THE LEGALITY OF DETAINING REFUGEES IN THE UNITED STATES

ARTHUR C. HELTON*

INTRODUCTION

The United States introduced the detention of aliens along with immigration control measures in the late nineteenth and early twentieth centuries. Detention was integral to the immigration inspection process; it facilitated departure in those instances where an alien was denied admission into the United States. After falling into administrative disuse in the 1950's, government officials revived alien detention as a policy in the 1980's in response to the influx of Cubans and Haitians who were seeking political asylum in the United States.

However, the United States designed the new detention policy to do more than facilitate deportation; it was also to deter other aliens from coming to the United States. The prospect of incarceration, sometimes for a prolonged period, was supposed to discourage further arrivals. A few other countries also elected to pursue a policy of "humane deterrence" by confining refugees for the purpose of deterring others. To the officials who enacted these policies, however, it was of no moment that this form of deterrence was at odds with international and domestic law. Little attention was paid to the entitlements of refugees, particularly the right to apply for asylum, the right not to be penalized or unnecessarily restrained in one's movements, and the right not to be returned to territories where persecution awaits.

This article discusses the history of alien detention in the United States, particularly its revival in the 1980's. It also describes the magnitude and character of detention in the United States and in selected other countries. Finally, the article analyzes the legality of the detention policy under principles of administrative law, statutory and treaty entitlements respecting refugees, the U.S. Constitution, and customary international human rights law. Finding the policy wanting, the author makes recommendations for intervention and change.

* Director, Political Asylum Project of the Lawyers Committee for Human Rights, New York City; member, State Bar of New York. A.B., Columbia University, 1971; J.D., New York University, 1976.

I

HISTORY OF ALIEN DETENTION IN THE UNITED STATES

A. The Rise and Fall of Detention: The Late Nineteenth and Early Twentieth Centuries

From 1892 to 1954, the United States maintained a policy of detaining would-be immigrants upon arrival.[1] The largest detention facilities were the famed Ellis Island in New York Harbor and Angel Island in San Francisco Bay.[2] Individuals arriving from foreign countries knew that they had not truly arrived in the United States until they had passed through immigration inspection and control centers.[3] Most immigrants were detained only briefly for medical checks before being either released into the U.S. or sent back to their country of origin. Others, suspected of being subversives or criminals, or believed likely to become public charges, were detained for longer periods if deportation was impracticable. In the 1930's, Ellis Island served principally as a deportation staging area.[4] By the 1950's, the facility had fallen largely into disuse; only a few hundred immigrants per year were detained there before its closing in 1954.[5]

During this period, the Supreme Court upheld the authority of the Attorney General to detain aliens for an indefinite period.[6] In the notorious *Mezei* case, an alien who had lived in the United States for twenty-five years was refused reentry after a nineteen-month trip abroad. During the trip, Mezei had sought to enter Romania, his country of nationality, to visit his ailing mother.[7] The Immigration and Naturalization Service (INS) refused to reveal the evidence upon which it based its denial of reentry, claiming that disclosure could harm national security. The Supreme Court held that the Attorney General had the power to detain Mezei without a hearing and without revealing its reasons.[8]

Since neither the United States, Romania, nor any other nation would allow Mezei to enter, his stay on Ellis Island would have been virtually perpetual had the Executive Branch not reconsidered the matter. After winning the case, the Department of Justice appointed an *ad hoc* committee to take evidence and give Mezei an opportunity to know and to meet the evidence against him. The committee found that he was a member of the Communist

1. T. PITKIN, KEEPERS OF THE GATE: A HISTORY OF ELLIS ISLAND 19, 177 (1975).
2. *Id.* at ix.
3. *Id.* at 23.
4. *Id.* at 170.
5. *Id.* at 176.
6. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).
7. *Mezei,* 345 U.S. at 208.
8. *Id.* at 214-15. The Immigration and Naturalization Service (INS) is a division of the Justice Department under the control of the Attorney General. It is headed by the Commissioner of the INS. 8 U.S.C. §§ 1101(a)(34), 1103 (1982).

Party and, as such, legally excludable under the immigration laws.[9] Nevertheless, the committee recommended that Mezei be allowed to return to his home in Buffalo, and the Department of Justice followed the recommendation.[10] Though the *Mezei* decision is "widely considered to be one of the most shocking decisions the Court has ever rendered,"[11] it has not been overruled.[12]

In 1954, just one year after *Mezei* was decided, the INS announced that it was abandoning the policy of detention.[13] Henceforth, the INS would detain only those deemed likely to abscond or those whose "freedom of movement could be adverse to the national security or the public safety." United States consuls stationed abroad would conduct initial screening of immigrants. The vast majority of aliens arriving in the United States were released on conditional "parole," sometimes forced to post bonds or placed under supervision. Announcing the new policy at a mass naturalization ceremony, then United States Attorney General Herbert Brownell, Jr. characterized the new policy as "one more step forward toward humane administration of the immigration laws."[14] Brownell anticipated that fewer than 1,000 aliens per year would be detained for a significant length of time under the policy.[15]

For the next twenty-six years, the policy of releasing newly arrived immigrants and refugees resulted in the detention of only a "minimal" number of aliens.[16] The liberal release policy was explained by the Supreme Court in *Leng May Ma v. Barber*:[17]

> 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

9. Under the Immigration and Nationality Act, membership in a Communist organization is a basis for excluding arriving aliens from entry into the United States. 8 U.S.C. § 1182(a)(28)(C) (1982). Communist affiliation is one of 33 statutory grounds for exclusion under the Act; other exclusionary grounds relate to the mentally retarded, the insane, drug addicts, professional beggars, criminals, polygamists, and prostitutes. 8 U.S.C. §§ 1182(a)(1)-(33) (1982).

10. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11:5 (2d ed. 1979).

11. *Id.*; *see Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322-24 (1983).

12. *See, e.g.*, Jean v. Nelson, 105 S. Ct. 2992 (1985). In *Jean*, a class of Haitian detainees contended that immigration authorities discriminated among aliens by race and/or nationality when implementing detention policy. Justice Rehnquist, author of the majority opinion, found it unnecessary to address the separate constitutional issues of the power to detain aliens and equal protection since the discrimination issue raised by petitioners could have been resolved on non-constitutional grounds under facially neutral statutes and regulations.

