the Attorney General sought to exclude him without a hearing. In Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), the Supreme Court held that a lawful permanent resident of the United States who was continuously present in the United

States could not, under the fifth amendment, be excluded without a hearing. Serving as a crewman on an American registry vessel was sufficiently similar to remaining within the boundaries of the United States. Thus, the Attorney General could not exclude Kwong Hai Chew without a hearing.

Then came Mezei. Like Kwong Hai Chew, Mr. Mezei had lived in the United States for a substantial period of time. Unlike Kwong Hai Chew, however, Mr. Mezei did not have the appropriate authorization to leave the United States. He was excluded without a hearing, and brought his claim primarily to obtain a hearing. Thus, in context, Mezei was primarily a case about the right to an exclusion hearing. It did not stand for the proposition that the Attorney General can detain all aliens indefinitely without an express grant of statutory authority. Indeed, the Attorney General's actions in Mezei were taken under regulations expressly authorized by the Passport Act.

The district court's reliance on Mezei was thus misplaced. The circuits have fundamentally disagreed on the proper interpretation of Mezei. The Tenth Circuit has correctly viewed Mezei as applying only to an excluded alien's right to due process in a hearing which determines his or her right to reside in the country. That court also noted the special national security concerns which were present in

Mezei. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981). The Fourth and Eleventh Circuits' interpretations of Mezei, contained in Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982) and Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), are misguided. Mezei does not make an alien's interest in admission inseparable from his or her protected interest in being free from indefinite detention. Mezei does not control the civil detention of an excludable alien, at least where there is no suggestion that the alien poses a threat to national security.

3. The legislature has not delegated to the Attorney General the authority to promulgate regulations under which aliens are indefinitely detained.

Section 407 of the Act, 8 U.S.C. § 1103, gives the Attorney General the power to promulgate regulations "necessary for carrying out his authority under the provisions of [the] Act." Regulations which are not reasonably related to the Attorney General's duties, however, constitute an abuse of the Attorney General's discretion and will not be upheld upon judicial review. Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 748 (9th Cir. 1972). Further, regulations must be construed to avoid conflict with the Constitution. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (statutes construed to avoid conflict with Constitution); Northwest Hospital, Inc. v. Hospital Service Corp., 687 F.2d

985, 992 (7th Cir. 1982) (same principle applies equally to administrative regulations).

The district court in this case noted that the Attorney General has promulgated regulations which govern Mr. Alvarez's parole. [R.25; ER.31]. Nevertheless, the regulations establishing the Cuban Review Plan are an abuse of discretion; those regulations cannot permit the Attorney General to incarcerate Mr. Alvarez indefinitely. The Attorney General can promulgate regulations governing the detention of excludable aliens during admission proceedings and during a reasonable period of time for negotiations to return an alien to his or her country of origin or to the initial transporter. That period has long passed for Mr. Alvarez and for every Mariel Cuban in INS detention for more than six months. The decision to detain Mr. Alvarez beyond that period is not reasonably related to any of the Attorney General's legitimate powers, for there is no reasonable expectation that the Attorney General can return Mr. Alvarez to Cuba. Further, as explained below on pages 23-29, any additional incarceration would simply punish Mr. Alvarez. Punishment without a criminal trial is prohibited by the Constitution. The Attorney General's regulations may not be construed to permit him to violate the Constitution.

In sum, the Attorney General has no statutory authority

to detain Mr. Alvarez. The pre-1950 cases limit the length of detention of excludable aliens. Those cases are still the law. Mezei is distinguishable because it addresses a different problem, and because it concerned national security. Excludable aliens awaiting repatriation can be incarcerated for only "a reasonable period of time," or they must be released. Mr. Alvarez has been incarcerated for more than that reasonable period of time. The Attorney General has no power to hold him. He must be released.

II. MR. ALVAREZ IS BEING PUNISHED WITHOUT A CRIMINAL TRIAL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

Mr. Alvarez is incarcerated in a medium security federal prison. He completed his state sentence, and he is not now serving a criminal sentence. Mr. Alvarez's present incarceration is not the result of his prior criminal conviction. Under the fifth and sixth amendments, no one may be punished without a criminal trial. Mr. Alvarez's continued incarceration is punishment, in violation of the fifth and sixth amendments.

A. The Test Set Forth In Kennedy v. Mendoza-Martinez, Rather Than A Mere Label, Determines Whether Mr. Alvarez's Confinement Is Impermissible Punishment.

Aliens are entitled to the same constitutional rights available to citizens in criminal proceedings. See, e.g., United States v. Henry, 604 F.2d 908 (5th Cir. 1979) (Miranda rights), overr'd on other grounds, United States v.

Bengivenga, 845 F.2d 593 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988); United States v. Verdugo-Urquidez, 110 S.Ct. 1056, 1068 (1990) (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree that the dictates of the Due Process Clause protect the defendant.") The district court recognized this point; it correctly ruled that the fifth and sixth amendments protect aliens in criminal proceedings. [R.25; ER.47]. The district court failed to recognize, however, that labels do not determine whether incarceration is punishment. Even incarceration ostensibly labelled "civil" may amount to punishment, which cannot be imposed without a criminal trial.

