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No. 86-8010
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOISES GARCIA-MIR, et al.,

Appellees and cross-appellants,

v.

EDWIN MEESE, III, et al.,

Appellants and cross-apellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

APPELLANTS' CROSS-APPEAL AND REPLY BRIEF

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STATEMENT OF THE ISSUES

1. Whether any Mariel Cubans have a federally-created liberty interest respecting their detention.

2. Whether customary international law is relevant to their incarceration.

3. Whether they have, and can now raise, a claim to a "core" liberty interest arising directly from the Constitution.

4. Whether the class should have been decertified.

ARGUMENT

I. INTRODUCTION

This class action concerns the detention of excludable aliens who came to the United States during the 1980 Cuban flotilla and whose release at this time has been determined not to be in the public interest by the Attorney General and his delegates, the officials charged by Congress with exercsing the sweeping parole powers of 8 U.S.C. § 1182(d)(5). Notwithstanding the aliens' lack of constitutional rights in the exclusion context, Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied sub nom. Marquez-Medina v. Messe, 54 U.S.L.W. 3562 (Feb. 24, 1986) (No. 85-5874), the district court ruled that an "invitation" from President Carter to all sane and law-abiding Cubans gives those flotilla participants a federally-created liberty interest, such that their immigration-related detention must be justified at a hearing conducted under criminal trial-like procedures where the government bears the burden to show by clear and convincing evidence that the alien "is likely to abscond, to pose a risk to

the national security, or to pose a serious and significant threat to persons or property within the United States." Fernandez-Roque v. Smith, 622 F. Supp. 887, 904 (N.D. Ga. 1985), adopting procedures from, Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1129-45 (N.D. Ga. 1983), rev'd on other grounds 734 F.2d 576 (11th Cir. 1984).

In our opening brief, we demonstrated that the government's response to the 1980 flotilla could not properly be interpreted as an "invitation" to the general sane and law-abiding population of Cuba, that no particularized standards limiting official discretion under our immigration laws were established in any event, and that the district court improperly manufactured its own substantive tests for determining releasability. In addition, we explained how the district court erred in imposing criminal trial-type procedures for use in the civil immigration context, how its burden of proof ruling turned immigration law on its head by shifting the risk of an erroneous determination to innocent members of the public, and how it failed to comply with this Court's mandate in Garcia-Mir to decertify the class.

In reply to our arguments, and in support of their own cross-appeal from the district court's November 25, 1985 decision, the class of detained aliens contend that a liberty interest was created for all paroled Cubans by virtue of an alleged "invitation" and the creation of a special parole status, and that both previously paroled and continuously detained aliens also have a liberty interest arising from government detention policies and

our refugee-related treaty obligations. They reassert their claim to a "core" liberty interest under the Constitution, contend that the court correctly refused to decertify the class, and seek reversal of the district court's ruling that customary international law cannot override the considered actions of the Attorney General here.

None of their claims has any merit.

II. THERE WAS NO INVITATION

The aliens acknowledge, as they must, that the government opted to receive only 3,500 of the Cubans who had crowded into the Peruvian Embassy in Havana in April of 1980, and that the "intent was that immigration to the United States would be accomplished by an airlift to Costa Rica . . . ." Brief For Appellees And Cross-Appellants (hereinafter "Aliens' Br.") 3-4. Although the government urged the Cuban American community not to play into Castro's hands by going to Cuba, and took initially ineffective measures to stop the flotilla, the aliens claim that a legally significant welcome was in fact extended to all Cubans who could get here, unless they were criminals or suffered mental problems. Aliens' Br. 14-20. This welcome, they say, is shown by President Carter's "open heart and open arms" statement, by his subsequent decision not "to begin turning incoming boats around" when additional measures to stop the flotilla were announced on May 14, 1980, by efforts to "establish a more orderly and regular flow," and by the President's recognition that those "'already here will be assimilated into the American population,'" even though their

"'legal status [had] not yet been determined.'" Aliens' Br. 6, 19, 20 (quoting from 16 WEEKLY COMP. OF PRES. DOC. 989 (hereinafter "WEEKLY COMP.")).

In advancing this claim, the aliens make no attempt to explain the actions of the INS in commencing civil fine actions respecting incoming boats, or the vessel seizures which became routine in mid-May, or the Coast Guard radio warnings, or the attempts by the Coast Guard to intercept vessels en route to Mariel. The aliens brush off the repeated governmental urgings to the Cuban American community to stop the flotilla as being evidence of a desire merely for a more orderly flow, and conveniently ignore any fact which is inconsistent with their claim that: "No rational interpretation of those events and statements can lead to the conclusion that the government was discouraging the Cuban emigration . . . ." Aliens' Br. 19. However, neither their refusal to address the facts nor the unsupported assertion makes it so.