13. N.Y. Times, Nov. 13, 1954, at 20, col. 8.

14. N.Y. Times, Nov. 12, 1954, at 14, col. 3.

15. *Id.*

16. 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 3.17c (rev. ed. 1985).

17. 357 U.S. 185 (1958).

humane qualities of an enlightened civilization.[18]

This policy seemed firmly entrenched, and old precedents such as *Mezei* remained unchallenged in no small part because new cases of prolonged detention simply did not arise. The danger of such precedents, however, was explained eloquently in Justice Jackson's warning in *Korematsu v. United States*:[19] "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[20] Such was the case in the 1980's.

B. The Reintroduction of Detention: The Mariel Freedom Flotilla

In 1980, the INS suspended the policy of release which it had followed for over a quarter of a century. Aliens were detained on an *ad hoc* basis during the sudden and unanticipated arrival of over 125,000 Cubans in the Mariel boatlift. This mass influx began when 10,800 Cubans in Havana sought refuge at the Peruvian Embassy. President Carter then announced that the United States would accept 3,500 of these refugees pursuant to the recently enacted Refugee Act of 1980.[21] Plans for an organized airlift, however, were ruined when Fidel Castro announced that any Cuban who wanted to leave Cuba could do so by boat through Mariel Harbor. The announcement triggered a veritable exodus of Cuban refugees.[22]

Although the United States did not formally agree to accept all Cubans who chose to leave, President Carter provided encouragement to the refugees and to the Americans aiding them by stating that the refugees "will be received in our country with understanding . . . and processed in accordance with the law . . . . [W]e'll continue to provide an open heart and open arms . . . ."[23] American citizens organized boatlifts to bring over Cubans seeking to leave. Meanwhile, the Cuban government treated brutally those applying for permission to leave; one Cuban official claimed that "a national purge was taking place."[24]

Between April 20 and June 20, 1980, over 125,000 Cubans arrived in the United States in 1,800 boats.[25] Among the arrivals were individuals who admitted during initial interviews with INS agents that they had been convicted of crimes[26] or suffered from mental illness. Virtually all of these Mariel Cubans were technically excludable under American immigration law because

18. *Id.* at 190.
19. 323 U.S. 214 (1944).
20. *Id.* at 246 (Jackson, J., dissenting).
21. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).
22. United States v. Frade, 709 F.2d 1387, 1389 (11th Cir. 1983).
23. *Id.* at 1395.
24. *Id.* at 1390.
25. *Id.* at 1389.
26. Fernandez-Roque v. Smith, 671 F.2d 426, 428 n.1 (11th Cir. 1982).

they lacked a valid passport or visa.[27]

Initially, the arriving Cubans were either released immediately into the United States or detained at INS detention centers or federal prisons around the country. Ultimately, over 124,000 were released and given special "entrant" status in the United States.[28] Immigration authorities later offered the Cuban entrants permanent residence in the United States under a 1966 statute.[29]

During the summer of 1980, officials placed almost all of the Cubans who had not been approved for release in the Atlanta Federal Penitentiary, a maximum security prison.[30] All of the detainees were then adjudged excludable for one or more reasons in hearings held pursuant to the Immigration and Nationality Act.[31] Since Cuba refused to accept the return of the Marielitos, they faced indefinite imprisonment in the Atlanta Federal Penitentiary.[32] A 1984 agreement between the United States and Cuba cleared the way for the ultimate return of 2,746 Cubans over a period of about two years.[33] Cuba, however, suspended the agreement that same year as a protest to America's Radio Marti going on the air.[34]

The U.S. government has maintained that it considers the Cuban detainees for release from imprisonment only as "an exercise of grace."[35] Periodically, the government has suspended all consideration of parole.[36] As a result, individual detainees initiated legal challenges to the continued, indefinite imprisonment of the Mariel Cubans.[37] In August 1981, in response to decisions by two federal courts,[38] the Attorney General established a Status Review

27. 8 U.S.C. § 1182(a)(20) (1982); *see supra* note 9.

28. Brief of *Amici Curiae* in Support of Plaintiffs-Appellees at 5, Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984) [hereinafter cited as *Amici* Brief]; *see* 57 INTERPRETER RELEASES (American Council for Nationalities Service) 305 (June 30, 1980) regarding the establishment of "Cuban-Haitian" entrant status.

29. Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended in scattered sections of 8 U.S.C.); *see* 61 INTERPRETER RELEASES (American Council for Nationalities Service) 847 (Oct. 19, 1984).

30. *Amici* Brief, *supra* note 28, at 6.

31. 8 U.S.C. § 1226 (1982). Exclusion hearings are adversarial proceedings held before an immigration judge. The INS is represented by a separate lawyer. The proceedings are administrative and the rules of evidence do not apply. *See* 8 C.F.R. pt. 236 (1985).

32. *Amici* Brief, *supra* note 28, at 6-7.

33. Defendants' Motion for Denial of Writ of Habeas Corpus on the Issues of International Law at Exhibit C, Fernandez-Roque v. Smith, 600 F. Supp. 1500 (N.D. Ga. 1985); *see* N.Y. Times, Dec. 11, 1984, at A1, col. 6; *see also* 61 INTERPRETER RELEASES (American Council for Nationalities Service) 1080-82 (Dec. 21, 1984).

34. 62 INTERPRETER RELEASES (American Council for Nationalities Service) 483-84 (May 24, 1985).

35. Brief for Appellants at 24, *Fernandez-Roque*, 734 F.2d 576.

36. Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1051 n.1 (N.D. Ga. 1981) (review procedure "wihtheld from operation").

37. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984); *Soroa-Gonzales*, 515 F. Supp. 1049.

38. *Rodriguez-Fernandez*, 654 F.2d 1382; *Soroa-Gonzales*, 515 F. Supp. 1049.

