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**FILLING THE IMMIGRATION VOID:
RODRIGUEZ-FERNANDEZ v.
WILKINSON—AN EXCLUDED ALIEN'S
RIGHT TO BE FREE FROM
INDETERMINATE DETENTION**

The United States has maintained a long and proud tradition as a haven for the disadvantaged and for those fleeing persecution in other lands.¹ Since 1921, however, Congress has taken measures to limit the number of immigrants permitted to enter the United States.² Historically, the regulation of this immigration flow has been virtually the exclusive province of Congress.³ Courts have consistently upheld the sweeping authority of Congress to regulate immigration, even conceding that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."⁴ To the extent that Congress has granted the executive branch the authority to deal with immigration matters, the Supreme Court has recognized that "the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."⁵ The Court has also

1. The United States immigrant heritage is a well-known subject of history textbooks, political speeches, as well as a source of nationalist pride. Attorney General William French Smith stated recently before members of Congress:

As President Reagan has said many times, quoting John Winthrop, '[W]e shall be a city upon a hill. The eyes of all people are upon us' Like a beacon, our freedom still blazes forth in a world filled with too much darkness. That beacon beckons the immigrant and the refugee to our shores—seemingly in ever greater numbers.

Testimony of William French Smith, Attorney General, Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 19 (1981).

2. *Id.* at 1. Post-World War I conditions in Europe were such that millions of Europeans sought to immigrate into the United States. The 67th Congress passed the first immigration quota law on May 19, 1921. This law limited the number of immigrants of any "nationality [entering the United States] to three percent of foreign-born persons of that nationality who lived in the United States in 1910." H.R. REP. NO. 1365, 82d Cong., 1st Sess., reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1666-67.

3. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1385 (10th Cir. 1981).

4. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

5. *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953). See also *Fiallo v. Bell*, 430 U.S. 787 (1977); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580

invoked principles of international law in upholding the "plenary power" of Congress over the exclusion and regulation of aliens.⁶

The Immigration and Nationality Act of 1952⁷ represents an exercise of Congress' "plenary power" over immigration matters. The Immigration Act incorporates United States immigration laws relating to the immigration, exclusion, deportation, and expulsion of aliens.⁸ The Act classifies aliens differently, depending upon a variety of factors. Under this Act, aliens who have not been granted admission by visa or other means before leaving their homeland and who come to the United States seeking admission are subject to proceedings to determine whether they may enter or will be excluded.⁹ Those who have already entered and who fall within certain general classes of deportable aliens¹⁰ are subject to "expulsion" or "deportation proceedings" as opposed to "exclusion."¹¹

(1952); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950). As the Court in *Harisiades* observed: "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." 342 U.S. at 588-89.

Lower federal courts have followed the Supreme Court's lead. *See, e.g., Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980); *Bassett v. United States Immigration & Naturalization Serv.*, 581 F.2d 1385 (10th Cir. 1978).

6. *E.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). These cases established the framework for the judicial principle that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches . . ." *Kleindienst*, 408 U.S. at 765; *accord Fong Yue Ting*, 149 U.S. at 711. *See also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d at 1388.

7. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified in scattered sections of 8 & 50 U.S.C. (1976)) [hereinafter referred to as the Immigration Act].

8. 8 U.S.C. § 1101 (1976).

9. *Id.* § 1226(a). If the person is an alien, the immigration officer conducting the proceedings must determine whether the alien "belongs to any of the excluded classes enumerated in section 1182." *Id.* § 1225(a). These classes include, among others, aliens who are mentally retarded, *id.* § 1182(a)(1); aliens afflicted with sexual deviations, *id.* § 1182(a)(4); aliens afflicted with a "dangerous contagious disease," *id.* § 1182(a)(6); alien paupers, *id.* § 1182(a)(8); aliens convicted of a "crime involving moral turpitude (other than a purely political offense)," *id.* § 1182(a)(9); aliens who lack a visa or entry permit and a passport, *id.* § 1182(a)(20), (26); as well as alien polygamists, *id.* § 1182(a)(11); alien prostitutes, *id.* § 1182(a)(12); alien stowaways, *id.* § 1182(a)(18); alien anarchists, *id.* § 1182(a)(28)(A); and aliens who are members of or are affiliated with any communist or totalitarian party, *id.* § 1182(a)(28)(C). There are numerous other categories which serve as grounds for exclusion. *See id.* § 1182(a)(1)-(31).

10. *Id.* § 1251(a); *compare id.* (deportable aliens) with *id.* § 1182(a) (excludable aliens).

11. *Id.* §§ 1251, 1251(b). "Deportation proceedings" are proceedings for expulsion under 8 U.S.C. §§ 1251-1260 (1976). The word "deportation" in 8 U.S.C. §§ 1221-1230 (1976) is used in a nontechnical sense, simply meaning the process of returning an excluded alien to the country from which he embarked to the United States. *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

Under the Immigration Act, an "entry" is defined as "any coming of an alien into the United States."¹² Therefore, aliens who have already come into the United States—even though they may have been excludable at the time of their entry,¹³ or may have entered illegally¹⁴—are subject to "deportation proceedings" rather than exclusion proceedings.¹⁵ To the alien who has already entered, the Immigration Act provides rights and privileges which are not available to the alien nonentrant seeking admission.¹⁶ The courts have upheld these statutory distinctions, recognizing constitutional protections available to deportable but not to excludable aliens.¹⁷ The upheld provisions include sections of the Immigration Act which, because of their lack of specificity, permit government detention of an excluded alien without a time limit, while requiring expulsion of deportable aliens within six months.¹⁸ Despite statutory language that appears to indicate Congress' intent that detention of excluded aliens under the Immigration Act be temporary,¹⁹ until recently the courts have not focused upon

12. 8 U.S.C. § 1101(a)(13) (1976).

13. *Id.* § 1251(a)(1).

14. *Id.* § 1251(a)(2).

15. *Id.* § 1252(b). *See also supra* note 11.

16. *Leng May Ma v. Barber*, 357 U.S. at 187; *Shaughnessy v. Mezei*, 345 U.S. at 212. In *Mezei*, the Court stated that once aliens have "passed through our gates, even illegally," they are entitled to the full protection of due process of law under the fifth amendment. 345 U.S. at 212. *See also Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1395 (1953). For a discussion of the various procedural safeguards extended to deportable aliens as opposed to excludable aliens, see *infra* notes 35-49 and accompanying text. Ironically, the alien who properly seeks admission in accordance with United States immigration laws and who is found excludable pursuant to 8 U.S.C. § 1182 (1976) is penalized for doing so by receiving fewer protections and privileges than the alien who succeeds in entering the United States illegally by stealing across the border. *See also id.* §§ 1251(c), 1252(f).

17. *Leng May Ma v. Barber*, 357 U.S. at 187; *Shaughnessy v. Mezei*, 345 U.S. at 212.

18. *See* 8 U.S.C. §§ 1223(a), 1223(b), 1252(c) (1976); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d at 1389.

19. 8 U.S.C. § 1223(a) (1976) contemplates the "temporary removal" of aliens from ship to shore, for examination and inspection, even preserving the obligations of those in control of the vessel to the removed alien passenger. Moreover, the removal of the alien is not considered a landing. In § 1223(b), while stating that the transporter must bear the expenses of the alien's removal, Congress clearly indicated that it considers examination and inspection equivalent to detention. In fact, § 1223(b) refers to payment of expenses during "removal to designated place for examination and inspection or other place of detention and all expenses arising during subsequent detention . . . until they are either allowed to land or returned to the [transporter in the event of deportation]." *Id.* (emphasis added). *See also* 8 U.S.C. §§ 1222, 1223(c), 1227(a) (1976).

Furthermore, 8 U.S.C. § 1227(a) (1976) clearly states that once an alien is excluded under the Immigration Act, he is to be "immediately deported" by the vessel or aircraft bringing him. This provision indicates Congress' intent that removal and detention under § 1223 and § 1225(b) be for the purpose of furthering inquiry into the qualifications of the alien to

the issue of whether the government can detain an excluded alien for an indefinite period pending unforeseeable deportation.²⁰

Recognizing the absence in United States immigration law of a statutorily- or judicially-imposed time limit to an excluded alien's detention, the United States Court of Appeals for the Tenth Circuit, in *Rodriguez-Fernandez v. Wilkinson*,²¹ recently expanded the previously-limited due process protections afforded an excluded alien to include freedom from indefinite and arbitrary detention. By construing relevant provisions of the Immigration Act, the Constitution, and international law, the court attempted to remove the open-ended nature of detention from the exclusion process.

The petitioner, Pedro Rodriguez-Fernandez, was one of the approximately 125,000 people who participated in the Mariel Boatlift, the so-called "Freedom Flotilla."²² When the petitioner, a Cuban citizen, arrived at Key West, Florida on June 2, 1980, immigration officials temporarily removed him from the boat into the United States. While in the custody of immigration officials, Rodriguez-Fernandez admitted in a sworn statement that, when he left Cuba, he was serving a prison sentence for attempted burglary and escape.²³ Rodriguez-Fernandez's conviction for a "crime in-

remain in the United States. Once the alien was determined ineligible to enter, the purpose of his continuing detention having been served, Congress intended his immediate deportation.

Congress, however, added a crucial qualification to its provision for temporary detention pending a determination of the alien's admissibility. This qualification allows the Attorney General to delay deportation if "in an individual case, in his discretion, [the Attorney General] concludes that immediate deportation is not practicable or proper." *Id.* § 1227(a).