Contrary to their incomplete and distorted account of that period, the United States was not extending a welcome to every Cuban without a criminal history or a mental disorder. Attempting a blockage of overloaded American vessels with American crews would have resulted in serious loss of life at sea, and have caused the returning boats to disperse for uncontrolled and illegal landings all along the coast and Keys of Florida. The asserted effort to "regularize" the flow of arriving aliens was an offer by the President to permit four limited categories of aliens, and "no other escapees from Cuba," to come here if Castro would agree to

stop the flotilla. WEEKLY COMP. 914. Those limited categories were the aliens who sought refuge in our consular post, the U.S Interest Section in Havana, long-time political prisoners, those in the Peruvian Embassy, and close family members of Cuban Americans with permanent resident status. Not only was that offer largely in keeping with the policies of the statute, see 8 U.S.C. §§ 1101(a)(42), 1153, but it was also conditioned on the aliens being "screened and qualified" before being allowed to come, and on the United States being able to "determine the number of people to be taken . . . ." WEEKLY COMP. 914 & 917. Castro did not accept this offer. However, even if it had come to pass, the President's offer could not properly be interpreted as merely an effort to regularize the unacceptable number and nature of those then arriving via the illegal boatlift, which was fueled by Castro and which was driven by the family reunification desires of Cuban Americans.

The President's "open heart and open arms" statement has been interpreted as an endorsement of the flotilla. If read in isolation and without regard to its "in accordance with American law" preface, that statement could easily mislead the reader. However, the statement, while perhaps important in understanding the course of the flotilla, cannot fairly be read to negate the consistent and escalating measures taken by the government to both control and stop the flotilla.

The flotilla was under way before the United States could react, our initial enforcement measures were inadequate, and it continued despite vigorous efforts to curtail the traffic until

Castro closed Mariel harbor. Despite "open heart and open arms," the response of the United States cannot be read as an invitation to anyone, let alone to the entire sane and law-abiding population of Cuba.

III. NO LIBERTY INTEREST WAS CREATED

A. Previously Paroled Aliens

Apparently conceding that nothing in the government's response to the flotilla placed any "substantive limitations" on official discretion, or established "particularized standards or criteria" to guide the decisionmakers, see Olim v. Wakinekona, 461 U.S. 238, 249 (1983), the aliens contend that the alleged federally-created liberty interest for previously paroled aliens stems from a "legitimate expectation of parole" which they have by virtue of the asserted "invitation" and the "creation of a special entrant status distinguishing them from all other excludable aliens." Aliens' Br. 28. Their argument falls of its own weight because of the absence of the invitation upon which it so heavily depends. However, no liberty interest exists, even if some sort of invitation is assumed.

First, their reliance on the creation of the "Cuban/Haitian Entrant" parole classification adds little to their claim. The status of the aliens under our immigration laws was not enhanced by virtue of placement in that category, although it has facilitated receipt of social service benefits. That such aliens remain here at liberty in the unfettered discretion of the INS is demonstrated by the reasons for parole revocations

employed as to Mariel Cubans over the years, which have included sponsorship breakdowns and minor violations of half-way house rules. See Govt. Br. 16-17. While practical circumstances, such as Cuba's refusal to take them back, have meant that most will be assimilated into our society, their long-term legal status at the time the Cuban/Haitian Entrant classification was created had yet to be resolved, and they were released solely under the general parole authority of 8 U.S.C. § 1182 (d)(5). See WEEKLY COMP. 916 & 989. The absence of any legislative clarification in this respect, despite several proposals, leaves the Cubans right where they started -- as aliens paroled under the general provisions of our immigration laws, who have the same "rights" or lack therof as other paroled aliens. See Zamora-Garcia v. U.S. Dept. of Justice, INS, 737 F.2d 488, 494 n.4 (5th Cir. 1984) (existing statute controls despite legislative proposals supported by the government).

Second, the aliens' argument is predicated largely on Morrissey v. Brewer, 408 U.S. 471 (1972), which dealt with a revocation of parole in the criminal law context, where "release from prison [is] on the condition that the prisoner abide by certain rules during the balance of the sentence." 408 U.S. 477. Parole in the immigration context, however, is "for emergent reasons or for reasons deemed strictly in the public interest," and specifically contemplates a return to custody when the reasons for the parole no longer exist. 8 U.S.C. § 1182 (d)(5). While parole in the criminal area permits the

parolee to return to many of the elements of his prior freedom, and contains "an implicit promise" of revocation only for cause, id. at 482, immigration parole does not change an alien's status in any respect, nor does its grant contain any implicit promises of its continuation. Leng May Ma v. Barber, 357 U.S. 185 (1958); see Ahrens v. Rojas, 292 F.2d 406 (5th Cir. 1961).