Plan under which each detainee was interviewed by a two-member panel which recommended release or continued detention.[39] The Commissioner of the INS made the final decision to approve any release on parole. However, even after approval, releases were delayed until appropriate sponsors could be found.[40] By October 1982, 1,305 detainees had been released pursuant to the Review Plan.[41] The Status Review Plan, however, was withdrawn when the United States and Cuba reached agreement regarding the return of certain Cubans.[42] Five years have passed since the Freedom Flotilla, and over 1,500 Mariel Cubans remain in prison with little or no prospect of release.[43]

C. Declaration of a New Detention Policy: The Haitians

The United States detained the Mariel Cubans as an emergency response to the influx of 125,000 unanticipated asylum-seekers. However, the government has since promulgated a new detention policy for arriving aliens.

Haitian refugees began coming to southern Florida in 1971, fleeing the brutal and repressive regime of Jean-Claude Duvalier. They undertook considerable risk to leave Haiti, often travelling several hudred miles in small, unseaworthy boats. At times, they risked interdiction by the U.S. Coast Guard, and if returned, they risked persecution. They came from all strata of Haitian society, but most were poor, rural, and black. Upon arrival, they faced prejudgment and abuse by immigration authorities in the United States.[44] Nevertheless, between 1971 and 1981, approximately 35,000 to 45,000 Haitian boat persons came to the United States.[45] Until 1981, the INS followed the traditional policy of releasing such arriving aliens on parole pending a hearing and status determination.[46]

Beginning in May 1981, all Haitians arriving by boat in southern Florida without proper entry documents were detained at Camp Krome, a former Nike missile base in the Everglades swamp outside of Miami. When Krome

39. Palma v. Verdeyen, 676 F.2d 100, 102 (4th Cir. 1982).

40. Fernandez-Roque v. Smith, 557 F. Supp. 690 (N.D. Ga. 1982), *rev'd,* 734 F.2d 576 (11th Cir. 1984).

41. *Id.* at 692 n.1.

42. Letter from William French Smith, Attorney General to D. Lowell Jensen, Associate Attorney General, Alan C. Nelson, INS Commissioner, and Stephen S. Trott, Assistant Attorney General (Feb. 12, 1985) (memorandum of Attorney General suspending review plan) (on file at the offices of the New York University Review of Law & Social Change).

43. N.Y. Times, Mar. 10, 1986, at A1, col. 1; N.Y. Times, Oct. 25, 1984, at A19, col. 1. Release eligibility is governed now by the restrictive provisions of 8 C.F.R. § 212.5 (1985), assuming its validity. *See infra* notes 122-174 and accompanying text.

44. *See* Louis v. Meissner, 530 F. Supp. 924, 926-28 (S.D. Fla. 1981); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 510-32 (S.D. Fla. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982); *see also* Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy,* 45 LAW & CONTEMP. PROBS. 163, 174 (1982).

45. *Haitian Refugee Center,* 503 F. Supp. 442.

46. Jean v. Nelson, 711 F.2d 1455, 1468-69 (11th Cir. 1983), *rev'd in part, dismissed in part,* 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd,* 105 S. Ct. 2992 (1985). The Circuit Court *en banc* did not disturb the pertinent factual findings of the panel.

became overcrowded, the detainees were transferred to federal prisons and INS detention facilities located across the United States.[47] These Haitians were incarcerated whether or not they were likely to abscond or, if released, likely to pose a threat to national security or public safety. The new policy of detention was intended to deter Haitians from seeking refuge in the United States.[48] Explaining its reasons for adopting an immediately effective interim rule in 1982, the INS stated: "The Administration has determined that a large number of Haitian nationals and others are likely to attempt to enter the United States illegally unless there is in place a detention and parole regulation . . . ."[49]

The government instituted the 1981 change in policy without formal rulemaking. In *Louis v. Nelson*,[50] a class action suit brought in the Southern District of Florida, the district court held that the INS had violated the Administrative Procedure Act[51] by instituting a new rule without first publishing notice of the proposed change in the Federal Register and giving an opportunity for interested parties to comment.[52] Accordingly, the court declared the rule void and ordered the release of 1,800 Haitians detained pursuant to the defective rule.[53]

In response to the *Louis* decision, the INS published in the Federal Register an interim rule, effective immediately, which formalized the policy of detention.[54] Under this rule, aliens arriving without proper travel documents were to be detained and precluded release. Parole was possible only for "emergent reasons" (i.e., when an alien's serious medical condition made continued detention inappropriate), or when it would be "strictly in the public interest." To merit parole under the "public interest" standard, an alien had to satisfy two criteria. First, immigration authorities would have to determine that the alien posed "neither a security risk nor a risk of absconding." Second, the alien had to be pregnant, a juvenile, an infant, a beneficiary of an immigrant

47. Bertrand v. Sava, 684 F.2d 204, 205-06 (2d Cir. 1982) (facts found by Judge Robert L. Carter in both Vigile v. Sava, 535 F. Supp. 1002 (S.D.N.Y. 1982) and Bertrand v. Sava, 535 F. Supp. 1020 (S.D.N.Y. 1982)); Louis v. Meissner, 530 F. Supp. at 926-27.

48. Previous efforts had been made to deter Haitian immigration by employing mass expedited exclusion hearings and routinely denying asylum applications, despite overwhelming evidence of the brutality of the Duvalier regime. These proceedings were denounced and enjoined by the federal courts. *Haitian Refugee Center*, 675 F.2d 1023. Beginning in October 1981, boats transporting Haitians to the United States were interdicted on the high seas by Coast Guard vessels and the Haitians intercepted were sent back to Haiti. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C.A. § 1182 (West Supp. 1985) (historical note at 83-84). The interdiction program, like the detention policy, was designed to deter arriving aliens, specifically Haitians. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 254-60 (1984).

49. 47 Fed. Reg. 30,044 (1982); *see also Jean*, 711 F.2d at 1464-65, 1469-72.

50. 544 F. Supp. 973 (S.D. Fla. 1982).

51. 5 U.S.C. § 500 *et seq.* (1982).

52. 544 F. Supp. at 1003; *see also* 5 U.S.C. § 553 (1982).

53. 544 F. Supp. at 1004.