20. See 654 F.2d at 1385, 1388. The most closely related case prior to *Rodriguez-Fernandez* is *Shaughnessy v. Mezei*, 345 U.S. 206 (1952), where the Supreme Court upheld the 21-month detention of an excluded alien. *Id.* at 209. There are significant distinctions between the two cases, however, which suggest that *Mezei* is not controlling authority for the facts and issues presented by *Rodriguez-Fernandez*. Government efforts to deport the petitioner in *Mezei* were ongoing, *id.* at 208-09, as opposed to the discontinued efforts of the government in *Rodriguez-Fernandez*. 654 F.2d at 1386. Furthermore, *Mezei*'s exclusion and denial of parole were based upon national security concerns, heightened during wartime, differing materially from the factual circumstances in which the case of Rodriguez-Fernandez's denial of parole came into question. *Id.* at 1388. Finally, *Mezei*'s primary focus was not upon the constitutionality of indefinite detention as an alternative to the deportation of an excluded alien (not to mention one who is not shown to be a national security risk), but upon the right of *Mezei* to a due process hearing. For a more detailed analysis of the *Rodriguez-Fernandez/Mezei* relationship, see *infra* notes 144-70 and accompanying text. *Rodriguez-Fernandez* is the first case to focus upon and examine the legal questions arising from the indefinite detention of an excluded alien as an alternative to deportation.

21. 654 F.2d 1382 (10th Cir. 1981).

22. *Id.* at 1384.

23. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 788-89 (D. Kan. 1980). The petitioner admitted having committed several crimes in Cuba. He stole a suitcase in 1959, for which he was sentenced to and served two years. He stole another suitcase in 1964, for which he was

volving moral turpitude,"²⁴ as well as the fact that he lacked immigration documents (as did most of his 125,000 compatriots),²⁵ prompted an immigration officer's determination at a formal exclusion hearing on July 21, 1980 that the petitioner was an excludable alien. In accordance with 8 U.S.C. § 1227(a), the Immigration and Naturalization Service (I.N.S.) ordered Rodriguez-Fernandez to be deported to Cuba.²⁶ The Government of

sentenced to eight years, three of which he served before escaping. He was convicted of attempted burglary in 1973, for which he was sentenced to four years. He received an additional three-year term for the escape. Rodriguez-Fernandez claimed that the theft convictions were not serious because conditions in Cuba forced the citizenry to steal. He denied being guilty of the attempted burglary, for which he was tried by a military tribunal. *Id.* at 789. Petitioner testified that he was to be released from prison on June 27, 1981, when the previously-imposed terms expired. Rodriguez-Fernandez v. Wilkinson, 654 F.2d at 1384.

24. 8 U.S.C. § 1182(a)(9) (1976). There is a noticeable lack of explanation as to precisely what is a "crime of moral turpitude." Other than excepting a "purely political offense" from the definition of this issue, the words "moral turpitude" are subject to the broadest possible interpretations, unfortunately leaving a glaring opportunity for individual predilections to sway a decision of the admissibility of an alien or even of an excluded alien detainee's qualifications for parole. *See, e.g.,* Judge McWilliams' dissenting opinion in *Rodriguez-Fernandez*, 654 F.2d at 1390-91 & 1391 n.2.

In *Jordan v. DeGeorge*, 341 U.S. 223 (1951), the Court held that any crime involving fraud is within the scope of a crime of "moral turpitude," *id.* at 224, as applied in the deportation of resident aliens under § 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889, amended by 8 U.S.C. § 155(a) (1950). The Court recognized the difficulty in deciding whether or not "certain marginal offenses" lie within the meaning of crimes of moral turpitude, but nonetheless defended it from a "void for vagueness" attack, given the fact that fraud has always been deemed to involve moral turpitude. 341 U.S. at 225.

For a discussion of the problems associated with various attempts to rescue the phrase "a crime involving moral turpitude" from indefiniteness, as well as the need for a more specific standard given the harsh penalty of deportation, see the dissenting opinion of Justices Jackson, Black, and Frankfurter in *Jordan*, *id.* at 226.

25. *Fernandez*, 505 F. Supp. at 789. *See* 8 U.S.C. § 1182(a)(9), (20) (1976). Only 2,000 of the 125,000-130,000 Cubans were singled out for exclusion proceedings on the ground of lack of proper immigration documents. Brief of the International Human Rights Law Group as Amicus Curiae urging affirmance, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

In *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049 (N.D. Ga. 1981), the United States District Court refused to entertain the government's argument of a lack of entry papers required by 8 U.S.C. § 1182(a)(20) (1976) as a basis for revocation of the petitioner's parole. *Id.* at 1060 n.14. The court observed that the government "invited" over 100,000 Cuban refugees into the United States knowing that those in the "Freedom Flotilla" would not have proper documentation. *Id.* at 1059 n.12. It stated that a *revocation* of parole for a lack of entry papers would clearly be an abuse of the parole discretion "in light of the circumstances of the 'Freedom Flotilla' and the parole of over 100,000 others known to be lacking such papers . . ." *Id.* at 1060 n.14. However, the court stopped short of deciding whether the government "ought to be estopped by its own conduct" from using § 1182(a)(20) as a basis for *exclusion* (as opposed to a revocation or denial of parole) of those Cubans who have been paroled temporarily into the United States. *Id.* at 1059 n.12. *See also* *Fernandez-Roque v. Smith*, 91 F.R.D. 239, 242-43 (N.D. Ga. 1981).

26. 654 F.2d at 1384. 8 U.S.C. § 1227(a) (1976) reads in pertinent part:

Cuba, however, refused all State Department requests to accept the petitioner and other members of the flotilla.²⁷ The Attorney General refused to parole Rodriguez-Fernandez, and, consequently, his detention continued. The petitioner did not challenge the I.N.S. exclusion order either by means of available administrative remedies or judicial review and was confined in a maximum security federal prison for more than a year, some of which was spent in solitary confinement.²⁸

In September 1980, Rodriguez-Fernandez filed a petition for writ of habeas corpus,²⁹ which is the only available avenue for judicial review of a final exclusion order.³⁰ He was not contesting the validity of the exclusion order itself, but only the validity of his detention.³¹ The United States District Court for the District of Kansas determined that Rodriguez-Fernandez's detention was arbitrary, constituting an abuse of the Attorney General's discretionary power to detain an alien pending deportation, and that the detention was prohibited under accepted principles of interna-

Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, *shall be immediately deported to the country whence he came*, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, *unless* the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper.

(emphasis added).

27. At the time of district court review of the case, the Government of Cuba had either not responded or had responded negatively to six diplomatic notes sent by the United States. The district court stated: "Thus, the Government has been unable to expeditiously carry out the order of deportation and cannot even speculate as to a date of departure. No other country has been contacted about possibly accepting petitioner." 505 F. Supp. at 789. See also *Rodriguez-Fernandez*, 654 F.2d at 1384.

28. 654 F.2d at 1385. Petitioner and approximately 230 other Cuban refugees were detained at Leavenworth Penitentiary in a dormitory area separated from the general population of prison inmates. They were designated to be on "holdover status." Petitioner testified that conditions were more restrictive and privileges were fewer than for general population inmates. *Fernandez*, 505 F. Supp. at 789. Subsequently, Rodriguez-Fernandez was transferred to the maximum security federal penitentiary in Atlanta. The conditions of his detention were as severe as those applied to the worst criminals in the United States. *Rodriguez-Fernandez*, 654 F.2d at 1384-85.

29. Petitioner filed pursuant to 28 U.S.C. § 2241 (1976). *Fernandez*, 505 F. Supp. at 788.

30. 8 U.S.C. § 1105a(b) (1976).

31. Rodriguez-Fernandez failed to seek judicial review of his exclusion order within the six-month period allowed him under *id.* § 1105a(a)(1) and therefore could not, and did not, contest the exclusion order itself in his writ of habeas corpus. In what turned out to be a critical element in the case, he chose to contest only his ongoing detention. He did not qualify for a habeas corpus proceeding as provided by the Immigration Act, *id.* § 1105a(9), which limits judicial review to a deportation or exclusion order. The Immigration Act also requires that administrative remedies be exhausted (which includes making a timely appeal under § 1226(b)) before judicial review may be had under § 1105a(9). *Id.* § 1105a(c). Rodriguez-Fernandez, however, filed for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1976) to challenge his detention.

tional law.³²

On appeal, the United States Court of Appeals for the Tenth Circuit upheld the district court decision, but went beyond it to establish new constraints, founded in constitutional law, restricting the Attorney General's discretionary power to order the detention of excluded aliens subject to deportation. The court held that domestic law, as well as international law, guarantees the right of an excludable alien to be free from arbitrary, indefinite detention.³³ This decision establishes a new standard entitling excluded aliens who are not security risks to be either deported or released upon application following a "reasonable period of negotiations for their return."³⁴

This Note will examine the protection of the excluded alien from arbitrary detention as recently established in *Rodriguez-Fernandez*, weighing its likely impact upon the government and excluded alien plaintiffs. It will analyze the Immigration Act, common law, and international law to ascertain what rights had previously been extended to excluded aliens and to aliens in a position similar to the petitioner in the instant case. Focusing on the Attorney General's discretionary authority to detain and parole excluded aliens subject to deportation, this Note will explore the development of increasingly well-defined constraints upon the exercise of this discretionary power over aliens, and will demonstrate how *Rodriguez-Fernandez* is both a synthesis and an extension of this trend.