Any governmental act which deprives a person of life, liberty or property can be punitive. The protections of the fifth and sixth amendments apply whenever a person is "punished" by the government. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963); United States v. Salerno, 481 U.S. 739, 746 (1987). If a court determines that the governmental act is punitive, then the person being deprived of life, liberty, or property must be given all of the process afforded those facing criminal charges. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167-68 (1963). Thus, in Wong Wing v. United

States, 163 U.S. 228 (1896), the Supreme Court held that the executive could permissibly detain excludable aliens pending immediate deportation. The executive could not, however, require them to do hard labor while in detention. Hard labor was deemed "punishment" and could not be imposed without a criminal trial.

The district court skirted the issue of whether Mr. Alvarez is being punished. According to the district court, Mr. Alvarez's detention is related to immigration, which is a civil matter. [R.25; ER.47]. Attaching the label of "civil detention," however, does not answer whether the incarceration is punishment. "It is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies." United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975), cert. denied 424 U.S. 947 (1976) (citing In re Winship, 397 U.S. 358, 365-66 (1970)). See also In re Gault, 387 U.S. 1, 23-24, 27-30 (1967). The reality is that Mr. Alvarez is incarcerated indefinitely in a federal prison. Even if the custody is labelled "civil," this court must examine whether the detention is actually punishment.

B. Under Kennedy v. Mendoza-Martinez, Mr. Alvarez's Incarceration Is Punishment.

The Supreme Court has acknowledged that some forms of commitment are not "punishment," but may instead be legitimate

regulatory acts. United States v. Salerno, 481 U.S. 739, 746 (1987). The test for what constitutes "punishment" was described most fully in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), and was refined in Salerno. Under this test, Mr. Alvarez's confinement is punishment.

According to Salerno, 481 U.S. at 747, courts should first examine legislative intent to decide if a constraint on liberty represents illegal punishment or permissible regulation. Here, Mr. Alvarez is not confined under the express terms of any statute. Therefore, no clear congressional intent to punish him is present. If no congressional intent to punish exists, the court must then consider several factors to determine whether incarceration is punitive. Mendoza-Martinez, 372 U.S. at 168-69. The Court in Salerno isolated the two most significant factors: (1) whether there is a rational alternative purpose for the incarceration other than punishment, and (2) whether the incarceration is excessive in relation to the alternative purpose. 481 U.S. at 747 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. at 168-69). See also Schall v. Martin, 467 U.S. 253, 269 (1984).

The district court discussed two purposes for Mr. Alvarez's incarceration: (1) to effect deportation, and (2) to protect society. Mr. Alvarez's indefinite incarceration is

excessive in relation to both of those purposes. Moreover, "protecting society" is not a rational purpose for the Attorney General to incarcerate Mr. Alvarez.

First, Mr. Alvarez's continued incarceration is excessive to effect his deportation. Mr. Alvarez cannot be returned to Cuba in the foreseeable future; his incarceration cannot be justified by a purpose that cannot be accomplished. In Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court ordered the release of a criminal defendant detained indefinitely as mentally unfit to stand trial. As the Court noted, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Id. Under the Due Process Clause, a defendant may only be held as unfit to stand trial for a reasonable period of time to determine if there is substantial probability that he will attain competency in the foreseeable future. Id. Because there was no showing that Mr. Jackson could become fit to stand trial, he could not be detained for that purpose.

The Tenth Circuit's decision in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) is no more than a common-sense application of these established principles. There the court of appeals held that confinement cannot extend past reasonable efforts to deport an alien. A Mariel Cuban

detained for more than one year pending repatriation was held entitled to release. Detention pending deportation is analogous to incarceration pending trial, and it is thus justified only as a temporary measure. "Obviously detention pending trial assumes a different status if there is to be no trial." Id. at 1387. Further, if the Attorney General had ordered Mr. Rodriguez confined in a penitentiary for life or for a definite term simply because Cuba would not accept him, the courts would surely hold that that imprisonment is impermissible punishment, rather than permissible detention. "Logic compels the same result when imprisonment is for an indefinite period, beyond reasonable efforts to expel the alien." Id.[9]/

A second supposed purpose for Mr. Alvarez's incarceration is preventive detention. In the first place, this is not a rational reason for detention. Whatever power the Attorney General has over Mr. Alvarez derives from Mr. Alvarez's status as an excludable alien and from the Attorney General's duty to deport excludable aliens. Because that deportation cannot be accomplished, there is no reason why the Attorney General

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[9]/ In this case, the district court attempted to distinguish Rodriguez-Fernandez in part on the grounds that Mr. Rodriguez had never been released into the United States, whereas Mr. Alvarez had been released on parole and his parole was revoked. [R.25; ER.38-39]. Surely this is a distinction without a difference. Like Mr. Rodriguez-Fernandez, Mr. Alvarez has been held pending a deportation that cannot reasonably be expected to occur.

should have any greater power of "preventive detention" over Mr. Alvarez than the Attorney General has over any citizen. Moreover, detention is excessive to accomplish this purpose. In all other situations in which courts have upheld schemes for preventive detention, the detention has been strictly limited and has been accompanied by numerous procedural safeguards, none of which are present here.