54. 47 Fed. Reg. 30,044, 30,044-46 (1982) (to be codified at 8 C.F.R. §§ 212.5, 235.3) (proposed July 9, 1982).

visa petition filed by a close relative, or a witness to a judicial, administrative, or legislative proceeding.[55]

Fifteen interested parties commented on the interim rule. Of particular note is the comment of the United Nations High Commissioner for Refugees, who maintained that the rule violated the United Nations Protocol relating to the Status of Refugees. Other comments indicated that the new rule would violate the Refugee Act of 1980 and the Administrative Procedure Act. Nevertheless, on October 19, 1982, the INS issued a final rule, amending only the definition of "undocumented" aliens for the purpose of detention;[56] this rule of limited parole and blanket detention is still in effect. As a result, hudreds of aliens, including Afghans, Cubans, Haitians, and Iranians seeking asylum, remain imprisoned in facilities around the United States with no possibility of release while their cases are adjudicated.[57]

D. Impact of a Blanket Rule of Detention: The Imprisonment of Afghan Refugees

The new detention policy applies to all aliens who arrive in the United States and are charged with being inadmissible for lack of valid entry documents under the Immigration and Nationality Act.[58] These individuals are detained and precluded release even if they pose no risk of absconding and present no security risk.[59] Aliens may be held pending final determination of their excludability and may also be held indefinitely after a final order of exclusion has been issued until the United States finds a country willing to accept them.[60] Aliens are formally detained after a final order of exclusion even if they have been determined to be refugees, i.e., as having a reasonable fear of persecution in their homeland, and, therefore, entitled to the remedy of withholding of exclusion and deportation.[61]

Circumstances surrounding the arrival of refugees from Soviet-occupied Afghanistan dramatize the impact of the rule. Since 1982, over 142 refugees

55. *Id.* Internal INS detention guidelines which previewed the new regulations were issued in January 1982, and revised in April 1982. 59 INTERPRETER RELEASES (American Council for Nationalities Service) 344, 349-50 (May 20, 1982).

56. 47 Fed. Reg. 46,493 (1982) (codified at 8 C.F.R. §§ 212.5, 235.3 (1985)).

57. Statistics supplied by INS, copies of which are on file at the offices of the New York University Review of Law & Social Change [hereinafter cited as STATISTICS].

58. 8 C.F.R. § 235.3(b) (1985). STATISTICS, *supra* note 57, show that aliens from over 70 countries were detained in six detention centers as of July 25, 1984.

59. 8 C.F.R. § 212.5 (1985).

60. 8 C.F.R. § 212.5 (d)(2) (1985). Internal INS detention guidelines were revised in June 1983 to provide for release consideration of excludable aliens whose departure could not likely be enforced. 60 INTERPRETER RELEASES (American Council for Nationalities Service) 536-37 (July 14, 1983).

61. 8 U.S.C. § 1253(h)(1) (1982). ("The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."). This provision has been made available in exclusion as well as deportation proceedings. 8 C.F.R. § 208.3(b) (1985). For a discussion on the distinction between exclusion proceedings and deportation proceedings, *see infra* note 139.

from Afghanistan have been admitted to alien detention centers by the Immigration and Naturalization Service for various lengths of time, pending final adjudication of their applications for political asylum.[62] In many cases detention lasts well over a year.[63] In February 1985, thirty-one Afghans were being detained in the INS facility in New York.[64]

Detained upon arrival in the United States, the Afghans apply for political asylum on the grounds that they would be imprisoned, tortured, or murdered if returned to Afghanistan. Among them are former government officials, business people, doctors, and students who oppose the regime installed in Afghanistan by the Soviet Union in 1979, and who assisted the mujahidin (freedom fighters) in opposing the regime and the Soviet invading forces.[65] According to the U.S. State Department, the Afghan government resists such opposition by using secret police who arbitrarily arrest suspected opposition members and imprison them under primitive conditions. Prisoners are frequently tortured, beaten, and administered electric shocks.[66]

The Afghan refugees coming to the United States are among the three million Afghans who have left Afghanistan. Most initially seek refuge in Pakistan or India.[67] Afghan refugees who stop in Pakistan, however, report that they have been exposed to shelling and bombing near the border and have suffered harassment by agents of the Afghan regime and by Pakistani communists.[68] Those who continue to India encounter similar problems since the Indian government has established diplomatic relations with the new Afghan regime and now sometimes endorses efforts to return the refugees to

62. *See* STATISTICS, *supra* note 57. Over 156 Afghans have been admitted to non-INS facilities.

63. *See, e.g.*, N.Y. Times, July 3, 1983, § 1, at A19, col. 1 (5 Afghans, of 46 being held in INS Brooklyn facility, released after 17 months).

64. THE COMMITTEE ON IMMIGRATION AND NATIONALITY LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE PROPRIETY OF DETAINING ASYLUM-SEEKERS, at app. A (1985).

65. *See* HELSINKI WATCH & ASIA WATCH, TO DIE IN AFGHANISTAN (1985); HELSINKI WATCH, "TEARS, BLOOD AND CRIES": HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION 1979-1984 (1984); *see also* Amended Petition for Writ of Habeas Corpus *passim*, Ishtyaq v. Nelson, No. CV. 82-2288 (E.D.N.Y. *dismissed as moot*, Sept. 17, 1984); Return to Amended Petition for Writ of Habeas Corpus *passim*, *Ishtyaq*, No. CV. 82-2288 [Amended Petition and Return hereinafter collectively cited as *Ishtyaq* Pleadings]. *Ishtyaq* was a challenge on behalf of several Afghans to the new detention regulations. The regulations survived a motion for summary judgment in an unpublished decision on October 4, 1983. Another challenge by Afghans to the regulations was commenced last year. Singh v. Nelson, 623 F. Supp. 545 (S.D.N.Y. 1985). On December 12, 1985, the district court in *Singh* denied habeas corpus relief, and an appeal was filed and expedited in the United States Court of Appeals for the Second Circuit, No. 85-8127. The appeal was dismissed by stipulation as moot on January 21, 1986, since, in the interim, the immigration authorities had released the appellants. N.Y. Times, Jan. 11, 1986 at 27, col. 5; N.Y. Times, Jan. 10, 1986, at B2, col. 1.

66. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985, at 1163-73 (1986).

67. U.S. COMMITTEE FOR REFUGEES, AFGHAN REFUGEES IN PAKISTAN (1982); *see also Afghan Refugees Hear Shultz Vow: "We are with You,"* N.Y. Times, July 4, 1983, at 1, col. 6.

68. *See, e.g.*, N.Y. Times, Aug. 21, 1984, at A3, col. 2; N.Y. Times, Aug. 20, 1984, at A3, col. 2.

Afghanistan.[69]

Some of the Afghan refugees detained in the United States applied at American embassies in India or Pakistan to be admitted as refugees to the United States. The requests were not granted, in some cases because the applicants lacked close relatives in the United States. Many of the Afghans then purchased false travel documents from "travel agents" in Pakistan and India, and made their way to the United States.[70]

The Afghans who tried to enter the U.S. without proper documentation have remained incarcerated under the new detention rule. This is the case notwithstanding their applications for asylum, requests for release, offers to post bond, and arrangements for sponsorship by individuals or religious and civic organizations in the U.S.[71] State Department officials and immigration authorities who consider their cases agree that their fear of persecution upon return to Afghanistan is "well-founded,"[72] but generally deny them asylum as a matter of "discretion" and order deportation on the ground that they have "bypassed the orderly procedures prescribed for applying [to U.S. authorities] for refugee status broad."[73] The Afghans remain in detention while they challenge this determination. If they lose their appeals, detention persists until the U.S. manages to deport them, not to Afghanistan, but to another country. Neither Pakistan nor India, to which the INS seeks to send them, ordinarily will accept them.[74] Release into the U.S. is considered when all administrative proceedings concerning their cases end and deportation appears

69. Petition for Writ of Habeas Corpus at Exhibit C, Khugiani v. Sava, No. CV. 84-0939 (E.D.N.Y. filed Mar. 6, 1984) (letter from the Office of the United Nations High Commissioner for Refugees).

70. *See Ishtyaq* Pleadings *passim, supra* note 65; Petition for a Writ of Habeas Corpus at 9-11, 20-25, 28, *Singh,* 623 F. Supp. 545. The processing of Afghan refugees in Pakistan is governed by State Department guidelines. Processing is limited to those Afghans who have prior employment ties with the United States or relatively close American relatives. *See* OFFICE OF THE U.S. COORDINATOR FOR REFUGEE AFFAIRS, PROPOSED REFUGEE ADMISSIONS AND ALLOCATIONS FOR FISCAL YEAR 1986, at 20 (1985). The overseas refugee admissions process as it pertains to Afghans in Pakistan and India is described in detail in Helton, *The Proper Role of Discretion in Political Asylum Determinations,* 22 SAN DIEGO L. REV. 999, 1011-13 (1985).

71. *See Ishtyaq* Pleadings *passim, supra* note 65; *see also Singh,* 623 F. Supp. 545.

72. This finding is a central element in meeting the statutory definition of "refugee" under the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(42)(A) (1982); 8 C.F.R. § 208.5 (1985).

73. *See Ishtyaq* Pleadings *passim, supra* note 65; *see also In re* Salim, 18 I. & N. Dec. 311, 315 (BIA 1982) (possession of false travel documents constituting a "negative discretionary factor").

74. *See* Petition for Writ of Habeas Corpus at Exhibit C, *Khugiani,* No. CV. 84-0939; First Amended Complaint for Declaratory and Injunctive Relief at Exhibit A, Sarwary v. Sava, No. 85 Civ. 4338 (PKL) (S.D.N.Y. filed July 31, 1985) (letter from the Office of the United Nations High Commissioner for Refugees regarding the restrictive attitude of the Pakistani authorities toward accepting undocumented Afghans from countries other than Afghanistan). *Sarwary* was a challenge to the practice of excluding and deporting Afghans from the United States to a third country without first assuring that they would be accepted by that country. It was dismissed without prejudice by stipulation on January 14, 1986, upon the release of the Afghan plaintiffs. *See supra* note 65.

impracticable.[75]

II
THE MAGNITUDE AND CHARACTER OF DETENTION

A. Current Detention Practice

Aliens are incarcerated in facilities owned and operated, or contracted for, by the INS. Some of the facilities are located in urban areas; others are located in more remote locales in border areas. All now include in their populations long-term detainees; most often, applicants for political asylum.

1. The Facilities

At present there are seven INS-owned and operated detention facilities with a total rated capacity of 2,074 persons. They are located in Miami (capacity 451); Port Isabel in Los Fresnos, Texas (capacity 477); El Paso, Texas (capacity 342); El Centro, California (capacity 344); New York City (capacity 250); Florence, Arizona (capacity 160); and Boston (capacity 50).[76] As of July 1984, 1,714 aliens were being detained in INS facilities.[77] In addition, the INS has held aliens in over 1,000 non-Service detention facilities, including state and local jails, federal prisons, and private facilities run by organizations under contract with the INS, including a facility opened recently in Houston (capacity 350).[78] Concerns as to the propriety of delegating control over the detention of aliens to private companies have recently been raised.[79] Women, children and families are frequently held in such contract facilities. In fiscal year 1983, 22,945 non-Mexican aliens were admitted to non-INS facilities.[80]

A new INS alien detention center, the largest in the country, opened on March 21, 1986 in Oakdale, Louisiana. Congress allocated $17 million for its construction and the estimated operating costs approximate $12 million per year. Oakdale has a population of 7,000, including five practicing lawyers. It is located in rural central Louisiana, about 200 miles from both Houston and New Orleans.[81]

---

75. *See supra* note 60.

76. *See* STATISTICS, *supra* note 57.

77. *See* STATISTICS, *supra* note 57. In 1983, 148,853 aliens were admitted to Service Processing Centers, of which 128,088 were Mexicans who were presumably deported quickly back to Mexico. In the first quarter of 1984, 33,520 were admitted, including 25,638 Mexicans.

78. *See* STATISTICS, *supra* note 57; *see also* Miami Herald, Jan. 6, 1986, at 1B, col. 1; Wash. Post, Nov. 21, 1985, at A1, col. 3; N.Y. Times, Feb. 19, 1985, at A15, col. 1.