I. DIFFERENT VOICES: THE VARIOUS SOURCES OF ALIEN RIGHTS UNDER UNITED STATES LAW

A. *A Statutory Dichotomy: Excludable Versus Deportable Aliens Under the Immigration Act*

The Immigration and Naturalization Act³⁵ has carefully maintained the distinction between the exclusion and expulsion of aliens under the immigration laws. The Act provides significantly different treatment and affords significantly different rights to excludable and deportable aliens.³⁶ For example, the Act states that a deportable alien may be deported to any coun-

32. The district court found that *Rodriguez-Fernandez's* detention was arbitrary detention which violated customary international law as exemplified by the Universal Declaration of Human Rights and the American Convention of Human Rights. *Fernandez*, 505 F. Supp. at 795-99.

33. 654 F.2d at 1389-90.

34. *Id.*

35. Pub. L. No. 82-414, 66 Stat. 831 (1952) (codified in scattered sections of 8 & 50 U.S.C. (1976)).

36. *See supra* note 16 and accompanying text.

try "willing to accept him into its territory,"³⁷ while an excluded alien must be deported to the country from which he came.³⁸

In expulsion proceedings, an alien is entitled to numerous procedural safeguards not extended to aliens in an exclusion proceeding.³⁹ Unlike the excludable alien, the deportable alien is eligible for suspension of deportation, for voluntary departure,⁴⁰ for adjustment of status,⁴¹ and for the temporary withholding of deportation on grounds of persecution.⁴² Most importantly, the Immigration Act authorizes direct recourse for the deportable alien to a court of appeals and an automatic stay of deportation pending judicial review.⁴³ The excludable alien may have only judicial review of a final exclusion order "by habeas corpus proceedings and not otherwise"⁴⁴ and only after having exhausted his administrative remedies under the Immigration Act.⁴⁵

One of the procedural safeguards extended by the Immigration Act to the deportable alien requires that the deportable alien's departure be within a specified time limit.⁴⁶ This provision allows the Attorney General

37. 8 U.S.C. § 1253(a) (1976).

38. *Id.* § 1227.

39. *Maldonado-Sandoval v. United States Immigration & Naturalization Serv.*, 518 F.2d 278, 280 n.3 (9th Cir. 1975). *See also* 8 U.S.C. § 1252(b), (c) (1976).

40. 8 U.S.C. § 1254 (1976).

41. *Id.* §§ 1255, 1259.

42. *Id.* § 1253(h).

43. *Id.* § 1105a.

44. Habeas corpus proceedings may be had by the excluded alien under § 1105a of the Act, or be granted independently by a federal court under 28 U.S.C. § 2241 (1976) of the habeas corpus statute. The latter was granted at the court's discretion by the United States District Court for the District of Kansas. *Fernandez*, 505 F. Supp. at 788. Habeas corpus proceedings under 28 U.S.C. § 2241, unlike those under 8 U.S.C. § 1105a, were not a statutory right to which *Rodriguez-Fernandez* was entitled. *See supra* note 31 and accompanying text.

45. 8 U.S.C. § 1105a(c) (1976). The Immigration Act provides that after a decision of a special inquiry officer excluding an alien, the alien may make a timely appeal to the Attorney General which stays final action until the Attorney General makes a decision on the appeal. *Id.* § 1226(b). The requirement that administrative remedies be exhausted prior to habeas corpus proceedings under § 1105a is subject to the exception, described *supra* note 44, that habeas corpus proceedings may be granted independently by a federal court under 28 U.S.C. § 2241 (1976).

46. 8 U.S.C. § 1252(c) (1976). When Congress passed the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) (codified as amended in scattered sections of 8, 18, 22, 50 U.S.C.), and its successor, the Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified in scattered sections of 8, 50 U.S.C.), it was aware of more than 3,000 warrants of deportation that could not be enforced because of the refusal of countries of origin to grant passports for these persons' return. *Rodriguez-Fernandez*, 654 F.2d at 1389. Nevertheless, Congress provided in the Immigration Act for detention not to exceed six months in deportation cases, indicating congressional concern that the detention of these aliens be temporary and not an end in itself. *See* 654 F.2d at 1389.

to deport a deportable alien six months from the date of the deportation order or most recent judicial review. Since deportation or release is made inevitable by this provision, it effectively bars extended imprisonment.

In contrast, the Immigration Act does not provide a specific time limitation for the detention of an excluded alien. Instead, an excluded alien is to be "immediately" deported to the country from which he came *unless* the Attorney General, in his discretion, decides that immediate deportation is impracticable or improper.⁴⁷ Still, the Attorney General may, in his discretion, temporarily parole excluded aliens into the United States pending their deportation.⁴⁸ Therefore, while the Immigration Act provides a general rule of deportation of an excluded alien, the Attorney General has discretionary power to take other action when certain conditions exist.⁴⁹ Similarly, the judiciary has afforded Congress, which has in turn granted the executive branch, broad discretion in its handling of immigration matters involving excluded or excludable aliens.

B. A Common Law Mosaic: Detention and the Rights of an Excluded Alien

As persons who have not entered and thus have "gained no foothold in the United States,"⁵⁰ excludable aliens have consistently been denied constitutional rights that are guaranteed to citizens and alien entrants.⁵¹ Recognizing that Congress' power to legislate in immigration matters is plenary⁵² and that deportation is not penal in nature,⁵³ the Supreme Court

47. 8 U.S.C. § 1227(a) (1976). For specific language of the statute, see *supra* note 26.

48. *Id.* § 1182(d)(5). The temporary parole of excluded aliens also may be granted "for emergent reasons or for reasons deemed strictly in the public interest." *Id.* Deportable aliens may also be paroled by the Attorney General. *Id.* § 1252(a).

49. As the district court indicated, the precise factual circumstances leading up to the present case have been uncommon in the past and were unforeseen by Congress in its passage of the Act. *Fernandez*, 505 F. Supp. at 792. *Accord* *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1055 (1981). Therefore, it would be highly likely, as in the instant case, that where the country of the excluded alien's embarkation refused to accept the alien's return and he cannot be set upon the vessel that brought him, that deportation would be impracticable under the dictates of 8 U.S.C. § 1227(a) (1976).

Furthermore, Congress recognized that there might be some situations which would justify the temporary admission of excluded aliens for humane reasons. H.R. REP. NO. 1365, 82d Cong., 1st Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1706. Certainly, if an excluded alien suffered from a life-threatening injury, it would be neither practicable nor proper to deport him immediately.

50. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925), *quoted in* *Leng May Ma*, 357 U.S. at 189.

51. *E.g.*, *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Fernandez*, 505 F. Supp. at 790.

52. *See supra* note 6. This plenary power has been described as a "sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson v. Landon*, 342 U.S. 524, 534 (1952).

has repeatedly held that usual constitutional protections do not apply to exclusion proceedings.⁵⁴

In *Carlson v. Landon*,⁵⁵ the Court addressed the issues of detention without bail and the due process rights of deportable aliens. Certain aliens had been arrested and taken into custody without bail under warrants based on sections 22 and 23 of the Internal Security Act of 1950,⁵⁶ the predecessor of the 1952 Immigration Act, which provided for the deportation of Communist Party members or those affiliated with the Communist Party.⁵⁷ In discussing the constitutionality of deportation, the Court stated:

The power to expel aliens, being essentially a power of the political branches of the government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.' *This power is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'*⁵⁸

The Court declared that "deportation is not a criminal proceeding and has never been held to be punishment."⁵⁹ Rather, detention is a "necessary part" of deportation, in order to prevent aliens arrested for deportation from endangering United States interests.⁶⁰

Carlson upheld the rule that resident aliens detained pending deportation may be released on bond by the Attorney General should such release be considered appropriate. This discretionary decision is then subject to judicial review.⁶¹ The power to release deportable aliens is based on statutory authority of the present and preceding Acts⁶² and on the rationale of allowing resident aliens to rejoin the community owing to the "drastic"

53. *Wong Wing*, 163 U.S. at 236; *Carlson*, 342 U.S. at 536. Also, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court declared that orders of deportation are not punishment for crime. That deportation is not considered penal obviates the need for judicial review and permits the detention and deportation of excluded aliens. *Carlson*, 342 U.S. at 537-38.

54. *See, e.g.*, *Abel v. United States*, 362 U.S. 217 (1960); *Carlson*, 342 U.S. 524 (1952).

55. 342 U.S. 524 (1952).

56. Pub. L. No. 81-831, §§ 22-23, 64 Stat. 987 (1950) (codified as amended in scattered sections of 8, 18, 22 & 50 U.S.C.).

57. *Carlson*, 342 U.S. at 531.

58. *Id.* at 537 (emphasis added).

59. *Id.*

60. *Id.* at 538.

61. *Id.*; *see also Mezei*, 345 U.S. at 215-16.

62. *Carlson*, 342 U.S. at 528 n.5, 538. *See* 8 U.S.C. § 1252(a) (1976). In addition to the power to release under bond, the Act also provides the Attorney General with authority to conditionally parole the deportable alien at his discretion. *Id.*

nature of deportation.⁶³

The due process rights of an excluded alien, as opposed to a deportable resident alien, were at issue in *Shaughnessy v. Mezei*.⁶⁴ In *Mezei*, an alien resident had left the United States and lived in Hungary for nineteen months. Upon his return to the United States, he was ordered excluded by the Attorney General on national security grounds.⁶⁵ Mezei could not be deported, however, and was detained at Ellis Island for twenty-one months as an excluded alien.⁶⁶

In its decision, the Court recognized its earlier rule that once an alien has entered this country, even illegally, he can only be deported after legal proceedings "conforming to traditional standards of fairness encompassed in due process of law."⁶⁷ However, the Court reaffirmed its position that where the subject is a nonentrant, "[w]hatever the procedure authorized by Congress [to determine exclusion and deportation] is, it is due process as far as an alien denied entry is concerned."⁶⁸ The Court explained that in this case the alien's temporary removal from ship to shelter ashore, under what has now become section 1223 of the Immigration Act, was not dispositive. It was considered by Congress and the courts as only a temporary arrangement, not as an entry into the United States.⁶⁹ The Court observed, somewhat paradoxically, that although Congress granted excluded aliens only limited due process rights, statutory authority for temporary removal and detention was in part the result of congressional sensitivity to the hardships faced by aliens.⁷⁰

Finally, the Court determined that an excludable alien who is a national security risk is outside the scope of the Attorney General's discretionary power to release resident aliens on bond pending finalization of deporta-

63. *Carlson*, 342 U.S. at 537-38.