Thus, the aliens understandably do not contend that the mere grant of immigration parole accorded them a liberty interest, as the mere grant of criminal parole had done in Morrissey v. Brewer, 408 U.S. at 480-82. Instead, they claim that the "invitation" coupled with the Cuban/Haitian Entrant parole status has this effect. In this respect, they assert that their case "starts and ends with the invitation and grant of special immigration status" to Mariel Cubans. Aliens' Br. 23. But we have shown that there was no invitation and that the special immigration status they received was no more that a normal grant of parole.

Moreover, it is from the nonexistent invitation and the unavailing Cuban/Haitian Entrant status that the aliens claim to derive "a legitimate expectation that parole will be continued," and to have shown that "a legitimate expectation of entitlement exists" to release on parole. Aliens' Br. 22 & 24. But, to have a protected interest there must be a legitimate claim of entitlement, not merely an "expectation," unless the expectation rises to the level of an actual entitlement by virtue of some substantive limits that have been

placed on discretion. Compare Board of Regents v. Roth, 408 U.S. 564, 577 (1972), with Olim v. Wakinekona, 461 U.S. at 249, and Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463-67 (1981).

An "entitlement" of the sort the aliens claim would have given them a right of admission into the United States at the time of their arrival so long as they were sane and law-abiding. In addition, according to the aliens, the Carter "administration never attempted to withdraw or invalidate the invitation." Aliens' Br. 21. Thus, if their contention is correct, it would seem to lead to the conclusion that the United States disgarded all its statutory immigration laws and abdicated its sovereignty to Castro during the flotilla, while reserving only the right to keep out criminals and the mentally incompetent.

Merely stating the nature and extent of the entitlement that they claim is enough to refute its existence. Whether or not the "open arms and open heart" statement contributed to the problem in 1980, the aliens arrived here with at most a unilateral expectation of release, not a claim of entitlement.

The aliens understandably rely and defend the decision in U.S. ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958). Contrary to the aliens' assertion, the significant distinction of "pre-screening" is not the primary basis upon which the government contends that Paktorovics is inapplicable to this case, even assuming it was rightly decided. See

Aliens' Br. 23. Paktorovics never imposed any substantive standards on the government with respect to "invited" Hungarian refugees, nor did it mandate criminal trial-like proceedings. The concern of Paktorovics, moreover, does not even exist in these cases. The alien there was being excluded without the opportunity to show that the reasons leading to the proceedings were flawed. No such claim is made here, and, in any event, the Cubans can contest the basis for their parole revocations, as is amply shown by the decision in Moret v. Karn, 746 F.2d 989 (3d Cir. 1984), which found error in the revocation of a Mariel Cuban's parole.

The errors in the aliens' reasoning extend beyond the question of whether a federally-created liberty interest exists. The aliens do not directly attempt to defend the district court's substantive tests for detention, or its imposition of criminal trial-like procedures. Instead, they argue from Bell v. Burson, 402 U.S. 535 (1971), that the district court could "extrapolate" its own tests for detention from the invitation and the Cuban/Haitian Entrant status, that constitutional law determines the procedures once a right is shown to exist, and that the district court's own reasoning is adequate to justify its criminal-like procedures. Aliens' Br. 14, 25, 27.

Bell v. Burson, supra, ruled that fault must be considered in a driver's license revocation proceeding so long as fault was at the heart of the underlying statutory scheme.

The district court here "extrapolated" dangerousness and the likelihood of absconding from an invitation which it ruled was concerned solely with prior serious criminal conduct and with mental incompetency. This stretches Bell v. Burson beyond all bounds. The court was clearly wrong.

To the extent that procedural due process applies once a protected right is found to exist in the general domestic law arena, any such rule would be of little aid to the detainees. In immigration law the rule is different. Congress may create statutory benefits that can be claimed by aliens, but it is solely left to the political branches to set the procedure. Whatever procedure is given is due process as far as the newly arriving alien is concerned. E.g., U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Unless the alleged invitation actually changed their status, the aliens can claim no entitlement to any procedures which might be due citizens or permanent residents.

Finally, the inadequacy of the district court's 1983 reasoning with respect to its criminal trial-like procedures, on which the aliens now exclusively rely, is illustrated by the Supreme Court's more recent decision in INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), which refused to extent the exclusionary rule respecting the suppression of illegally seized evidence to deportation hearings in part because of their civil character.

B. Continuously Detained Aliens

The aliens assert only two grounds for a federally-created liberty interest for class members held continuously in detention, namely, a treaty respecting refugees, and isolated White House statements indicating that "exclusion proceedings would be held 'consistent with the constitutional requirements for due process of law,'" and that "fair decisions" will be made respecting exclusion. Aliens' Br. 29-33. With respect to the refugee issue, the aliens conceded that their liberty interest claim would fall if the Supreme Court denied certiorari with respect to this Court's Garcia-Mir decision. In view of the recent denial of certiorari, 54 U.S.L.W. 3562 (Feb. 24, 1986) (No. 85-5874), no reply is needed here. The isolated White House comments in no way limit the discretion of any government official, and cannot give rise to a liberty interest. The district court was correct in denying relief on this claim.