In United States v. Salerno, 481 U.S. 739 (1987), for example, the Supreme Court upheld the pretrial detention provisions contained in the Bail Reform Act of 1984, 18 U.S.C. §§ 3141, et seq. Pretrial detention under the Bail Reform Act is limited, as a defendant has a right to a speedy trial.[10]/ A defendant also may not be detained prior to trial without probable cause to believe that an offense has been committed. The detainee is entitled to a full adversarial hearing within a few days of his or her first appearance in court. See 18 U.S.C. §§ 3142(e),(f). If detention is ordered, the detainee is entitled to appellate review of the detention order. 18 U.S.C. § 3145(b),(c). Pretrial detainees are also kept in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C. § 3142(i)(2). In Schall v. Martin, 467

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[10]/ The sixth amendment right to a speedy trial is implemented by 18 U.S.C. § 3161. Under § 3161(c)(1), a trial must generally be held within 70 days after the charges are filed or the defendant first appears with counsel on the indictment.

U.S. 253 (1984), the Court held that pretrial preventive detention of juvenile delinquents did not violate due process because notice, a hearing, and a statement of facts and reasons were given to the juvenile before detention. Also, a formal hearing was required shortly after initial detention, if the fact-finding hearing did not take place within three days. Id. at 275.

Mr. Alvarez has received none of the protections which we otherwise afford persons facing preventive detention. His confinement is unlimited. Mr. Alvarez has not been charged with a crime, and he is not awaiting a criminal trial.[11]/ He has had no proper hearing concerning any alleged threat he may pose to society. His continued incarceration is excessive for any proper governmental purpose and constitutes punishment. Had the Attorney General unilaterally decreed that "upon the completion of Mr. Alvarez's Florida sentence, he will serve a minimum of two years in a federal prison," this court would

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[11]/ The district court noted that Mr. Alvarez received his due process rights when he was arrested and convicted in Florida. [R.24; ER.47]. That is true, but Mr. Alvarez has already completed the sentence imposed by the Florida court. He is now subject to a new and different period of punishment, and the fact that he received proper procedures in the past cannot justify his present punishment. See, e.g., Baxstrom v. Herold, 383 U.S. 107 (1966) (prison inmate cannot be committed to a mental institution after the expiration of criminal sentence unless the former inmate is afforded the same rights as all others facing civil commitment); McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) (the State cannot detain a former inmate past the expiration of his criminal sentence to determine if he is a "defective delinquent").

surely agree that such incarceration would constitute punishment. The Attorney General's indistinguishable. Mr. Alvarez must therefore be released from prison.

III. MR. ALVAREZ'S IMMIGRATION PAROLE WAS REVOKED AND HIS REPAROLE WAS DENIED WITHOUT DUE PROCESS OF LAW.

Even if the Court does not find either that the Attorney General lacks the power to detain Mr. Alvarez or that Mr. Alvarez's continued confinement is punishment in violation of the fifth and sixth amendments, the Court should nonetheless conclude that his continued confinement is illegal because it has not been accompanied by appropriate procedures. Excludable aliens, like Mr. Alvarez, are entitled to fifth amendment due process protection against restraints on their liberty. Mr. Alvarez's parole was revoked without a hearing. In addition, the Cuban Review Plan, 8 C.F.R. § 212.12, under which Mr. Alvarez was twice denied reparole, denies Mr. Alvarez due process.

A. Mr. Alvarez is Entitled to the Protections of the Fifth Amendment.

The fifth amendment provides that: "No person shall . . . be deprived of . . . liberty . . . without due process of law." U.S. Const. amend. V (emphasis added). The protections of the Due Process Clause are not limited to citizens. Aliens are also entitled to the protections of the fifth amendment. The Constitution's provisions are "universal in their

application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).[12]/ In Plyler v. Doe, 457 U.S. 202, 210 (1982), the Court held that even illegal aliens are "persons" guaranteed due process of law.

There is one exception to this general rule. "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." Landon v. Plasencia, 459 U.S. 21, 32 (1982) (emphasis added). The exception, however, does not apply in this case. Mr. Alvarez does not assert a protected interest in challenging his status as an excludable alien. He only requests that since he has been deemed excludable, his confinement not continue without appropriate procedural protections. The Landon exception is relevant only in the process of initial admission. In the initial admission process, the interests of the United States are paramount. This process directly determines who may enter the physical territory of the United States. Conversely, the interest of

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[12]/ See also Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976)(alien's liberty interest includes eligibility for federal employment); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931)(alien corporation has property interest for purposes of Constitution's Taking Clause); Mathews v. Diaz, 426 U.S. 67, 77 (1976)(aliens enjoy due process rights generally).

the alien at that stage is limited for he or she is simply seeking admission to a foreign country. In the parole context, however, the interest of the alien is far greater, for he or she is now seeking freedom from prolonged incarceration. Meanwhile, the interest of the United States is unaffected, because parole does not affect admission status. 8 U.S.C. § 1182(d)(5).