64. 345 U.S. 206 (1953).

65. According to the Attorney General, the exclusion order was based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest," and on a finding that the alien's entry would be a security risk. *Id.* at 208.

66. All efforts to deport Mezei failed. *Id.* He shipped out twice to return to the countries from which he came, but France and Great Britain would not allow him to land. *Id.* at 208-09. The State Department unsuccessfully sought to arrange his readmission to Hungary. Mezei himself applied for entry to many Latin American countries, but all refused him. So, in June 1951, he informed the Immigration and Naturalization Service that he would discontinue efforts to deport himself. As the Court pointedly explained: "In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in." *Id.* at 209.

67. *Id.* at 212.

68. *Id.* (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

69. *Mezei*, 345 U.S. at 215.

70. *Id.*

tion proceedings.⁷¹ The Court in *Mezei* declared that the release of an alien who is a national security risk is not protected by the immigration statutes and fails to satisfy the general rationale for release.⁷²

In contrast, the Court in *Leng May Ma v. Barber*⁷³ limited the application of the *Mezei* decision to certain categories of excluded aliens. Concluding that the Immigration Act provides that the granting of temporary parole does not change the legal status of an excluded alien, the Court stated:

The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. . . . Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. . . . Certainly this policy reflects the humane qualities of an enlightened civilization.⁷⁴

While the Court has encouraged detention only under circumstances where necessary for protection of the public interest, it has distinguished between certain forms of detention. In the landmark case of *Wong Wing v. United States*,⁷⁵ the appellants were found to be unlawfully within the United States under the Chinese Exclusion Acts.⁷⁶ A commissioner of the Circuit Court of the United States for the Eastern District of Michigan ordered their imprisonment at hard labor for sixty days, to be followed by deportation to China.⁷⁷ A writ of habeas corpus was denied, and an appeal was taken to the Supreme Court. The Court held that while orders of deportation are not punishment for crime and are within the congressional

71. *Id.* at 215-16.

72. *Id.* at 216. Moreover, the authority to parole excluded aliens, as created by the Immigration and Nationality Act of 1952, did not apply in *Mezei* because the Act expressly provided, in § 405(a), that litigation pending on its effective date, June 27, 1952, would not be affected. 8 U.S.C. § 1101 (1976).

73. 357 U.S. 185 (1958).

74. *Id.* at 190.

75. 163 U.S. 228 (1896).

76. As a result of a large influx of Chinese immigrants following the discovery of gold in California (an estimated 200,000 from 1850 to 1880), Congress enacted the first of the Chinese Exclusion Acts in 1882. H.R. REP. NO. 1365, 82d Cong., 1st Sess., reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1661. The Chinese Exclusion Acts operated on two classes of Chinese persons or persons of Chinese descent—those who came here with the consent of the United States and those who did not. The Acts provided for the arrest of any such individual found unlawfully in the United States 'upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States' *Wong Wing*, 163 U.S. at 229. See Chinese Exclusion Act, ch. 1015, 25 Stat. 476, 479 (1888). Section 4 of the Act of May 5, 1892 required the imprisonment at hard labor for up to one year, prior to expulsion, of Chinese aliens unlawfully in the United States. 163 U.S. at 235. See Chinese Exclusion Act, ch. 60, 27 Stat. 25 (1892).

77. *Wong Wing*, 163 U.S. at 228.

prerogative, the imprisonment of Chinese aliens at hard labor under the Chinese Exclusion Acts was "infamous punishment" and thus violative of the fifth and sixth amendments.⁷⁸ The Court stated that for legislation authorizing such imprisonment to be valid, it "must provide for judicial trial to establish the guilt of the accused."⁷⁹

Wong Wing established that temporary detention is permissible only to the extent that it serves the necessary purpose of accomplishing deportation or exclusion.⁸⁰ Subsequent federal circuit and district court rulings have similarly held that deportable aliens in custody for more than a few months must be released. After this time, detention is considered to be imprisonment.⁸¹ Other pre-Immigration Act decisions involving deportable aliens have held that such aliens should be released if deportation is impossible or cannot be achieved in the foreseeable future,⁸² for the reason that detention was intended by the Immigration Act and its predecessors solely to effect deportation.⁸³ Some courts stated that two to four months is a reasonable period to detain an alien pending deportation efforts.⁸⁴

Despite the trend evidenced by many of the decisions, domestic law has not assured the protection of unadmitted, excludable aliens from lengthy, perhaps indefinite, detention because of these aliens' special legal status in

78. *Id.* at 228, 236-37. The fifth amendment provides in part that "no person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The sixth amendment states in part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crimes shall have been committed . . ." U.S. CONST. amend. VI.

79. 163 U.S. at 237.

80. *Id.* at 235; *Fernandez*, 505 F. Supp. at 791. See *Rodriguez-Fernandez*, 654 F.2d at 1387.

81. *Rodriguez-Fernandez*, 654 F.2d at 1387-88. As the United States District Court for the District of Massachusetts declared in *Petition of Brooks*, 5 F.2d 238, 239 (1925):

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 crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime. . . . He is entitled to be deported, or to have his freedom. He has already been imprisoned, for no crime, about nine weeks, for which he is apparently without remedy.

82. *E.g.*, *Wolck v. Weedon*, 58 F.2d 928, 930-31 (9th Cir. 1932); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir.), *cert. denied*, 227 U.S. 589 (1928); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922); *United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 203 (D. Mass. 1942).

83. *Wong Wing*, 163 U.S. at 235. See also *Kusman v. District Director of Immigration*, 117 F. Supp. 541 (S.D.N.Y. 1953) (post-Immigration Act case).

84. See cases cited *supra* note 82. It has been suggested that these federal court decisions may have prompted the creation of the six-month limitation for the detention of deportable aliens under 8 U.S.C. § 1252(c) (1976). *Fernandez*, 505 F. Supp. at 793.

this country.⁸⁵ In the absence of precise and uncontroverted statutory or case authority on the issue of indeterminate detention of an excluded alien,⁸⁶ it is necessary to determine whether there are any other sources of legal principles which may guide United States courts. International law, in particular, is a part of United States law which federal courts must ascertain and apply in appropriate cases.⁸⁷ It provides guarantees of various rights of the individual against governmental or state violation.⁸⁸

C. *International Human Rights Law in United States Courts: Impact of Filartiga*

International law has traditionally governed relations between and among states rather than between the individual and the state. In recent years, however, international organizations, corporations, and individuals have increasingly gained rights and duties of their own under international law.⁸⁹

In the United States, the role of international law is reflected by the Supreme Court's acceptance of the doctrine of incorporation, which recognizes international law as a part of the law of the land.⁹⁰ Under this doctrine, courts will resort to pertinent rules of customary international law only when there is "no applicable rule of domestic law already established by previous executive or legislative act [including a treaty] or judicial

85. *Fernandez*, 505 F. Supp. at 795.

86. *Rodriguez-Fernandez*, 634 F.2d at 1385.

87. *The Paquete Habana*, 175 U.S. 677 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

88. The *Rodriguez-Fernandez* case demonstrated the applicability of international law in United States courts, especially where no substantive rule of domestic law exists on an issue which has been addressed by international law. The district court, in *Rodriguez-Fernandez*, based its holding exclusively on international legal protections against arbitrary detention. See *supra* note 32 and accompanying text. The United States Court of Appeals for the Tenth Circuit also used these international legal principles to support its holding.

89. See, e.g., Note, *The Alien Tort Statute: Implications of Filartiga v. Pena-Irala*, 15 GA. L. REV. 504, 505-08 (1981).

90. *Id.* See *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filartiga*, 630 F.2d at 876, 880-81; 1 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 39-41 (1955); I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 51-53 (1973); W. TUNG, INTERNATIONAL LAW IN AN ORGANIZING WORLD 6-7 (1978). Incorporation has also been referred to as the "implementation" of international law by national law. See H. KESSEN, PRINCIPLES OF INTERNATIONAL LAW 291-93 (1966). Art. 1, § 8, cl. 10 of the United States Constitution recognizes international law as part of the law of the land by authorizing Congress to punish offenses against international law. The doctrine of incorporation is recognized by many states today, evidencing itself in "both constitutions and decisions of national tribunals." W. TUNG, *supra*, at 6.

decision."⁹¹

The seminal decision of *The Paquete Habana*⁹² defined the circumstances under which international law would be controlling on a United States court.⁹³ In *The Paquete Habana*, two fishing smacks, operated and owned by Spanish subjects of Cuban birth, were stopped while fishing off the coast of Cuba. The vessels were taken to Key West and, after having been condemned as prizes of war, were sold at auction.⁹⁴ The Court traced the historical ripening of the rule of international law which exempts fishing vessels from capture as prizes of war,⁹⁵ stating that international law is a part of United States law and must be ascertained and administered by United States courts.⁹⁶ According to the Court, in the absence of a treaty, a controlling executive or legislative act, or a judicial decision, courts must resort to customary international law, evidence of which may be found in the works of authoritative jurists and commentators.⁹⁷

Most current international human rights law⁹⁸ has developed very recently. Its first significant breakthrough came at the close of World War II, when the international community began establishing norms in this area of law.⁹⁹ However, the United States has ratified very few international human rights agreements,¹⁰⁰ and courts are not technically required to up-

91. N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 9 (1973).

92. 175 U.S. 677 (1900).