IV THE "CORE" LIBERTY INTEREST ISSUE HAS BEEN RESOLVED

This Court rejected the aliens' "core" liberty interest argument in Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), and the aliens have not requested en banc consideration of this question. Thus, they cannot now prevail. See United States v. Holman, 680 F.2d 1340, 1356 n.11 (11th Cir. 1982). Moreover, they did not ask the district court to rule on the "core" liberty interest issue as part of their "federally-created" liberty interest or international law arguments,

although they stated their intention to press the point in the Supreme Court after "all of Plaintiffs' claims for relief have been fully adjudicated." Letter of July 5, 1984, to Honorable Marvin H. Shoob, p. 2. Thus, it may be inappropriate for further consideration, at least until there is a final judgment entered below. Compare Dean Witter Reynolds v. Fernandez, 741 F.2d 355, 360 (11th Cir. 1984), and Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1353 (11th Cir. 1982), with Steelmet, Inc. v. Caribe Towing Corp., 747 F.2d 689, 696 (11th Cir. 1984), and Yamamoto v. Omiya, 564 F.2d 1319, 1325 n.11 (9th Cir. 1977).

V. THE CLASS SHOULD BE DECERTIFIED

The aliens contend that this Court did not mandate decertification of the class in its Garcia-Mir opinion, 766 F.2d 1478, 1487 n.11. While the interpretation of this Court's mandate would appear to be a question of law, see Aliens' Br. 35 (arguing abuse of discretion), it is unlikely that the parties can be very helpful in clarifying the import of the footnote in question. As the Court is aware, the government has opposed class action treatment in this case from its inception, and we continue that opposition now. We leave it to the Court, however, to explain the meaning of its footnote as applied to this aspect of the case, and rely on our opening brief for the remainder of our class action argument.

VI. CUSTOMARY INTERNATIONAL LAW CONFERS NO BENEFITS

A. The Courts Should Not Apply Principles Of International Law In Determining The Legality Of The Aliens' Detention.

Principles of customary international law do not provide a basis for relief in this case. This Court has already determined that the Attorney General is acting pursuant to valid constitutional and statutory authority in detaining alien class members to effectuate this country's immigration laws. Because domestic law authorizes the aliens' detention, they may not seek to have their detention declared illegal based on an application of customary international legal principles. The question of the legality of the detention does not depend on international law for its resolution. This is the test which must be met for international law to be applied in this case. The Paquete Habana, 175 U.S. 677, 722 (1900).

In order for international legal principles to be controlling, the case must (1) "depend" upon international law and (2) domestic law must provide no basis for decision. The Paquete Habana, 175 U.S. at 700. As the Supreme Court explained:

> 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 . . . (emphasis added).

In The Paquete Habana the President had proclaimed a blockade of Cuba to be maintained "in pursuance of the laws of the United States and the law of nations applicable to such cases." 175 U.S. at 712. From this the Supreme Court inferred that it was "the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations." Id. The precise issue before the Court was the fate of a Cuban fishing boat taken as a "prize" capture, a subject long considered "an anomaly in jurisprudence" because of the special role that international law plays in prize courts. 78 Am. Jur. 2d, War § 125; 3 Blackstone, Commentaries 68-69 (Cooley ed. 1876). The Court concluded (175 U.S. at 708):

> This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter. (Emphasis added).

Similarly, in Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), the Court rejected the argument that the United States violated international practice by seizing property under the Trading with the Enemy Act. The Court stated:

> [I]t has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law [treaties, statutes, and the Constitution] as superior to canons of international law.

267 F.2d at 666. See generally J. Goldklang, Back on Board The

Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law, 25 Va. J. Int'l L. 139 (1984).

The exclusion of aliens is an area where the Executive carries out a "fundamental act of sovereignty" on behalf of this Nation. See, e.g., U.S. ex rel Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950). Although the United States contends that there has been no infraction of custom in this case, the necessary corollary to the rule announced in The Paquete Habana is that the political and judicial organs of the United States have the power, based upon statute or a "controlling executive act," to disregard international law. See Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814); The Chinese Exclusion Case, 130 U.S. 581, 602 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Paquete Habana, supra, 175 U.S. at 715; L. Henkin, Foreign Affairs and the Constitution, 221-22 (1972); Rosenberg, The Theory of Protective Jurisdiction, 57 N.Y.U.L. Rev. 933, 1021-22 (1982); Restatement (Revised) of Foreign Relations Law of the United States, § 135, note 3 (Tentative Final Draft) (1985). If, for example, in The Paquete Habana, the President had expressly authorized the seizure of the fishing boat, this would have been a "controlling executive act" taking precedence over international norms to the contrary and would have bound the court. 175 U.S. at 700, 708. It was because there was no "order of the President" that "expressly authorized" the boat to be taken that it was released. Id. at 711.