The district court, however, disagreed. It found that parole was inseparable from admission, and held that Mr. Alvarez had no grounds to assert any constitutional rights with respect to his confinement. [R.25; ER.45]. In reaching this conclusion, the district court relied substantially on the Eleventh Circuit's decision in Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd in part, 472 U.S. 846 (1985).

The court's reliance on Jean was misplaced, for that decision is fundamentally flawed in at least three respects.

First, the Jean court relied heavily on Mezei to conclude that indefinite detention is constitutional. As discussed above, this is an inaccurate characterization of the holding in Mezei.

Second, the Jean court held that "since the immediate implications of parole and legal admission are identical in a number of important respects," parole ought to be treated like

admission. Jean, 727 F.2d at 972. This ignores Leng May Ma v. Barber, 357 U.S. 185 (1958) and 8 U.S.C § 1182(d)(5). Paroling Mr. Alvarez will in no way change his status as an excludable alien. Whether he is detained or paroled, he can be deported as soon as Cuba agrees to accept him.

Third, the Jean court stated that granting parole to an alien who could not be deported "would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back." Jean, 727 F.2d at 975. This sort of inflammatory rhetoric contributes nothing to the legal problem at hand. It ignores that the United States retains substantial power in the international community to force foreign leaders to keep their dissidents at home; that power ranges from diplomatic pressure to interception on the high seas. Paroling Mr. Alvarez will not end the Attorney General's power to control our borders.

The Landon v. Plasencia exception does not apply; Mr. Alvarez is entitled to the protections of the fifth amendment with respect to his incarceration.

B. Mr. Alvarez Has an Interest, Protected by the Due Process Clause, In his Freedom.

Mr. Alvarez has a liberty interest, protected by the Due Process Clause, in release on immigration parole. The "right

to be free from, and to obtain judicial relief for, unjustified intrusions on personal security" is a traditional liberty protected by the Due Process Clause. Vitek v. Jones, 445 U.S. 480, 492 (1980) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425 (1979) (emphasis added). Mr. Alvarez's liberty is qualified, not absolute, however, since he was initially released in the United States on parole, and not given unconditional freedom. But that conditional liberty is still protected by the Due Process Clause. In Morrissey v. Brewer, 408 U.S. 471, 482 (1972), the Court determined that defendants released on parole from criminal sentences have a liberty interest protected by the Constitution. At the very least, Mr. Alvarez has the same protected liberty interest in his continued release on parole as the parolees in Morrissey.

C. Mr. Alvarez Has Lost His Liberty Without The Procedures Required By the Due Process Clause.

Mr. Alvarez has a liberty interest protected by the fifth amendment; his interest cannot be extinguished without first affording him certain procedural protections. Mr. Alvarez, however, received no procedural protections whatsoever when his parole was revoked, and has received insufficient procedural protection from the Cuban Review Plan.

In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the Supreme Court articulated a balancing test to determine what process is due before a person may lose a protected interest. The first Mathews factor is the private interest affected by the government's action, namely Mr. Alvarez's interest in being free from indefinite detention. This interest is paramount. There is no greater interest than liberty.

The second Mathews factor is the risk of erroneous deprivation of Mr. Alvarez's interest and the value of additional safeguards. Id. There is a significant risk of error under the INS's current practices in both the revocation and reparole context. For example, no INS official interviewed Mr. Alvarez before his parole was revoked. Nor has Mr. Alvarez been permitted to appear personally before the Associate Commissioner for Enforcement, who alone determines whether he should be reparoled. Additionally, the sole qualifying requirement for a Panel member is that he or she be on the professional staff of the INS (i.e. that he or she be someone charged with enforcing immigration laws). 8 C.F.R. § 212.12(d)(1).

Mr. Alvarez received his second hearing under the Cuban Review Plan on January 10, 1990. The Panel which reviewed him recommended that Mr. Alvarez be released on parole based upon their determinations that Mr. Alvarez appeared to be

rehabilitated, was not a danger to the community and that he would not violate the law if released. The Commissioner did not interview Mr. Alvarez personally. Nevertheless, the Commissioner overturned the Panel's determinations, which were based upon the Panel's own personal observations. The Commissioner refused to release Mr. Alvarez on parole. Without seeing Mr. Alvarez in person, the Commissioner simply cannot make an informed decision about Mr. Alvarez's credibility.[13]/ The risk of an erroneous decision is heightened, for INS procedures do not permit any administrative review of the Commissioner's parole decision.

The third Mathews balancing factor is the government's legitimate interest in incarcerating Mr. Alvarez. Mathews, 424 U.S. at 335. Paroling Mr. Alvarez will not affect his immigration status as a deportable alien. Thus, the only other rational reason to hold him is to protect the public. The Commissioner admits that this is the reason why Mr. Alvarez is still incarcerated. In the Final Notice of Parole Denial, the Commissioner stated that he could not conclude that Mr. Alvarez would remain non-violent or honor

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[13]/ In United States v. Bergera, 512 F.2d 391, 394 (9th Cir. 1975), this Court held that due process requires that, in a criminal proceeding, a district judge cannot overturn a magistrate's credibility determination without rehearing live testimony. In Flores v. Stock, 715 F. Supp. 1468 (C.D. Cal. 1989), the district court held that the reversal of a credibility finding in a parole revocation hearing, without rehearing live testimony, violates due process.

the conditions of his parole if released. [R.20; ER.20]. Yet, as discussed on pages 28-29 of this brief, indefinite detention is excessive to accomplish this purpose. On balance, Mr. Alvarez's liberty interest is not outweighed by any interest the government might have in detaining him. At the very least, Mr. Alvarez ought to receive the same procedural protection as criminal parolees, pretrial detainees, and others facing civil commitment.