79. Medina v. O'Neill, 589 F. Supp. 1028 (S.D. Tex. 1984); *see* N.Y. Times, Feb. 12, 1986, at A28, col. 4; N.Y. Times, Feb. 11, 1985, at A1, col. 2.

80. *See* STATISTICS, *supra* note 57. Including Mexicans, the total was 84,990 (i.e., 62,045 Mexicans). From October 1983 through January 1984, 26,696 aliens (including 18,536 Mexicans) were admitted to non-service facilities.

81. Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss or Summary Judgment *passim*, Roshan v. Smith, 615 F. Supp. 901 (D.D.C. 1985); First Amended Complaint for Declaratory and Injunctive Relief *passim*, *Roshan*, 615 F. Supp. 901; *see also* N.Y. Times, Mar. 14, 1986, at A35, col. 3.

Construction and use of the Oakdale facility were challenged inconclusively in 1984 on the grounds that the project's environmental impact statement is inadequate and that detainees will inevitably be denied their right to appear by counsel in immigration proceedings.[82] The new center has an ordinary capacity of 1,000 (with a contingency capacity of up to an additional 5,000), and is administered jointly by the INS and the Bureau of Prisons. By the end of 1986, the U.S. government plans to have the capacity to detain over 5,000 aliens, including asylum applicants.[83]

2. *Conditions of Confinement*

Confinement occurs under isolated and depressing conditions. Some of the facilities are located in remote areas where it is difficult to find adequate legal representation or social support. For instance Florence, Arizona is located in the desert, sixty-five miles from Phoenix and Tucson. El Centro, California is an impoverished border area 100 miles from San Diego and over 200 miles from Los Angeles. Los Fresnos, Texas is near the border in the Rio Grande Valley, over 250 miles from Houston. The detention facility at Oakdale provides the starkest example of these problems, as it is the largest such remote facility.

The detainees, most of whom do not speak English, are isolated from family and friends. They are unable to communicate with other aliens, or the authorities, including medical personnel. The physical conditions of confinement vary depending on the facility, but are generally similar to prison conditions. There is little or no social or educational programming available. What were once short-term detention facilities are now increasingly used to incarcerate long-term detainees. Boredom is exruciating.[84] Overcrowding is a recurrent problem.[85] In protest of long-term confinement, there are suicides and hunger strikes.[86]

3. *Duration of Detention*

Asylum procedures are inherently complicated and time-consuming, and implementation of the new detention rule further protracts incarceration for most asylum applicants. Scarcity of administrative resources as well as the requirement that the State Department provide the INS with an advisory opinion in each individual case before any asylum claim can be adjudicated prolong the process.[87] Delay also arises when documentation from abroad

82. *Roshan,* 615 F. Supp. 901, a class action, was dismissed on ripeness and standing grounds.

83. First Amended Complaint for Declaratory and Injunctive Relief *passim*, *Roshan*, 615 F. Supp. 901.

84. *See, e.g.*, N.Y. Times, Jan. 1, 1982, at 7, col. 2; N.Y. Times, Apr. 24, 1982, at 6, col. 1.

85. N.Y. Times, Jan. 1, 1982, at 7, col. 2. INS statistics show that the number of aliens detained sometimes exceeds the capacity of a facility. *See* STATISTICS, *supra* note 57.

86. *See infra* note 93.

87. 8 C.F.R. §§ 208.7, 208.10(b) (1985).

must be assembled to substantiate an applicant's claim that she has a well-founded fear of persecution upon return to the home country.[88] Detention itself further complicates the adjudication process since the access of detainees to counsel is severely diminished, and detainees are limited in their ability to assist in preparation of their own cases.

Although the policy of the immigration authorities is to expedite the cases of detained asylum seekers, an asylum request for a detained alien customarily requires well over a year to determine.[89] Given the protracted character of asylum cases, asylum applicants tend to predominate in INS detention facilities. In July 1984, of the 1,714 aliens in detention, 1,015 were from nationalities from which many asylum requests come.[90]

Even when release is nominally available, an alien generally may not be released until she finds a sponsor or posts bond.[91] In deportation proceedings, a minimum bond of $500, and frequently much more, is required. Some bonding companies require 100 percent prepayment, and fees can be as high as almost one-third of the amount of the bail.[92] For indigent refugees, this obstacle may be insurmountable.

The policy of long-term detention devastates many of those who seek asylum in the United States. Prolonged imprisonment affects detainees' psychological condition and ability to present their cases. As they have in the past, frustration and despair suffered during protracted asylum proceedings trigger suicide attempts and mass hunger strikes.[93] In some cases, the policy of detention succeeds in deterring detainees from pursuing their applications for asylum, including the right to appeal adverse immigration court decisions.[94]

---

88. *See* 8 C.F.R. § 208.5 (1985); *see, e.g.*, Helton, *supra* note 48, at 253.

89. *See Singh*, 623 F. Supp. 545; *Ishtyaq* Pleadings *passim*, *supra* note 65.

90. *See* STATISTICS, *supra* note 57. The numbers included Salvadorans (476), Guatemalans (84), Nicaraguans (66), Haitians (226), Cubans (60), Afghans (10), and Iranians (9). Information provided by the Service indicates that on May 31, 1985, INS detention centers held 2,637 aliens, including 634 Salvadorans, 179 Guatemalans, and 195 Nicaraguans.

91. 8 C.F.R. § 242.2(b) (1985).