The present case in no sense has been shown to "depend" upon

international law as required by the Supreme Court decision in the The Paquete Habana. On the contrary, as demonstrated by the prior decision of this Court in the present case, domestic law addresses the issue and provides a rule of decision so that customary international law should not be applied. The statutes of the United States expressly contemplate the option of continued detention of aliens by the Executive where exclusion is not practical, even when the detention is indefinite. Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984); Jean v. Nelson, 727 F.2d 957, 974-975 (11th Cir. 1984).

The district court incorrectly concluded that 8 U.S.C. § 1227(c) was not in itself a controlling legislative act because it did not expressly authorize indefinite detention. The court refused to "construe" the statute to authorize indefinite detention because the court concluded that such a construction would violate a customary international principle prohibiting "prolonged and arbitrary" detention. The district court found that the terms "arbitrary and prolonged" as defined in the international context prohibited indefinite detention of excludable aliens for any purposes except deportation and the protection of the American public. There is absolutely no evidence in the record to support the court's conclusion that customary international law thus restricts the inherent right of sovereigns to detain excludable aliens in order to control admission of foreigners. Moreover, this Court has already examined the Attorney General's statutory detention authority and concluded that the immigration laws do

provide legislative authority to detain aliens even where immediate deportation is not a practical means to effectuate the immigration policies. Fernandez-Roque v. Smith, 734 F.2d at 580, n.6; Jean v. Nelson, 727 F.2d at 974-975. Thus, contrary to the suggestion in the Amicus Brief (at 10), which turns Fernandez-Roque on its head, there is a "controlling legislative act" which would preclude application of customary international law in this case.

By ignoring the Eleventh Circuit's prior construction of the statutory authority for the aliens' detention and by applying a principle of international law to construe the statute in a manner contrary to this Court's prior construction, the district court has engaged in a "bootstrapping" analysis. It applied an international legal principle to an otherwise valid domestic statute and concluded that the domestic statute as thus interpreted was not a "controlling legislative act" which would preclude application of customary international law in this context. The Eleventh Circuit has already concluded that the immigration laws authorize the aliens' indefinite detention (id.); thus there is a "controlling legislative act" and the analysis stops there. International law is then not necessary to a determination of the legality of their detention since the decision is controlled by valid domestic legislative authority. See The Paquete Habana, supra.

The district court correctly analyzed the existence of a valid Executive act which precludes the application of international law to the case. The Attorney General is granted principal

responsibility for immigration matters in the Executive branch. He has been given broad authority by Congress, including the authority to detain excludable aliens. When the Attorney General acts to detain an excludable alien, he acts pursuant to valid statutory and constitutional authority. His decision to detain is clearly a valid domestic Executive act. It is this valid Executive act by which all class members are now detained. Since the Attorney General's action has been held to be legal under domestic law, there is no occasion to look to international law to ascertain the legality of this detention.[1]

The alien's own expert acknowledges that international law

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[1] The Amicus Brief (pp. 11-15), upon which the aliens rely, wrongly argues that only the President can override customary international law, that the government conceded this below, and, by implication, that the President has not acted here. That brief quotes the government's arguments out of context, and is to no avail for several reasons. First, President Carter clearly directed the Attorney General to protect the American public by taking appropriate actions, including detention. See WEEKLY COMP. 819-20, 915, 1053, 1072. Second, Congress has delegated ample authority to the Attorney General to act in this respect. See U. S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (Congress can delegate broad authority over aliens); Olegario v. United States, 629 F.2d 204, 232-33 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert denied, 446 U.S. 957 (1980). Third, the Amicus Brief wrongly attempts to read The Paquete Habana to require Presidential action. The Court in that case did not, however, say that only the President could decide to disregard international law but said that the courts were bound by "any other public act of their own government in relation to the matter." 175 U.S. at 708. Contrary to what amici assert, the court did not say that the Secretary of the Navy lacked the power to disregard international law. It said that the Navy's responses were not intended to be inconsistent with the President's own direction to obey international law in conducting the blockade. 175 U.S. at 712-713.

should not be applied by domestic courts to invalidate the exercise of constitutionally conferred governmental powers.

> Like treaties, customary international law is for the executive and the courts to apply. But the Constitution does not forbid the President or the Congress to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law.

Henkin, T. 56, (emphasis supplied; accord, Maier, T. 79).[2]

The Attorney General's detention of excludable aliens is a valid exercise of his Executive powers conferred both constitutionally and statutorily. The courts will not invoke international legal limits upon the exercise of constitutionally conferred governmental powers. Because the aliens' detention is authorized by controlling legislative authority and Executive action, there is no need to refer to international law for a rule of decision in the case. While the district court erred in finding that international law had been violated, it properly refused to apply principles of customary international law in determining the legality of the detention.