1. Process Due At Revocation of Immigration Parole.

Mr. Alvarez did not have a hearing before his parole was revoked. The Cuban Review Plan does not afford Mariel Cubans such a hearing. See 8 C.F.R. § 212.12(h). He deserved, however, at least the same procedural protections afforded a person paroled from a criminal sentence or a person facing civil commitment. A criminal parolee is still serving a sentence imposed for commission of a crime; Mr. Alvarez, in contrast, has already completed his criminal sentences. In Morrissey v. Brewer, 408 U.S. 471, 489 (1972), the Supreme Court held that a parolee is entitled to many procedural protections, including notice of the claimed parole violations, disclosure of evidence, the opportunity to be heard in person and to present evidence, and the right to confront and cross-examine witnesses in a hearing before a neutral and detached decisionmaker. In Addington v. Texas,

441 U.S. 418 (1979), the Supreme Court held that a state cannot hospitalize a person in a mental health facility without meeting the statutory commitment criteria with clear and convincing evidence. Here, however, Mr. Alvarez has been indefinitely committed to custody without any evidentiary standard applied. The government was not required to show that release is not in the "public interest" by any well-defined standard of proof, much less by clear and convincing evidence.

Since Mr. Alvarez's interest in avoiding indefinite detention is greater than that of a criminal parolee or a person facing commitment, more procedure is required to detain him. The primary requirement of due process is the opportunity to be heard "at a meaningful time in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Mr. Alvarez was not heard. He has a liberty interest in release on parole. He cannot be denied that interest without due process. Mr. Alvarez was entitled to a full adversarial hearing before his parole was revoked.

2. Process Due At Annual Review of Ongoing Incarceration.

The district court did not reach the question whether the Cuban Review Plan complies with due process. The court ruled that while Mr. Alvarez's Statement, filed on February 20, 1990, attempted to set forth a due process violation, the

Statement was insufficient in that it did not describe the substantive or factual arguments supporting the contention that due process was violated. [R.25; ER.39]. Moreover, according to the court, the allegations in the Statement had not been included in the petition. [R.25; ER.39].

With respect to the insufficiency issue, it is well-settled that documents filed by pro se litigants are held to less stringent standards than formal pleadings drafted by lawyers. See United States v. Ten Thousand Dollars in U.S. Currency, 860 F.2d 1511, 1513 (9th Cir. 1988) (holding that a pro se prisoner's letter to a judge could be construed as a motion for a stay); see also Haines v. Kerner, 404 U.S. 519, 520 (1972). Establishing a valid due process claim requires sophisticated legal analysis. Mr. Alvarez said, in his Statement, that "Cuban Panel Review did not satisfy due process. Conclusion [sic] pletioner [sic] ask this court to issue a Writ of Habeas Corpus." This court should construe Mr. Alvarez's Statement liberally and hold that Mr. Alvarez's due process claim was properly raised.

As to the timing issue, Mr. Alvarez could not have raised his complaints about the implementation of the Cuban Review Plan in his original petition. He filed his petition on August 2, 1989. At that time he had not yet received official notification of his denial of parole from his first hearing

under the Cuban Review Plan. He received his most recent Cuban Review Plan interview on January 3, 1990. By writing in his Statement his objections to the implementation of the Plan, Mr. Alvarez did his best to raise the issue. The district court should have ruled upon his claim (or, at the very least, given him leave to amend his papers). This court can and should reach the issue. Otherwise, Mr. Alvarez will be forced to file yet another petition in the district court raising identical issues to the issues before this court on this appeal.

One district court has held that the Status Review Plan, a precursor to the Cuban Review Plan, was procedurally inadequate to protect the parole rights of excludable aliens who could not be deported. Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), rev'd, 734 F.2d 576 (11th Cir. 1984). The district court ruled that detainees were due certain rights, including: (1) written notice of the reasons for incarceration; (2) disclosure of the government's evidence; (3) opportunity for the detainee to be heard in person and present witnesses and documentary evidence; (4) confrontation and cross-examination of adverse witnesses, unless the hearing officer specifically finds good cause for not permitting such confrontation; (5) a neutral hearing body; (6) a written statement by the decisionmaker of the reasons

for his or her conclusion; (7) the privilege against self-incrimination; (8) appointed counsel and (9) the presumption of releasibility which can be overcome only by clear and convincing evidence. Id. at 1134-40. While the Eleventh Circuit did not agree with the district court, Mr. Alvarez suggests that, following a balancing of various interests, these are the procedures required by the Due Process Clause. Mr. Alvarez has not received those procedures. He should be granted a new hearing with these protections.