93. *Filartiga*, 630 F.2d at 880-81.

94. 175 U.S. at 678-79.

95. N. LEECH, *supra* note 91, at 6-7.

96. 175 U.S. at 700.

97. As the Court stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id.

This ruling was recently applied in *Filartiga*, 630 F.2d at 880-81, 887.

98. International human rights law is the body of international law which governs human rights. Human rights are "rights against society as represented by government and its officials." 14 L. HENKIN, *THE RIGHTS OF MAN TODAY* 1-2 (1978).

99. *Fernandez*, 505 F. Supp. at 795 (quoting Stotzky, *Lawyer of the Americas* (Book Commentary), 11 *MIAMI J. INT'L L.* 229 (1979)); see also Note, *supra* note 89, at 505.

100. It has been thoughtfully argued that the United States—which views itself as the "model protector of human rights," and whose Constitution is an exemplar of protection

hold these unratified documents as binding United States law.¹⁰¹

In addition to ratified treaties and international agreements, another source of international law is customary law. To become customary law, a rule of conduct must command "the general assent of civilized nations."¹⁰² For example, while the United Nations Charter and the Charter of the Organization of American States are not considered self-executing human rights treaties,¹⁰³ courts have used their provisions as evidence of binding principles of customary international law.¹⁰⁴

The recently decided case of *Filartiga v. Pena-Irala*¹⁰⁵ exemplifies the implementation of customary international law in a United States court. In this case, two citizens of Paraguay brought an action in a United States court against a Paraguayan official for the wrongful death of their son and

from arbitrary governmental encroachment upon human rights—sees international human rights as an area which only other countries need to address and to commit themselves:

Because we believe that human rights in the United States need no international support; because we do not think we have anything to learn in human rights from others and we even fear dilution or 'contamination' from them; because though we continue to assert that human rights are everybody's business, we make an exception where those of our own citizens are concerned; because we have always remained in some measure 'isolationist,' especially resisting foreign 'interference' here; because we fear that foreign scrutiny might bring subversion, distortion, or hostile propaganda—the United States has refused to be a full and equal participant in the international human rights program. Most glaringly, it has adhered to virtually no human rights agreement of any importance.

L. HENKIN, *supra* note 98, at 118. See also, Stotzky, *supra* note 99, at 238.

101. Under the Constitution, United States treaties are part of the "Supreme Law of the Land," but ratification by two-thirds of the Senate is required before they become United States domestic law. U.S. CONST. art. 6; U.S. CONST. art. 2, § 2, cl. 2.

One ratified treaty is the United Nations Charter, 59 Stat. 1031 (1945). In this document, the United States pledges itself, as a U.N. member, "to promote . . . universal respect for, and observance of, human rights and fundamental freedoms." *Id.* at art. 55.

102. *The Paquete Habana*, 175 U.S. at 694; *Filartiga*, 630 F.2d at 881.

103. *Filartiga*, 630 F.2d at 881-82, 882 n.9; *Hitai v. Immigration & Naturalization Serv.*, 343 F.2d 466, 468 (2d Cir. 1965). In *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952), the Supreme Court of California held that provisions of the United Nations Charter, which pledge the cooperation of member nations in promoting observance of fundamental freedoms, "lack the mandatory quality and definiteness" sufficient to demonstrate an intent of the signatory nations to create immediately enforceable rights in individuals upon ratification. Instead, the court observed, the provisions "are framed as a promise of future action by the member nations." *Id.* at 724, 242 P.2d at 620-21.

104. *Filartiga*, 630 F.2d at 882 n.9; *United States v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1978). In *Toscanino*, the court alluded to the United Nations Charter and the Charter of the Organization of American States as clear evidence of "a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable . . ." *Id.* at 278.

105. 630 F.2d 876 (2d Cir. 1980).

brother, allegedly caused by the use of torture.¹⁰⁶ Federal jurisdiction was obtained under the Alien Tort Claims Statute.¹⁰⁷ On appeal, the United States Court of Appeals for the Second Circuit found that official torture violates established norms of the international law of human rights.¹⁰⁸ Using the methodology posited in *The Paquete Habana*,¹⁰⁹ the court concluded that the prohibition of official torture is an accepted norm of customary international law.¹¹⁰

Filartiga is significant because customary international law provided the basis for establishing that government officials can be liable in United States courts for acts which violate individual human rights. Although the issue with which it dealt was one of jurisdiction, *Filartiga* demonstrated the potential effectiveness of relying on international law in United States

106. *Id.* at 878-79. Defendant/appellee was Inspector General of Police in Asuncion, Paraguay at the time the decedent was allegedly tortured to death.

107. 28 U.S.C. § 1350 (1976). The Alien Tort Claims Statute provides that federal district courts "have original jurisdiction of any civil action by an alien, for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* See *Filartiga*, 630 F.2d at 885-86.

The Alien Tort Claims Statute is a telling example of Professor Henkin's view that the United States aggressively seeks improvement of human rights conditions in other countries, but not for itself. See *supra* note 100. While the United States has enacted a statute to enable aliens to redress violations of international law or a treaty of the United States in United States courts, it has refused to recognize the authority of non-United States tribunals to adjudicate international law violations by American citizens, or, for that matter, any domestic issue. L., HENKIN, *supra* note 98, at 101. For example, the Connally Reservation, which was passed by the United States Senate, narrowed United States acceptance of International Court of Justice jurisdiction by withdrawing from the courts' consideration any matter "determined by the United States" to be essentially within its domestic jurisdiction. U.S. Dep't of State, *The International Court of Justice*, 12 DIGEST OF INT'L LAW 1297, 1301 (1971), quoted in Note, *supra* note 89, at 514 n.49.

108. The court identified these norms in numerous international agreements and in the condemnation of torture as an instrument of official policy by essentially all of the countries of the world. *Contra Dreyfus v. von Finck*, 534 F.2d 24, 31 (2d Cir.), cert. denied, 429 U.S. 835 (1976) (excluding laws governing a state's treatment of its own citizens from application of the law of nations through the Alien Tort Claims Statute).

109. 175 U.S. 677 (1900).

110. The court ascertained that official torture violates accepted norms of international law by consulting the works of jurists writing on public law, by the general usage and practice of nations, and by judicial decisions recognizing and enforcing such law. The court considered several sources as evidence of customary international law:

(1) The Universal Declaration of Human Rights and other United Nations declarations; see 630 F.2d at 882;

(2) numerous international accords and treaties, see *id.* at 883-84;

(3) the constitutional prohibitions of over 55 states, see *id.* at 884;

(4) reports from the international diplomatic corps, see *id.*; and

(5) the conclusions of international legal scholars and commentators; see *id.* at 879 n.4, 883.

courts in a case where there is no applicable rule of domestic law.¹¹¹

In *Rodriguez-Fernandez*, however, the United States Court of Appeals for the Tenth Circuit faced the issue of what rights an excluded alien can claim against the United States government under United States domestic law or international law. The issue in this case, like that of *Filartiga*, appeared to be resolvable only by recourse to accepted principles of customary international law.¹¹²

II. *RODRIGUEZ-FERNANDEZ*: FILLING AN IMMIGRATION VOID

Due to his prior convictions and lack of immigration documents, Rodriguez-Fernandez's exclusion was properly ordered on July 21, 1980. However, because the United States government either ceased efforts or was unable to deport him to Cuba, as the Immigration Act requires, he was detained in federal prison for more than one year. The government appealed the district court's decision that Rodriguez-Fernandez's detention was arbitrary and prohibited under accepted principles of international law.¹¹³

The United States Court of Appeals for the Tenth Circuit construed the Immigration Act's provisions as entitling Rodriguez-Fernandez to release upon application, after the passage of a reasonable time to negotiate a return to his country of origin or to the transporter that brought him from that country.¹¹⁴ The court found its construction to be consistent with the Immigration Act's treatment of deportable resident aliens, federal constitutional principles, and accepted international law principles entitling individuals to be free from arbitrary detention.¹¹⁵ Stating that the absence of agreement by any country to take the excluded alien is insufficient reason to continue his imprisonment,¹¹⁶ the court went on to hold:

When an excludable alien in custody tests the detention by writ of habeas corpus pursuant to 8 U.S.C. § 1105a(a)(9) or 28 U.S.C. § 2241, we hold that the burden is upon the government to show

111. See Note, *supra* note 89, at 510-13.

112. *Rodriguez-Fernandez*, 654 F.2d at 1388.

113. *Id.* at 1385.

114. *Id.* at 1386, 1389-90.

115. *Id.* at 1390.