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[2] References to the transcript throughout the brief refer to the hearing on the international law issue on July 1, 1985.

B. Customary International Law Does Not Create A Cause Of Action In This Case.

The aliens assert that "customary international law," in and of itself, creates a cause of action in this case; they do not rely on any self-executing treaty obligations.

It is well-established that in normal circumstances customary international law does not itself create private causes of action in domestic courts.[3] As long ago as Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814), Chief Justice Marshall rejected the argument that "modern usage constitutes a rule which acts directly upon the thing by its own force, and not through the sovereign power."

This issue was examined at length by the United States District Court for the District of Columbia in Tel-Oren v. Libyan Arab Republic, 517 F.Supp. 542 (D.D.C. 1981), aff'd, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1354 (1985). The decision made clear that an action for tortious injury could not be brought unless international law specifically contemplated that a private right of action (as opposed to international remedies) be available. Tel-Oren, 517 F.Supp. at 549.

The district court was affirmed in a decision by the Court of Appeals for the District of Columbia in which the Court made clear

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[3] As indicated earlier, special categories of actions, such as prize cases, may be exceptions to this rule. 28 U.S.C. § 1332(2); 78 Am. Jur. 2d, War § 125.

that, except where specially recognized by Congress, no right to enforce international law can be created by domestic courts. See Tel-Oren, 726 F.2d at 778-780, n.2, 4. In a concurring opinion in that case, Judge Bork wrote:

> To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.

726 F.2d at 811 (concurring opinion). See also United States v. Berrigan, 283 F.Supp. 336 (D. Md. 1968), aff'd, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970); Jamur Productions Corp. v. Quill, 51 Misc. 2d 501, 509-510, 273 N.Y.S. 2d 348, 356 (Sup. Ct. 1966). Cf. Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (7th Cir. 1978); In re Alien Children Education Litigation, 501 F.Supp. 544, 589-596 (S.D. Tex. 1980), aff'd without opinion (5th Cir. 1981), aff'd on other grounds sub. nom. Plyler v. Doe, 457 U.S. 202 (1982).

In those cases where international legal principles have been invoked, they have been incorporated by reference into United States law, either by executive proclamation or by legislation. For example, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the Court found that Congress had enacted a statute authorizing suits by aliens for torts "in violation of the law of nations" (28 U.S.C. §1350). This law imposed on the courts the task of ascertaining which torts violate international law so as to

determine the jurisdiction of the court. 630 F.2d at 880-84. No such incorporation has occurred in this case.

It is important to recognize that there are two separate legal systems--a United States legal system and an international legal system. Our domestic system establishes those causes of action recognized in our courts. International legal principles are applicable in our courts only to the extent that a domestic cause of action creates a right to enforce international law in our court system. See Maier, T. 86-93, 96-97.

The case attached as Exhibit B to the Amicus Brief is illustrative of the domestic creation of a cause of action permitting enforcement of an international legal prohibition through our court system. See Von Dardel v. USSR, Civil Action No. 84-0353 (D.D.C. 1985). The district court in Von Dardel found that the Alien Tort Claims Act, 28 U.S.C. § 1350, provided a cause of action in district court to enforce a violation of the law of nations. The court found that a cause of action had been stated for a tort which was established as prohibited by a clear consensus of the community of nations.[4]

In the present action, the aliens have established no cause of action which permits the enforcement of international legal

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[4] The district court noted the importance of ascertaining a clear consensus among the community of nations before a cause of action could be established.

principles directly in United States courts. Because customary international law does not, in and of itself, create a cause of action, class members cannot obtain habeas corpus relief grounded on an alleged violation of principles of customary international law. The judgment entered by the district court on the international legal issue should be affirmed on this alternative ground.

C. The Aliens' Detention Does Not Violate The Principle Of Customary International Law Prohibiting Arbitrary And Prolonged Detention.

Although the district court correctly found that customary international law was inapplicable to this case, the Court improperly volunteered that the aliens' detention violated principles of customary international law prohibiting arbitrary and prolonged detention. The evidence does not support this conclusion. Rather, the evidence fails to show that the detention of uninvited aliens seeking admission is a violation of customary international law. This Court should affirm the judgment in favor of the government on the international law issue on the alternative ground that the detainee class has failed to establish the existence of any violation of customary international law, even if such law were applicable to this case.

The Supreme Court recognized in The Paquete Habana that resort could be had "to the customs and usages of civilized nations" in those situations "where there is no treaty, and no controlling executive or legislative act or judicial decision." 175 U.S. at

700. In such a case international law instruments not directly binding on the United States may nonetheless be evidence of custom. However, customary law is created by the practice of states and the best evidence is proof of state practice and the assertion of this practice as a matter of right. Jean v. Nelson, supra, 727 F.2d at 964, n.4. See also Note, Custom and General Principles as Sources of International Law in American Federal Court, 82 Colum L. rev. 751, 765, 782-83 (1982) (critizing the failure of courts to determine custom); Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U. of Ill. L. Forum 609; G. Schwarzenberger, A Manual of International Law 32 (5th ed. 1967).