IV. MR. ALVAREZ'S PROLONGED DETENTION VIOLATES INTERNATIONAL LAW AND IS THEREFORE ILLEGAL IN THE UNITED STATES.

Mr. Alvarez is being held indefinitely in a federal prison. This violates customary international law, which forbids prolonged, arbitrary detention. Customary international law is part of the domestic law of the United States; it is treated as federal common law. It is enforced in the United States unless repealed or ousted by certain constitutionally authorized acts of government. The district court erred in ruling that the customary international law prohibition against prolonged arbitrary detention has been ousted, and that it is not applicable in this case.

A. Mr. Alvarez's Prolonged Arbitrary Incarceration Violates Customary International Law.

Customary international law prohibits prolonged arbitrary detention. In Rodriguez-Fernandez v. Wilkinson, 505 F. Supp.

787 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981), the court held that the extended indefinite confinement of an excludable Cuban in federal prison violates this principle of international law. As the Tenth Circuit stated, affirming, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Rodriguez-Fernandez, 654 F.2d at 1388. Other courts have also found that arbitrarily detaining excludable aliens violates international law. See Fernandez-Roque v. Smith, 622 F. Supp. 887, 902 (N.D. Ga. 1985) ("Even the government admits that customary international law of human rights contains at least a general principle prohibiting prolonged arbitrary detention"), rev'd on other grounds sub nom. Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986) (accepting the proposition that general principles of international law forbid prolonged arbitrary detention).[14]/

Scholars agree. The American Law Institute recently

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[14]/ In other contexts, United States courts uniformly recognize that international law prohibits prolonged arbitrary detention. See, e.g., Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (illegal detention may constitute a tort in violation of the "law of nations"); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (right "not to be arbitrarily detained" incorporated into law of nations); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) ("[t]here is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention").

published the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") (1987), the most authoritative compilation of international law principles as applied in our country.[15]/ Section 702 of the Restatement provides that a country "violates international law if, as a matter of . . . policy, it practices, encourages, or condones . . . prolonged arbitrary detention."

All of the major human rights instruments recognize a right not to be arbitrarily detained by the state.[16]/ Further, the practice and pronouncements of states, particularly the United States, recognize the right not to be arbitrarily detained. Our own federal statutes demonstrate our acceptance of this right and our insistence that other nations respect

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[15]/ The Supreme Court has recognized that in the area of international law, scholarly opinions are "trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. 677, 700 (1900).

[16]/ See, e.g., American Convention on Human Rights, done Nov. 22, 1969, art. 7(3), O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21 re. 6 (1979) (entered into force July 18, 1978) ("No one shall be subject to arbitrary arrest or imprisonment"); International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 9, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 54, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention"); European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, art. 5, Europ. T.S. No. 5, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (providing that anyone arrested or detained "shall be brought promptly before a judge or other officer authorized by law to trial within a reasonable time or to release pending trial"); Universal Declaration of Human Rights, Dec. 17, 1948, art. 9, G.A. Res. 217, 3 U.N. GAOR (183 plen. mtg.) at 71, U.N. doc. A/810 (1948) ("No one shall be subject to arbitrary arrest, detention, or exile").

this right.[17]/ The United States has advanced the argument, in international judicial fora, that arbitrary prolonged detention is a violation of international law. See, e.g., Case of United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 42 ¶ 91.

Mr. Alvarez's incarceration is arbitrary by international law standards. Restatement section 702, comment h provides that

> Detention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice or with the dignity of the human person." [citation omitted]. Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given early opportunity to . . . consult with counsel; or is not brought to trial within a reasonable time. Customary international law probably does not require a state to provide for release on bail pending trial so long as trial is not unreasonably delayed.

Indeterminate detention of a Mariel Cuban who cannot be deported is arbitrary, in violation of international law.

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[17]/ See, e.g., 22 U.S.C. § 2151n(a) (generally prohibiting foreign development assistance to any country engaging in a consistent pattern of gross violations of internationally recognized human rights, including, inter alia, "prolonged detention without charges"); 22 U.S.C. §§ 2304(a)(2), (d)(1) (generally prohibiting military assistance to any country engaging in a consistent pattern of gross violations of internationally recognized human rights, including inter alia "prolonged detention without charges and trial"); 22 U.S.C. § 262d(a) (assistance policy of United States government toward international financial institutions "shall advance the cause of human rights, including by seeking to channel assistance toward countries other than to those whose governments engage in a consistent pattern of gross violations of internationally recognized human rights," including "prolonged detention without charges").

Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981).

Mr. Alvarez's detention is certainly incompatible with the principles of justice. He awaits no trial. He has had no meaningful review of his confinement. Mr. Alvarez's immigration parole was revoked without notice or a hearing, and the Cuban Review Plan denies him the opportunity to appear personally before the finder of fact in reparole proceedings. His detention is prolonged, now well over two years. His detention violates customary international law.

B. Customary International Law is Federal Law.

Even though the Constitution does not explicitly address all of the United States' international law obligations, it assumes them. Very early on the Supreme Court recognized that "the United States had, by taking a place among the nations of the earth, became amenable to the laws of nations . . . ." Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793). Justice Marshall later wrote that "the Court is bound by the law of nations which is a part of the law of the land." The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). Accord, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice . . .").