116. The court upheld the requirements of 8 U.S.C. § 1227 (1976) for the government to return or negotiate a return of the excluded alien to the country of origin, or to the transporter from that country. 654 F.2d at 1390. However, after a "reasonable period of negotiations" elapses, if the incarcerated alien wishes to risk an option to continued detention by writ of habeas corpus, the court suggested other acceptable choices the government might make to effect the alien's release from detention. These alternatives, the court emphasized, include, but do not require, release within the United States. *Id.* at 1389-90.

that the detention is still temporary pending expulsion, and not simply incarceration as an alternative to departure.¹¹⁷

The court noted the lack of evidence that any negotiations were currently underway with Cuba or any other country to take Rodriguez-Fernandez.¹¹⁸ This led the court to conclude that his detention was imprisonment as an alternative to departure, rather than "temporary pending expulsion."¹¹⁹

The court found a number of other factors persuasive in rendering its decision. It recognized that the temporary parole of excluded aliens into the United States is now contemplated by the Immigration Act as within the discretion of the Attorney General,¹²⁰ although parole is not considered an admission of the alien into the United States.¹²¹ The court observed that representatives of the Attorney General, exercising their discretionary parole power, determined Rodriguez-Fernandez to be releasable under 8 U.S.C. § 1182(d)(5).¹²² The court appeared skeptical of the motives for, and propriety of, a suspension of the duly-recommended release of the petitioner.¹²³

117. 654 F.2d at 1390.

118. *Id.*

119. Temporary detention pending expulsion has been upheld by the Supreme Court as a necessary part, and for the necessary purpose, of deportation. As such, it has been ruled not to be punishment. *See, e.g.,* Carlson v. Landon, 342 U.S. at 537-38. *See also supra* notes 57-60 and accompanying text. But, when that detention proves not to be temporary but indefinite, and under prison conditions like those endured by the petitioner, it is a form of punishment violative of the fifth and sixth amendments.

120. *See* 8 U.S.C. § 1182(d)(5) (1976).

121. *Rodriguez-Fernandez*, 654 F.2d at 1389. In his dissenting opinion in this case, Judge McWilliams responded by correctly construing 8 U.S.C. § 1182(d)(5) (1976) and prior holdings of the Court to conclude that the petitioner had no *right* to release on parole. 654 F.2d at 1352 (McWilliams, J., dissenting). Narrowing the focus to whether the Attorney General abused his discretion in both refusing to release Rodriguez-Fernandez on parole and ordering his continued detention, Judge McWilliams found no such abuse of discretion under the circumstances. *Id.* at 1390-91.

122. 654 F.2d at 1385. The government reported in its brief to the court the status of Cuban refugees:

summariz[ing] Immigration and Naturalization Service status reports as follows: Approximately 1,700 of the original 125,000 some Cuban refugees who entered the [United States] in the spring of 1980 . . . [were] detained in Atlanta as aliens convicted of crimes of moral turpitude. Nearly 400 previously detained criminal aliens were released on parole under the [subsequently] suspended review and release procedures. . . . The vast majority of the refugees [had] been released into the United States on parole under 8 U.S.C. § 1182(d)(5) [as of May 4, 1981]."

654 F.2d at 1385 n.1. The court stated: "[W]e note that, under procedures approved by the predecessor to the present Attorney General, this petitioner was found to be qualified for such parole." *Id.* at 1390.

123. The suspension was ostensibly for the purpose of permitting a review of government policies under the new Reagan Administration. 654 F.2d at 1385. On April 22, 1981, the

As a basis for its analysis of the petitioner's detention, the court carefully considered the statement in *Leng May Ma v. Barber*¹²⁴ of Supreme Court Justice Tom Clark (the Attorney General during the formation of the present Immigration Act) that "[p]hysical detention . . . is now the exception . . . and is generally employed only as to security risks or those likely to abscond."¹²⁵ It noted the lack of evidence of "a significant number of excludable aliens" having been physically detained for lengthy periods prior to the instant case.¹²⁶

Additionally, the court emphasized that it would not set a specific time limit for detention. Instead, it held that the standard "of a reasonable period of negotiations" was appropriate.¹²⁷ Further, the court refused to construe the Immigration Act to require release within the United States.¹²⁸ Instead, while maintaining that this was an option for which Rodriguez-Fernandez was found qualified,¹²⁹ the court discussed other options available to the government, such as returning him to the vessel that brought him,¹³⁰ or sending him "to a country other than Cuba, if Cuba will not take him."¹³¹ The court's decision not to set rigid guidelines for govern-

district court was told that the President had appointed a special task force to file a report on May 4, 1981, to address what should be done with the excluded aliens still being detained. The government requested that the court grant it another 60 days either to deport or to parole Rodriguez-Fernandez. On April 23, the court denied the request and ordered Rodriguez-Fernandez's release to the sponsorship of a citizen living in Kansas City. The government appealed these orders. *Id.*

On May 12, 1981, a panel of the court of appeals considered another request by the government for more time. "The government attorneys . . . wanted additional time to develop a solution. The period we have needed for research and deliberation has given the government significant additional time. . . . [W]e must now determine this controversy." *Id.*

124. 357 U.S. 185 (1958).

125. 654 F.2d at 1389.

126. *Id.* The court was probably aware that this factor could be a reason for the failure of the statutes to address the issue of permissible length of detention of excluded aliens. As the district court stated in its opinion: "It seems . . . plausible that statutory guidance as to the permissible length of administrative detention is lacking because the present situation has not been a common occurrence." *Fernandez*, 505 F. Supp. at 792.

127. *Rodriguez-Fernandez*, 654 F.2d at 1389.

128. *Id.* at 1390.

129. *Id.*

130. *Id.*

131. *Id.* This sensible view has now found judicial acceptance, although it is contrary to the letter of the immigration statute. The Immigration Act unequivocally states that the Attorney General should deport the excluded alien to the country "whence he came." 8 U.S.C. § 1227 (1976). However, as early as *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), the Supreme Court, faced with attempts by an alien respondent to gain entry to a large number of disinterested countries, expressed no opposition to this alternative as a solution to the intractable problem of deporting the otherwise undeportable, excluded alien. *Id.* at 208-09. Unfortunately, more often than not, disinterested countries have been less than willing to relieve the United States of its excluded aliens. In the words of a United States District

ment enforcement of immigration laws reflects an understanding of the need for a degree of flexibility in handling difficult individual cases of excluded aliens.

The court disposed of the appeal by construing the Immigration Act to require Rodriguez-Fernandez's release, but recognized the need "to discuss the serious constitutional questions involved if the statute were construed differently."¹³² The court concluded from an examination of *Wong Wing*¹³³ and related cases that "it would appear that an excluded alien in physical custody within the United States may not be 'punished' without being accorded the substantive and procedural due process guarantees of the Fifth Amendment."¹³⁴ Citing *Carlson v. Landon*,¹³⁵ the court observed that, if not for the fiction that detention is a continuation of exclusion, imprisonment in a federal prison of one neither convicted nor charged with a criminal offense would constitute a deprivation of liberty violative of the fifth amendment.¹³⁶ The *Rodriguez-Fernandez* court properly interpreted the language of *Carlson* and analogized detention pending deportation to incarceration pending trial,¹³⁷ justifying detention "only as a necessary temporary measure."¹³⁸ It reasoned that if there were no trial and the petitioner were ordered to a definite term of penitentiary confinement, such action would compel the courts to apply *Wong Wing* and determine the imprisonment to be "impermissible punishment rather than detention pending deportation."¹³⁹ The court cited *Petition of Brooks*¹⁴⁰ and *United States ex rel. Ross v. Wallis*¹⁴¹ for the proposition that detention for more than a few months constitutes imprisonment.¹⁴² Although

Court judge, an excluded alien detainee "is unlikely to be able to make arrangements to emigrate and settle elsewhere while his return address is an American penitentiary." *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1053 n.1.5 (N.D. Ga. 1981). The United States government, cognizant of the statutory guidelines as well as the minimal chance of success of deporting to a disinterested country, has not found this option one that is worth pursuing aggressively.

132. 654 F.2d at 1386.

133. 163 U.S. 228 (1895).

134. 654 F.2d at 1387, citing *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979), the court agreed with the holding in that case "that no distinction can be drawn in application of these [due process] rules between an alien like Rodriguez-Fernandez and one who is a resident in the United States." 654 F.2d at 1387 n.3.

135. 342 U.S. 524 (1952).

136. 654 F.2d at 1387.

137. *Id.*

138. *Id.*

139. *Id.*

140. 5 F.2d 238 (D. Mass. 1925).

141. 279 F. 401 (2d Cir. 1922).

142. *Rodriguez-Fernandez*, 654 F.2d at 1387-88.

these cases concerned deportable aliens, they occurred before the enactment of the Immigration Act and its precursor, The Internal Security Act of 1950,¹⁴³ and therefore the aliens involved were, like today's excluded aliens, also unprotected by a statutory time limitation on detention. The law prior to *Rodriguez-Fernandez*, as represented by the above cases and the language of the current Immigration Act, has clearly recognized a general rule that detention pending deportation is to be of a temporary nature.

Both the majority and the dissent recognized the importance of *Shaughnessy v. Mezei*¹⁴⁴ with respect to the government's case.¹⁴⁵ Initially, *Mezei* would seem to control the result of the instant case. However, upon close examination, several distinguishing characteristics appear between the two cases. In *Mezei*, the excluded alien was confined to Ellis Island for twenty-one months before the Supreme Court decided his case.¹⁴⁶ The Court refused to require his release within the United States.¹⁴⁷ The majority in *Rodriguez-Fernandez* cited numerous factual distinctions between the instant case and *Mezei* to support its view that "constitutional problems inhere in petitioner's detention status."¹⁴⁸ *Mezei*'s primary focus was on the petitioner's right to a due process hearing regarding his right to reenter the United States,¹⁴⁹ not on the constitutionality of indefinite detention as an alternative to deportation under the circumstances of the petitioner's case.¹⁵⁰

Another distinguishing factor in *Mezei* was that the petitioner was excluded as a security risk at the time of the Korean War.¹⁵¹ The court in *Rodriguez-Fernandez* noted that "security risks and enemy aliens during wartime have always been treated specially."¹⁵² The *Mezei* Court stated that temporary parole was not applicable in that case because there was no authority under the statute in force at that time to release nonresident aliens.¹⁵³ However, at the time of *Rodriguez-Fernandez*, unlike when *Mezei* was decided thirty years ago, the statutory authority to parole excluded aliens does exist.¹⁵⁴ The Court in *Mezei* further stated that an ex-

143. Pub. L. No. 81-831, 64 Stat. 987 (1950) (codified in scattered sections of 8, 18, 22 & 50 U.S.C.) (amended by Pub. L. No. 82-414, 66 Stat. 831 (1952)).