The overriding principle of custom relevant to this case is that every nation asserts as part of its fundamental right of sovereignty in accordance with ancient principles of international law the privilege to determine which aliens shall be admitted into its territory and under what conditions. 1 H. Lauterpacht, Oppenheim's International Law 675-76 (8th ed. 1955); Kleindienst v. Mandel, 408 U.S. 753, 756-66 (1972); Jean v. Nelson, supra, 727 F.2d at 964. This universally accepted power includes the right to exclude persons with criminal histories[5] and to detain

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[5] The Chinese Exclusion Case, 130 U.S. 581, 608-09 (1889). Based on this principle, other countries in addition to the United States have enacted laws proscribing the entry of criminal aliens. See 1 Oppenheim, supra, at 616 (7th ed. 1948). Indeed, even the Protocol Relating to the Status of Refugees, 19 U.S.T.

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pending expulsion. 1 Oppenheim, supra, at 694. To demonstrate that the continued detention of excludable aliens is inconsistent with international law, the detainee class had the burden of producing evidence to show that the actual custom and practice of nations prohibits national control over the entry of illegal aliens into a country and that any such custom is accepted as law. See Jean v. Nelson, supra, 727 F.2d at 964, n.4. This they did not do.

The aliens argue that their detention violates a customary international principle against arbitrary and prolonged detention. However, as noted by the Eleventh Circuit in Jean v. Nelson, 727 F.2d at f.n.4, the term "arbitrary" is hardly self-defining. The term must be defined in its international context by evidence "in the way of diplomatic protests, international arbitrations, and court decisions. . . . ." Id. The class produced no such evidence before the district court. Rather, they offered only the testimony of professor Louis Henkin, an expert in international law, who testified to his own definition of "arbitrary and prolonged."[6] Henkin's testimony falls far short

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[5] (FOOTNOTE CONTINUED)

6223, and the Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, exclude from protection persons who may reasonably be believed to have committed serious non-political crimes.

[6] For example, Professor Henkins' tri-partite analysis of the elements of the term "arbitrary" is submitted solely as his own opinion without a single reference to the practice of states relevant to this case to support his view as distinguished from any other. (Henkin, T. 15). As the United States Supreme Court said

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of establishing an international legal prohibition against the detention of excludable aliens under the circumstances in this case.

Whether the United States' practice in this case falls within the prohibition against "arbitrary and prolonged" detention is to be determined by the meaning given to those terms by the international community evidenced by the practice of states; not from the attitudes of any single nation or the notions of any particular court or expert (Henkin, T. 19). In finding and applying international law, a court is not to apply its own notions of fairness to decide whether a given practice is "arbitrary," or its own notions of necessity to decide whether a given incarceration is "prolonged"; rather, it must seek that definition in the international legal system. Where state practice does not indicate that the acts of the United States fall within the prohibition as defined by the international community, these acts do not violate international law. (Henkin, T. 50).

While the experts agreed that there is a general principle of international law against prolonged arbitrary detention, they both recognized that any prohibitions derived from that principle must be determined to apply in the light of the circumstances (Henkin, T. 14-15). Professor Henkin admitted that the circumstances

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[6] (FOOTNOTE CONTINUED)

in The Paquete Habana, 175 U.S. 677, 700 (1900), ". . . international scholars' opinion are resorted to not for the speculations of what the law ought to be, but for trustworthy evidence of what the law actually is." (Quoted by Maier, T. 83).

surrounding immigration matters might make a difference in the scope and content of an international prohibition. (Id.) He did not, however, cite evidence of any state practice to indicate that the detention of these excludable aliens was arbitrary and prolonged within the meaning of international legal principles as applied in the immigration context.

Professor Henkin's references to the absence of state practice similar to that of the United States in this case cannot be taken as evidence that the United States' actions are prohibited. At no point did he offer evidence to indicate that states that have not detained aliens in this manner have refrained from doing so out of a sense of legal obligation. Unless it can be shown that the lack of similar practice is attributable to a widely held belief--an opinio juris --that such a practice is prohibited, no inference can be drawn from the absence of practice to support a finding that the United States is in violation of international law. The inference that can be drawn from Henkin's testimony is that other states have not faced circumstances sufficiently similar to those in this case to provide evidence of legally relevant state practice to indicate community acceptance of an international prohibition applicable in this case.[7]

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[7] The only statement regarding actual state practice appears in the record in Appendix A to "Reply Brief of Amici Curiae in Opposition to Defendants' Supplemental and Responsive Brief On the Issues of International Law." This review of actual state practice concludes that even with regard to asylum seekers, detention is the

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Professor Henkin himself admits both that the "arbitrariness" of a detention must be judged in the light of the circumstances in which it occurs and that he knows of no circumstances similar to those in this case. (Henkin, T. 56). Therefore, the class representatives adduced no evidence of relevant state practice from which a prohibition can be inferred. Professor Maier, likewise, found no evidence of state practice that would indicate that the United States' actions violate the principle against prolonged arbitrary detention on the facts of this case. (Maier, T. 121).