Our courts rely upon customary international law as

United States law. See, e.g., First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) ("[the claim] arises under international law, which, as we have frequently reiterated is part of our law") (citations omitted); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("it is, of course, true that United States courts apply international law as part of our own in appropriate circumstances") (citations omitted); Filartiga v. Pena-Irala, 630 F.2d 876, 886-87 (2d Cir. 1980) (dismissing as an "extravagant claim" the proposition that customary international law forms a part of the law of the United States only to the extent that Congress acts to define it as such, and holding that "in the absence of Congressional enactment, United States Courts are 'bound by the law of nations, which is a part of the law of the land.'").

Scholars have also advanced this analysis. International law includes customary law. Restatement § 102(1)(a). International law is the law of the United States. Restatement § 111(1). "Customary international law is considered to be like a common law in the United States, but it is federal law." Comment d to Restatement § 111.

C. The International Law Prohibition Against Prolonged Arbitrary Detention Has Not Been Ousted Or Repealed.

Customary international law prohibits Mr. Alvarez's prolonged arbitrary detention. This prohibition, as a tenet

of customary international law, is incorporated into the body of United States domestic law and is enforceable in United States courts. In his opinion in The Paquete Habana, 175 U.S. 677, 700 (1900), Justice Gray, however, wrote that customary international law could be ousted or repealed from the body of domestic law by a "controlling executive or legislative act or judicial decision." As set forth below, the district court erred in finding an "ouster" of the international law prohibition against prolonged arbitrary detention.

1. Controlling legislative act.

Congress has not ousted or repealed the international law prohibition against Mr. Alvarez's indefinite detention. Absent clearly expressed intent, Congress will not be deemed to have repealed international law. See Commodity Futures Trading Commission v. Nahas, 738 F.2d 487, 493 n.13 (D.C. Cir. 1984); Fernandez-Roque v. Smith, 622 F.Supp. 887, 903 (N.D. Ga. 1985); Restatement § 115(1)(a). Mr. Alvarez is not incarcerated under the express provisions of any act of Congress. Congress has not clearly and expressly set aside the international law prohibition against prolonged arbitrary incarceration.

2. Controlling executive act.

The district court in this case ruled that Mr. Alvarez could not claim a violation of international law. Following

Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986), the district court held that an action by the executive (terminating a precursor of the Cuban Review Plan) was "controlling," and that international law was therefore somehow "inapplicable." [R.25; ER.42-43]. The district court was wrong. First, it is not clear that the executive may, without congressional approval, repeal international law. Second, even if the executive may do so, there has been no showing that the President has acted to repeal or oust the international law norm prohibiting prolonged arbitrary detention. Third, Garcia-Mir was wrongly decided. Fourth, the executive act found "controlling" in Garcia-Mir does not apply to this case.

Not every act of the executive may be a "controlling" act, for the executive branch has no general ability to ignore or violate international law. Indeed, under our Constitution the President must enforce the law. He has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Federal law includes customary international law; the President must therefore faithfully execute customary international law.

It is not clear that the President and his subordinate executive branch officers have the constitutional power to act unilaterally to oust or repeal the domestic effectiveness of

customary international law. In United States v. Smith, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342), for example, the court held that the President, in exercising the war power, cannot "authorize a person to do what the law [either domestic or international] forbids." Strict construction of the language of several Supreme Court decisions indicates that the President may not, without congressional approval, oust a rule of customary international law from the law of the United States. See The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations which is a part of the law of the land"); Brown v. United States, 12 U.S. (8 Cranch) 110, 125, 128 (1814) (under international law, property of the enemy is not immediately confiscated; absent an act of Congress, the executive does not have the power to confiscate enemy property).[18]/

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[18]/ Of course, even under this view the executive branch would retain primary power to determine and enforce international law. The President would decide whether to sign or veto superseding statutory law. The President would determine whether to exercise prosecutorial discretion in challenging or ignoring possible violations of customary international law in national or international fora. The President, through foreign policy acts or pronouncements contributing to the practices of states which form the basis of customary international law, would help shape our understanding of international law. But in no instance, could the executive by itself, in the absence of joint action with Congress and outside of existing enabling legislation, negate the incorporation into domestic law of rights recognized by customary international law.

There are reasons why the executive cannot, without congressional approval, violate (and thereby oust) customary international law. Violations of international law may cause the nation to incur serious costs. A nation seen as a "law-breaker" by the international community can receive the treatment of a

Even if the executive could act unilaterally to repeal or oust a provision of international law, that act may not be delegated to INS officials, or even to the Attorney General. In The Paquete Habana, 175 U.S. 677 (1900), the Supreme Court indicated that a "controlling executive act" must be an act expressly ordered by the President himself. That case involved a claim by citizens of Spain for the return of two coastal fishing vessels seized by a United States admiral, acting under the instructions of the Secretary of the Navy. The Court held that customary international law forbade the seizure of the vessels as prizes of war. The actions by the admiral and Secretary were not deemed to be "controlling acts," making customary international law somehow inapplicable. The Supreme Court noted,

> [That enemy property on land is not subject to capture] dispel[s] any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court . . ."

The Paquete Habana, 175 U.S. at 711 (emphasis supplied).