144. 345 U.S. 206 (1953).

145. 654 F.2d at 1388, 1391 n.2.

146. 345 U.S. at 209.

147. *Id.* at 215.

148. 654 F.2d at 1388-89.

149. *Mezei*, 345 U.S. at 212. *See also Rodriguez-Fernandez*, 654 F.2d at 1388.

150. *See* 654 F.2d at 1389; *Fernandez*, 505 F. Supp. at 791.

151. *Rodriguez-Fernandez*, 654 F.2d at 1388.

152. *Id.*

153. *Mezei*, 345 U.S. at 215-16, 216 n.14.

154. *See Fernandez*, 505 F. Supp. at 795; 8 U.S.C. § 1182(d)(5) (1976).

clusion proceeding based on danger to national security lacked the rationale to parole detained aliens.¹⁵⁵ During Rodriguez-Fernandez's detention, however, the country was neither at war nor in a state of siege which would warrant, as part of a heightened national security posture, the indeterminate detention of excludable aliens. Moreover, Rodriguez-Fernandez's prior convictions for escape from a Cuban prison and attempted burglary make him at best a questionable threat to United States national security.¹⁵⁶

The standard that the court has applied of continuing detention and denying temporary parole only to those excluded and deportable aliens who are truly "security risks" or "likely to abscond"¹⁵⁷ seems the proper test. That there is little statutory support for this test is not surprising given the demonstrated inability of the Immigration Act to adequately address particular immigration problems which have arisen since its enactment. This test satisfies the essential requirement of protecting the citizenry and the general public welfare while at the same time advancing the rationale for parole to avoid the needless, punitive confinement of aliens.¹⁵⁸ Furthermore, the policy underlying this test reflects this country's ideals of respect for individual human rights and of general fairness and justice,¹⁵⁹ and is in keeping with the American tradition of serving as a refuge for disadvantaged immigrants.¹⁶⁰

The court went on to distinguish the conditions of Mezei's confinement in a temporary haven on Ellis Island from those of Rodriguez-Fernandez's detention or imprisonment in two maximum security prisons.¹⁶¹ The conditions of detention in *Rodriguez-Fernandez* were far more like those of *Wong Wing* than of *Mezei*, in that they were similar to conditions of im-

155. 345 U.S. at 216.

156. *Fernandez*, 505 F. Supp. at 795. The district court indicated that the government never established a national security interest as being at stake in a judicial determination of this case. From apparent State Department and Immigration and Naturalization Service lack of interest, the court concluded that a covert threat to national security was not the situation presented here, but rather, this was a situation in which "established immigration laws . . . provide no direct solution." *Id.* at 795 n.1.

157. As for Rodriguez-Fernandez's likelihood of absconding, he indicated that he would like to reside here permanently as a resident alien. *See id.* at 789. *See also infra* note 169 and accompanying text. He originally applied for political asylum in the United States. Moreover, given his lack of immigration documents and criminal record, it would be very difficult for him to find a home elsewhere.

158. *Leng May Ma*, 357 U.S. at 190.

159. *See generally id.*; Rodriguez-Fernandez, 654 F.2d at 1388; *Fernandez-Roque v. Smith*, 91 F.R.D. 239, 243 (N.D. Ga. 1981); *Soroa-Gonzales*, 515 F. Supp. at 1051; *Fernandez*, 505 F. Supp. at 799.

160. *See supra* note 1.

161. *Rodriguez-Fernandez*, 654 F.2d at 1388.

prisonment for the conviction of felonies in the United States.¹⁶²

Rodriguez-Fernandez's "long record of criminality" is emphasized by the dissent as a justification for his detention to continue in a maximum security prison.¹⁶³ Distinguishing *Mezei*, the dissent indicated that, unlike Rodriguez-Fernandez, Mezei had no criminal record to justify the same conditions of detention. Nevertheless, this assertion is undermined by the unsupported conclusion that "the conviction of a crime of a moral turpitude parallels the determination that an alien is a national security risk as a ground for exclusion."¹⁶⁴ In effect, the dissent likened an alien convicted of attempted burglary and escape in Cuba to an alien determined to be a national security risk in this country. The Immigration Act lists thirty-one distinct classes of excludable aliens.¹⁶⁵ Other than the fact that they are both statutory grounds for exclusion, the dissent related the two classes in *Mezei* and *Rodriguez-Fernandez* through an unsupported assertion. This attempt to link petitioner's grounds for exclusion with those of a national security risk is clearly inadequate for the purpose of denying him parole into the United States.

The dissent also gives much credence to Rodriguez-Fernandez's convictions for "crimes involving moral turpitude" as a reason for denying the petitioner parole.¹⁶⁶ While the dissent fails to mention the actual crimes for which the petitioner was convicted, it compares the facts in the instant case to the hypothetical situation of Rodriguez-Fernandez having been convicted of murder. While the continued detention of a convicted murderer would surely be a legitimate example of a national security risk, to classify a person having prior convictions for petty theft, attempted burglary, and escape as a national security risk, without apparently considering the nature of the crimes and the surrounding circumstances,¹⁶⁷ is both unjust and a distortion of the *Leng May Ma* standard for parole. A fundamental weakness of the dissent is its failure to adequately demonstrate that the petitioner, although properly excluded for prior convictions, is a national security risk and thus not qualified for parole within the United States.

A further distinction between the cases is that in *Mezei* there were continuing efforts to deport the alien and that he finally terminated his search

162. Rodriguez-Fernandez served more than one year in maximum security federal prisons; Wong Wing was sentenced to imprisonment at hard labor for one year.

163. *Rodriguez-Fernandez*, 654 F.2d at 1390-91.

164. *Id.* at 1391 n.2.

165. 8 U.S.C. § 1182(a)(1)-(31) (1976). *See, e.g., supra* note 9.

166. *Rodriguez-Fernandez*, 654 F.2d at 1390-91.

167. *See supra* note 23.

for a new home voluntarily.¹⁶⁸ It is worth noting that Mezei not only sought release from confinement, but unlike Rodriguez-Fernandez, he also sought admission to the United States.¹⁶⁹

The dissenting opinion makes no mention of the lack of continuing efforts to deport Rodriguez-Fernandez. Those efforts were present in *Mezei*, a case upon which the dissent heavily relies. Indeed, it has been shown that detention is a necessary incident of exclusion, but it must be only temporary pending deportation of the alien.¹⁷⁰ The dissent fails to address the critical issue that detention of an excluded alien may become impermissible punishment under the Immigration Act and the common law if efforts to deport the alien cease and detention is no longer necessary for deportation.

After distinguishing the facts of *Mezei*, the court in *Rodriguez-Fernandez* made reference to recently-expanded constitutional protections owed aliens apart from any right to enter or remain in the United States.¹⁷¹ The court determined that due process is subject to change "to take into account accepted current notions of fairness."¹⁷² The many factual differ-

168. 654 F.2d at 1388.

169. *Id.* "Petitioner testified he is willing to go to another country, 'anywhere in the world where I'll not be a prisoner unjustly or unfairly.'" *Id.* at 1386.

170. *See supra* notes 80-84 and accompanying text.

171. 654 F.2d at 1388.

172. *Id.* In spite of its recognition of the plenary power of Congress to expel or exclude aliens, the Supreme Court has held that this power is still subject to judicial intervention if it violates the Constitution. *See Carlson*, 342 U.S. at 537. Recently, the Court has repeatedly emphasized the doctrine that not only is the availability of pretrial review presumed when constitutional questions are at issue, but that the Court will not read a statutory scheme to take the extraordinary step of foreclosing review unless Congress' intent to do so is manifested by "clear and convincing" evidence. *E.g.*, *Califano v. Sanders*, 430 U.S. 99, 109 (1976); *Weinberger v. Sarf*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

There is no specific statutory provision granting (or prohibiting) the federal courts authority to review an Immigration and Naturalization Service district director's decision whether or not to grant parole to an alien determined to be excludable by an administrative law judge. *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1054 (N.D. Ga. 1981). However, the courts have found adequate jurisdiction for such cases under general jurisdictional provisions. *Id.* at 1054. For example, 8 U.S.C. § 1329 (1976) provides the United States district courts with jurisdiction of all civil and criminal actions under Title II of the Act, 8 U.S.C. § 1151 (1976). Furthermore, 28 U.S.C. § 1331 grants the district courts "original jurisdiction of all civil actions arising under the Constitution laws or treaties of the United States." Finally, the federal courts may grant writs of habeas corpus under 28 U.S.C. § 2241 (1976). 515 F. Supp. at 1055-56. In *Soroa-Gonzales*, the court found it had jurisdiction of the petitioner's habeas corpus action challenging his indefinite detention under 28 U.S.C. § 2241 (1976), out of the utmost respect traditionally accorded the Great Writ, which "shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2, *quoted in Soroa-Gonzales*, 515 F. Supp. at 1056. *See also* *Fay v. Noia*, 372 U.S. 391, 399-426 (1963). The *Soroa-Gonzales* court indicated that the attendant

ences between *Mezei* and *Rodriguez-Fernandez* demonstrate that standards of fairness do change, and have changed, significantly over time.