Inquiries by the government's expert disclosed no evidence that other nations had protested the United States' actions in this case on international legal grounds, and the testimony of the aliens' expert did not even address the question of such protests (Maier, T. 104-5).[8] Thus, there is no direct evidence that the community of nations believes that this detention violates international law.

Consequently, there is neither direct nor indirect evidence

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[7] (FOOTNOTE CONTINUED)

norm and that no uniform practice exists among nations regarding appeal or review. Appendix A, supra at pp. 38-39, referenced by Maier, T. 103-4. Indeed, Professor Henkin conceded that he was generally unaware of other countries' actual detention and review procedures in exclusion proceedings. (Henkin, T. 59).

[8] Private protests are irrelevant as evidence of the attitude of the community of nations--the international law-makers--about the validity of the United States' actions under international law unless those protests represent official governmental statements. The opinions of private parties cannot be substituted for those of states in the world community as evidence of international law. To do so would amount to taking a poll of a self-selected sample.

that the detention here amounts to either "prolonged" or "arbitrary" detention within the meaning of the general international principle, as defined by the international community.

The alien's expert, in effect, suggested that the court should determine, in the light of its own view, whether the detention here is unreasonable under the circumstances and should impose that limitation upon the Congress by means of statutory interpretation (Henkin, T. 61). This position asks the court to perform what is, in effect, a process of constitutional review, based on its own notion of whether the detention in this case is arbitrary and prolonged, not on the meaning conferred on those terms by practice in the international community.

A review of the record in this case makes it clear that the only evidence presented by the class of an international legal prohibition against the United States government's detention of these excludable aliens is reference to an agreed upon general principle against "prolonged arbitrary detention." There is no evidence of state practice to indicate that the detention in this case is either prolonged or arbitrary within the meaning of that general principle. That there is no such state practice is made evident by the alien's ultimate resort to a kind of intellectual sleight-of-hand. Having agreed, as they must, that states are free to act absent an international prohibitory rule (Henkin, T. 50), and unable to establish an international practice barring the detention here, the detainees conveniently shifted gears to argue that there is no approval by state practice of the detention in

this case. (Henkin, T. 62). In effect, they asked the district court to substitute itself for the international community in giving content to the general international principle; to treat that principle as a kind of supranational constitutional enabling law. In error, the district court adopted that unwise suggestion and invested the terms "arbitrary and prolonged" with its own version of reasonableness. Based on this reasoning, the court, in dicta, concluded that detention for any purpose other than to deport, or to protect society from those who pose a danger to it, was in violation of customary international law.

Not only is this interpretation of the prohibition against arbitrary and prolonged detention not supported by any evidence of the consensus of nations, but it exceeds even the suggestion of the aliens' own expert witness. Professor Henkin admitted that these two purposes were the only legitimate ones he had "thought of", but that perhaps someone else could suggest others. (Henkin, T. 39). This Court has in fact suggested and recognized another legitimate purpose for detention--the control of the admission of uninvited aliens into our country. Jean v. Nelson, 727 F.2d at fn.4. Moreover, where a foreign leader refuses return of an illegal alien, the necessity for detention to preserve national sovereignty becomes more pronounced. Otherwise, a foreign leader could compel admission to our country by simply sending an alien here and refusing to take him back. Id. at 975. Thus, detention under the present circumstances is not only reasonable, but absolutely essential to control of our national borders.

It is apparent that even under the aliens' proposed "reasonableness" standard, the present detention is not "arbitrary and prolonged." However, the government stresses that such a personal interpretation of an international legal standard is ludicrous. A customary international principle must be interpreted in terms of its meaning in the international community. (Henkin, T. 50). The class representatives have produced no evidence which suggests that it is current international practice to regard detention of uninvited aliens seeking admission as a violation of customary international law. In the absence of such evidence, this Court should reaffirm its earlier pronouncement in Jean v. Nelson, at fn. 4, and find that, should international legal principles apply at all, the class has failed to establish that their detention violates principles of customary international law.

CONCLUSON

For these reasons, and for the reasons set forth in our opening brief, the district court's order should be reversed with respect to its finding of a federally-created liberty interest arising from an alleged invitation to Mariel Cubans, and the class ordered decertified, while the denial of relief on the aliens' other theories should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below two copies of the Appellants' Cross-Appeal And Reply Brief, by depositing the same in the United States Mail, postage prepaid to:

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March 7, 1986