Given that a "controlling executive act" must be upon the express order of the President, it seems clear that the customary international law norm prohibiting prolonged

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law-breaker. Restatement section 703(2) provides that any state "may pursue international remedies against any other state for a violation of the customary international law of human rights."

arbitrary detention has not been ousted or repealed by the executive. The district court did not point to any act of the President setting aside the prohibition in this case. Furthermore, in the case relied upon by the district court, Garcia-Mir v. Meese, the Eleventh Circuit considered the Attorney General's decision to terminate a precursor to the Cuban Review Plan to be a "controlling act." 788 F.2d at 1454. A cabinet officer's violation of international law should not be interpreted as an action which "sets aside" international law. If a cabinet officer sua sponte could oust international law, then international law would only be honored as long as it did not enter the realm of regulatory power of any cabinet officer. Any such conclusion would render meaningless the President's obligation to execute the laws faithfully.

Finally, the Attorney General's act found to be "controlling" in Garcia-Mir is not relevant to this case. Mr. Alvarez is subject to review under the Cuban Review Plan. A decision to terminate a preceding version of the Plan does not amount to a specific executive decision to abrogate international law with respect to Mr. Alvarez.

3. Controlling judicial decision.

As in the case of legislative and executive branch acts, the ability of the judicial branch to oust or repeal customary

international law from the body of domestic law is delimited by the judiciary's constitutional powers. Courts have the same function of "finding" customary international law -- that is, construing the law's dimensions -- that they otherwise exercise in interpreting domestic law in the cases before them. Domestic acts should be construed in a manner consistent with international law, and only where there is no possible consistent interpretation should international law be rejected. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

In the case at hand, the district court noted that the Garcia-Mir court relied upon two prior cases, Mezei and Jean v. Nelson. [R.25; ER.43]. The district court seemed to indicate that these cases were "controlling judicial decisions" within the meaning of The Paquete Habana "ouster rule." The district court was incorrect.

As already discussed on pages 18-21, supra, Mezei was a case primarily about the right to an exclusion hearing; it was not a case about detention in general. Moreover, the Supreme Court did not discuss Mezei's rights under international law. Properly read therefore, Mezei cannot be considered to be a "controlling judicial decision" within the meaning of The Paquete Habana "ouster rule."

Jean v. Nelson, 727 F.2d 957 (llth Cir. 1984) (en banc),

aff'd in part, 472 U.S. 846 (1985), was an action brought by Haitian aliens based upon the failure of INS to comply with certain administrative procedures and constitutional protections. Jean v. Nelson contained no substantive decision of the aliens' rights under international law. The court did not discuss the rule of international law prohibiting prolonged arbitrary detention other than in the context of the sovereign power over admission of aliens into the country (which sovereign power is not disputed). Moreover, the court neither looked for nor found any legislative or executive act purporting to oust such rule from the law of the United States. The Garcia-Mir court, and the district court in this case, erred in relying upon Jean v. Nelson as setting aside international law.

Thus, Mr. Alvarez's continued detention violates customary international law, which is federal law. Neither Congress, the President, nor the judiciary has set aside the international law prohibition against prolonged arbitrary detention. Mr. Alvarez's detention is therefore illegal. He must be released from custody.

CONCLUSION

For all of the reasons set forth in this brief, petitioner Luis Alvarez-Mendez respectfully requests that this Court reverse the decision below, and issue a writ directing his release from confinement on immigration parole. Alternatively, Mr. Alvarez requests that his case be remanded for the district court to enter an order that the INS provide him with an immigration parole hearing that complies with due process.

Respectfully submitted,

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By_____
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Luis Alvarez-Mendez

On the Brief:

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Law Student Intern
Class of 1992

STATEMENT OF RELATED CASES

Counsel for petitioner-appellant hereby certifies that the following cases, now pending in this Court, raise the same or closely related legal issues:

Fernandez-Rodriguez v. Brewer, C.A. 89-55503;

Picrin-Peron v. Rison, C.A. 89-55781.

Both of these appeals involve the indefinite detention of excludable aliens. While both are Cubans, Mr. Picrin-Peron arrived before the official commencement of the Mariel boatlift and thus he is not covered by the Cuban Review Plan.

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Charles D. Weisselberg

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ALVAREZ-MENDEZ	)	C.A. No. 90-55447
	)	
Petitioner-Appellant	)	
	)	
v.	)	PROOF OF SERVICE
FRED J. STOCK, WARDEN,	)	
	)	
Respondent-Appellee	)	
	)	

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the County of Los Angeles, State of California, not a party in the within action, and that my business address is University of Southern California Law Center, University Park, Los Angeles, California 90089-0071; and

2. That I served the within Brief for Petitioner-Appellant and Excerpt of Clerk's Record on the parties in this case by mailing two copies of the Brief and one copy of the Excerpts to:

Michael Johnson
Assistant United States Attorney
1400 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
(Counsel for Respondent)

and the same were delivered and deposited in the U.S. mail, first class postage prepaid, at Los Angeles, California, on December 31, 1990.

I certify that the foregoing is true and correct.

Executed on December 31, 1990, at Los Angeles, California.

Francis D. Logan Jr.