The court also considered international law principles as a source for standards of fairness as to the propriety of holding aliens in detention.¹⁷³ It determined that “[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”¹⁷⁴ While not grounding its decision solely in international law, the court gave international law considerable weight as a factor in resolving the issues presented in *Rodriguez-Fernandez*. This use of international law by the court is significant because it represents recognition by the United States courts of the need to adhere to pertinent international legal principles that have won the acceptance of a broad majority of the international community.¹⁷⁵

The court thus found that *Mezei* did not control a resolution of the constitutional problems of *Rodriguez-Fernandez*'s detention. In so doing, the court exercised its duty to see that individuals, including aliens, are not unreasonably subjected to an unrestricted governmental discretion, even if authorized or apparently authorized by Congress.¹⁷⁶

problems of the sudden influx of 130,000 Cubans ideally should have been addressed by the executive or the legislative branches. 515 F. Supp. at 1051. In light of the lack of government action to parole those Cubans detained solely on the basis of lack of proper entry papers, the court asserted its obligation to issue a writ of habeas corpus under the circumstances. *Id.* at 1051-52.

It has been observed that while due process must change with the circumstances of a given situation, the judiciary must determine if the handling of an immigration case has been consistent with due process, rather than ignore its obligation in the name of an omnipotent and unaccountable Congress. *See Hart, supra* note 16, at 1393-94.

173. 654 F.2d at 1388. The court deemed international law principles a proper source since the Supreme Court, in *Fong Yue Ting*, 149 U.S. 698 (1893), used the same source to support its upholding of Congress' plenary power over exclusion and deportation of aliens. 654 F.2d at 1388.

174. 654 F.2d at 1388.

175. By extending constitutional protection primarily through the interpretation of domestic law, this decision has a more powerful impact upon the rights of excluded aliens under United States law than it would have if it had established rights exclusively through a construction of international law. A due process right of excluded aliens may prevail over conflicting statutes and case law—as *Rodriguez-Fernandez* has demonstrated. International human rights law, however, if not adopted in the form of self-executing treaty provisions, holds no such exalted status in United States courts. It cannot prevail over conflicting domestic statutes and judicial decisions, as shown by the *Paquete Habana* methodology and United States adoption of the incorporation doctrine. *See supra* notes 90-91, 97 and accompanying text.

176. *See Hart, supra* note 16, at 1390, 1393.

III. *RODRIGUEZ-FERNANDEZ*: A LESSON IN JUDICIAL REVIEW OF POLITICAL "PLENARY POWER"

The *Rodriguez-Fernandez* case has an important effect upon the constitutional status of the excluded alien. While no specific time limit has been set upon his detention,¹⁷⁷ the right of the excluded alien to be free from indefinite detention pending deportation has been upheld. This right may be tested by the alien willing to risk one of the various alternatives to detention which may result.¹⁷⁸ When the constitutionality of continuing detention is challenged by an excluded alien's writ of habeas corpus, the government now has a burden of establishing that the detention is "temporary pending expulsion and not simply incarceration as an alternative to departure."¹⁷⁹ The effect of this burden is to ensure that excluded aliens are not punished by imprisonment or indefinite detention because of an inability to deport or by an abuse of discretion in denying parole within the United States. The decision in this case has provided a standard of fairness in the detention of excluded aliens which balances and protects the vital interests at stake for excluded aliens, for government officials, and for the public at large.

As a result of *Rodriguez-Fernandez*, judicial scrutiny of immigration laws and their enforcement against aliens has intensified. The effect has been quick in related immigration cases. On August 19, 1981, a federal judge ordered the release of 226 Cubans detained for fourteen months in Atlanta's federal penitentiary.¹⁸⁰ Judicial consideration of other Cuban de-

177. This is in accordance with the statute. *Rodriguez-Fernandez*, 654 F.2d at 1389.

178. *Id.* at 1389-90.

179. *Id.* at 1390. The court indicated that information on these matters is more readily available to the government than to excluded alien plaintiffs. *Id.*

180. In response to a class action suit against the Justice Department, United States District Court Judge Marvin Shoob, on August 19, 1981, ordered the release of 226 of the 1,800 Cubans detained for 14 months in Atlanta's federal penitentiary. The Washington Post, Aug. 19, 1981, at A26, col. 1. *Id.* Aug. 17, 1981, at A1, col. 4. This decision occurred as the result of the consolidation of two class actions and a single petitioner's action. See *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981). The decision dealt *solely* with Cuban detainees charged with exclusion or found to be excludable only on the ground of lack of entry papers. The Eleventh Circuit has adopted a standard of review whereby it determines whether or not the Attorney General abused his discretion in exercising his authority to parole or not to parole. See *Ahrens v. Rojas*, 292 F.2d 406, 411 (5th Cir. 1951); *Soroa-Gonzales*, 515 F. Supp. at 1057; *Fernandez-Roque*, 91 F.R.D. at 242.

Discretion is abused in this or any other immigration decision if it is made "without a rational basis" or departs from established government policies. *Soroa-Gonzales*, 515 F. Supp. at 1058. While the precise rationale for the release in *Soroa-Gonzales* and *Fernandez-Roque* was different from that in *Rodriguez-Fernandez*, both Eleventh Circuit decisions supported the results they reached by reference to *Rodriguez-Fernandez*. See *Fernandez-Roque*, 91 F.R.D. at 242-43; *Soroa-Gonzales*, 515 F. Supp. at 1051-53 nn.1 & 1.5, 1056, 1061 n.18. As

tainee cases has continued on the basis of the severity of prior convictions.¹⁸¹

On another level, this case will join *Filartiga* in opening the courts to possible future litigation concerning human rights violations which cannot be challenged by directly-pertinent United States domestic law. Furthermore, *Rodriguez-Fernandez* demonstrates the capacity of a resourceful judiciary to defend unprotected or vulnerable minority rights against infringement by the political branches. The court accomplished this largely by the use of analogical reasoning. It established new law from constitutional principles of prior law and related statutory principles concerning the rights of deportable aliens, supported by accepted international legal principles.¹⁸²

in *Rodriguez-Fernandez*, both decisions applied the *Leng May Ma* test to determine whether or not Cuban detainees should be paroled. *Soroa-Gonzales*, 515 F. Supp. at 1060-61; *Fernandez-Rogue* 91 F.R.D. at 239, 243. In *Fernandez-Rogue*, the court concluded that further detention of 226 Cuban refugees with "no history of criminality," already detained for 15 months, does not reflect "the humane qualities of an enlightened civilization." *Id.* at 243. The court continued, stating that:

[C]ontinued detention of persons (1) unlikely to be excluded back to Cuba any time in the near future; (2) unlikely to abscond; (3) not a threat to the national security; (4) not a threat to the public interest; (5) who have committed no crimes here; and (6) who were invited here by the President, is simply incarceration for an indefinite period as an alternative to departure and constitutes an abuse of discretion of the parole authority.

Id. (citing *Rodriguez-Fernandez*, 654 F.2d 1382 (10th Cir. 1981)).

An official in the United States District Court for the Northern District of Georgia recently reported the contents of a government status report on all Cuban detainees who have been or are now held in the Atlanta federal penitentiary. As of January 22, 1982, 587 of an estimated total Cuban detainee population of 1,885 had been released. Of a remaining 1,298 Cuban detainees, 400 had been approved for release by the government but were awaiting the assignment of sponsors. The Immigration and Naturalization Service (I.N.S.) Commissioner in Washington had determined that detention in 235 individual cases should continue. An additional 250 Cuban detainees, transferred to Atlanta in late January from the closed Ft. Chaffee, Arkansas facility, would probably be released once sponsors could be obtained for them. Telephone interview with official of the United States District Court for the Northern District of Georgia (Feb. 5, 1982). At long last, these figures and reports indicate a bona fide government effort to approve the parole of those excluded Cubans who present no threat to national security or the public interest, who are unlikely to abscond, and who would otherwise be subject to indefinite detention. Undoubtedly, *Rodriguez-Fernandez* and the Atlanta district court decisions have accounted for the sudden and dramatic increase in parole decisions of many Cuban detainees and have otherwise provided a forceful impetus for expeditious and thorough government review for possible parole in the other individual cases.

181. The Washington Post, Aug. 7, 1981, at A4, col. 1.

182. *Rodriguez-Fernandez*, 654 F.2d at 1390.

IV. CONCLUSION

The *Rodriguez-Fernandez* court recognized the importance of settling the unresolved question of "punishment" of excluded aliens. The lengthy, indefinite imprisonment of Rodriguez-Fernandez and many hundreds of other excluded aliens occurred because of a loosely-drafted statute in an area of immigration law that had not been carefully scrutinized by the federal judiciary prior to this case. The excluded alien is now better protected against the abuse of detention within the exclusion process, an abuse which had previously been allowed through the use of legal fictions that afforded the government great freedom to act and effectively increased the likelihood of mistreatment.¹⁸³ One of the alternatives to continued detention outlined by the court will ultimately have to be chosen by the government as an alternative to punishment without judicial review.¹⁸⁴ The burden the court has set on the government to show that detention is in fact temporary when detention is challenged by habeas corpus proceedings has in the past and should continue to encourage the government's timely implementation of one of these alternatives before judicial proceedings actually begin. Above all, *Rodriguez-Fernandez* firmly establishes the existence of the due process rights of every alien, even those of the excluded alien, before he may be punished under our laws.

Douglas G. Bonner, III

183. *Id.* at 1387.

184. *See id.* at 1390.