92. Survey of bonding companies on file at the offices of the New York University Review of Law & Social Change.

93. *See* Miami Herald, Jan. 6, 1986, at B1, col. 1 (capsule history of violent revolts and hunger strikes at Krome facility); N.Y. Times, Sept. 12, 1985, at B2, col. 3; Aug. 31, 1985, at 14, col. 2 (15 Afghans in New York hunger strike for 15 days); N.Y. Times, Sept. 2, 1985, at 8, col. 5 (50 Cubans in Atlanta hunger strike for a week); N.Y. Times, Mar. 15, 1985, at B6, col. 1; Mar. 12, 1985, at B20, col. 1; Mar. 11, 1985, at B3, col. 2; Mar. 10, 1985, § 1, at 35, col. 1 (23 Afghans detained in New York involved in ten day hunger strike); *see also* N.Y. Times, Oct. 25, 1984, at A19, col. 1 (Cubans at Atlanta Penitentiary demonstrate and hunger strike); N.Y. Times, Feb. 1, 1984, at A18, col. 6 (100 Haitians call for "collective suicide" in seventh day of hunger strike at Krome facility); N.Y. Times, May 11, 1983, at B3, col. 2 (hunger strike by most of the 40 Afghans detained in New York); N.Y. Times, Apr. 28, 1982, at A9, col. 1 (hunger strike by 38 Haitian women in Miami).

94. *Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives*, 97th Cong., 2d Sess. 63, 64 (1982) (statement of Arthur C. Helton). Aliens have also given up their rights to appeal to the Board of Immigration Appeals to pursue asylum

B. Other State Practices

The United States is not the only country in which detention is an element of immigration policy and procedure. A survey of twenty-three countries in May 1984 showed that some form of detention was practiced in several countries.[95] Over 150,000 Indochinese (principally Cambodians, Laotians, and Vietnamese) waiting for resettlement in third countries remain in camps in Hong Kong, Indonesia, Malaysia, the Philippines, Singapore, and Thailand.[96] Some live in "closed" camps (such as the 5,761 Vietnamese in Hong Kong) from which release is not possible pending resettlement, in furtherance of a policy of "humane deterrence" designed to discourage the arrival of asylum-seekers.[97] In other countries, the numbers of aliens in administrative detention are relatively small. Detention generally ranges from ten days to three months, although prolonged or indefinite confinement is not unusual in India, Sudan, Tanzania, and Zambia.[98] Access to counsel is often limited. Nevertheless, release through either administrative or judicial channels is possible in most countries.[99]

Some countries assign asylum applicants to designated areas or locations; in the Federal Republic of Germany, asylum applicants stay in so-called "communal housing facilities". Germany initiated the policy in 1982 in response to the 1980 influx of over 100,000 mostly Turkish asylum seekers.[100] German government officials concede that the purpose of this housing policy is to dissuade new arrivals and to encourage applicants already in Germany to give up their claims and return home.[101] While inhabitants are nominally free to come and go from the facilities, most have little choice but to stay since they are not permitted to work for their first two years in Germany, and free

in the United States in order to gain earlier release consideration. *See infra* note 160 and accompanying text.

95. The countries surveyed were Austria, Belgium, Cameroon, Canada, Federal Republic of Germany, Hong Kong, India, Indonesia, Kenya, Laos, Malaysia, the Netherlands, Nicaragua, the Philippines, Portugal, Singapore, Somalia, Sudan, Tanzania, Thailand, the United States, Zambia, and Zimbabwe [hereinafter cited as SURVEY]. Mr. Guy Goodwin-Gill, a noted international legal commentator and author of THE REFUGEE IN INTERNATIONAL LAW (1983) and INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES (1978), conducted the survey. Results of the survey are on file at the offices of the New York University Review of Law & Social Change.

96. SURVEY, *supra* note 95. The largest number (127,209) are in camps in Thailand. *See also* N.Y. Times, June 23, 1985, § 1, at 7, col. 1.

97. SURVEY, *supra* note 95. *See also* Grandjean, *The boat people's Alcatraz*, REFUGEES , May 1985, at 30; W. SHAWCROSS, THE QUALITY OF MERCY 405-06 (1984).

98. SURVEY, *supra* note 95.

99. SURVEY, *supra* note 95. Some countries (Canada, Portugal, and Zimbabwe) have made special provision in their laws to avoid punishing asylum applicants for unauthorized entry. These provisions reflect the obligation under Article 31(1) of the 1967 Protocol relating to the Status of Refugees not to penalize refugees for illegally entering a territory. *See infra* notes 119, 170.

100. SURVEY, *supra* note 95; Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 198, 201-03 (1984).

101. Aleinikoff, *supra* note 100, at 203.

meals and lodging are available at the facilities.[102]

The U.S. practice falls somewhere between the German and Indochinese programs. Unlike the Indochinese versions, the U.S. detention policy does not explicitly target asylum seekers. In effect, however, this distinction is meaningless. Those seeking asylum often arrive without valid travel documents,[103] or they are too poor to gain release by posting bond. In either case, they are guaranteed prolonged and sometimes indefinite incarceration under U.S. policy.

The U.S. practice is harsher than its German counterpart since incarceration in the United States is under prison-like conditions. While the U.S. policy does not expressly preclude resettlement or access to counsel or the legal process, the remoteness of the detention facilities can interfere gravely with access to counsel or any meaningful opportunity to participate in the adjudicatory process.[104]

III
THE LEGALITY OF CURRENT DETENTION POLICY

The preceding sections describe the development and effects of the current detention policy. Under U.S. practice, asylum applicants and excludable aliens who are unable to return to their country face prolonged and indefinite imprisonment under onerous conditions. For the reasons discussed below, such a detention policy is inconsistent with both domestic statutory and constitutional law, and violates obligations assumed by the executive under treaty and customary international law.

Judicial challenges to a detention policy are difficult because the Supreme Court has consistently deferred to the executive and legislative branches of government in matters concerning the admissibility of aliens. The Court, in 1953, specifically upheld the authority of the Attorney General to detain aliens whom the INS considers excludable.[105] Although the Court has not overruled *Mezei*, the case's precedential value must be judged from a historical perspective because it was decided at a very unique moment in our constitutional history.[106] At the time of *Mezei*, the Supreme Court had not yet extended the protection of the Constitution to the mentally incompetent,[107] prisoners,[108]

102. *Id.* at 201-03.

103. *See infra* text accompanying note 157.

104. Louis v. Meissner, 530 F. Supp. at 926-27; First Amended Complaint for Declaratory and Injunctive Relief *passim*, *Roshan*, 615 F. Supp. 901; Wash. Post, Nov. 21, 1985, at A1, col. 3.

105. *Mezei*, 345 U.S. 206.

106. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.15 (1958).

107. Massey v Moore, 348 U.S. 105, 108 (1954) (Interpreting the fourteenth amendment: "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.").

108. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (Although a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.").

pretrial detainees,[109] children,[110] or residents of U.S. territories and possessions[111] nor had the Constitution been held to guarantee blacks the right to an integrated education.[112] While specific protections have, by now, been extended to all the aforementioned persons, excludable aliens are still incarcerated without regard to the strictures of the Constitution.

Mezei has been widely criticized as a historical anomaly ever since it was decided. Shortly after the case was decided, Professor Hart of Harvard Law School, in his classic dialogue, labelled the opinion an "aberration," not "intellectually respectable," and with "brutal conclusions":

> [W]hen justices of the Supreme Court sit down and write opinions in behalf of the Court which ignore the painful forward steps of a whole half century of adjudication, making no effort to relate what then is being done to what the Court has done before, they write without authority for the future. The appeal to principle is still open . . . .[113]

Other commentators have cited *Mezei* as an example of "some of the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court"[114] and "one of the most shocking decisions the Court has ever rendered."[115]

The lower courts' reluctance to question earlier precedents or to create judicial restrictions on the INS's authority has hampered recent challenges to the reinstitution of detention.[116] However, both international and dometic law

---

109. Bell v. Wolfish, 441 U.S. 520, 545 (1979) (Although their rights may be subject to necessary restrictions and limitations, "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that . . . are enjoyed by convicted prisoners.").

110. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.") (citations omitted); *In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

111. Examining Bd. v. Flores de Otero, 426 U.S. 572, 600 (1976) ("It is clear now . . . that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").

112. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (Due to segregated educational facilities, black children were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

113. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390-95, 1396 (1953).

114. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 20 (1984).

115. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11:5 (2d ed. 1979); *see also Jean*, 105 S. Ct. at 3009 & n.9 (Marshall, J., dissenting); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322 (1983) ("In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development."); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173-80 (1983) (Along with *Knauff*, *Mezei* stands for a "rather scandalous doctrine.").

116. *Jean*, 727 F.2d 957; *Bertrand*, 684 F.2d 204. *But see Rodriguez-Fernandez*, 654 F.2d 1382; *Soroa-Gonzales*, 515 F. Supp. 1049.

have undergone considerable development since the days of the *Mezei* case. The Immigration and Nationality Act[117] and its underlying regulations[118] have been substantially revised, and a treaty has become a source of law. In 1968, the United States signed the United Nations Protocol relating to the Status of Refugees.[119] Later, the U.S. Congress passed the Refugee Act of 1980 to create a more humane and effective procedure for dealing with refugees and to bring this country into compliance with its obligations under international law.[120] Upon enactment of the Refugee Act, the Immigration and Nationality Act provided for the first time a statutory right to petition for asylum. The Attorney General has had to establish an asylum procedure for an alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status."[121] Aliens who have been found otherwise excludable or deportable are entitled to seek asylum. The analysis that follows demonstrates that a detention policy is incompatible with the parole provisions of the Immigration and Nationality Act, the Refugee Act, the fifth amendment to the United States Constitution, and the Protocol relating to the Status of Refugees.

A. Detention Pending Adjudication

1. The Parole Power

Congress has delegated to the Attorney General the discretion to release on parole into the United States "any alien applying for admission."[122] Until 1982, INS regulations treated all aliens alike for purposes of release consideration. However, in 1982, the Attorney General promulgated detention regulations which severely restrict the ability to exercise parole authority in favor of a particular class of aliens—excludable aliens who arrive in the United States without valid travel documents.[123] This category of excludable aliens is created through the legal fiction of "entry"—an artifice which simply defines the kinds of substantive and procedural protections to which aliens are entitled before being barred or expelled from the United States.[124]

The regulatory standards for parole of aliens arriving without valid travel documents create a category of aliens who are ineligible for release pending adjudication of immigration status. However, once a final decision on an ap-

117. 8 U.S.C. § 1101 *et seq.* (1982).

118. 8 C.F.R. pt. 1 *et seq.* (1985).

119. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. See generally INS v. Stevic, 467 U.S. 407 (1984), concerning the background to the accession by the U.S. to the Protocol.

120. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); S. REP. NO. 256, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 144.

121. 8 U.S.C. § 1158(a) (1982).

122. Immigration and Nationality Act of 1952, § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1982).

123. 8 C.F.R. §§ 212.5(a), 235.3(b) (1985).

124. *See infra* note 139 and accompanying text.

plication for admission is rendered, an alien whose departure cannot be effected may be released provided she is found unlikely to abscond or to pose a security risk.[125]

Discretionary power is "indispensable" in the administrative process "to take care of the need for individualized justice."[126] Particularly where adjudicative facts concerning individual parties are involved, case-by-case decision making is preferable to rulemaking.[127] Release decisions depend on the circumstances of individual cases, and thus, consistent with these principles of administrative law, should be made on an individualized basis.[128]

An administrator may certainly exercise discretion through regulation by determining that certain conduct is "so inimical to the statutory scheme" and "of such determinative negative force" that "all persons who have engaged in it shall be ineligible for favorable consideration, regardless of other factors that otherwise might tend in their favor."[129] In order to assure that such regulation is consistent with the principle that like cases should be treated similarly, an administrator cannot refuse to exercise his discretion with respect to a "class of cases . . . if that class is not rationally differentiated from other cases, not within that class, where he uses his discretion case by case."[130] Thus, the 1982 regulations should be deemed to improperly curtail the Attorney General's discretion unless it could rationally be concluded that arrival in the United States without documents is a "determinative negative factor," or so "inimical to the statutory scheme" that as a class, undocumented excludable aliens must be differentiated from all other inadmissible or undocumented aliens who are eligible for release.

The regulations, however, do not create a classification on the basis of conduct which is inherently inconsistent with the granting of parole. Most importantly, the legislative history of the parole provision demonstrates that Congress intended parole to be granted in individual cases involving humanitarian concerns or emergent circumstances, including cases involving undocumented aliens.[131] In addition, the overall scheme of the Immigration and

125. *See supra* note 60.

126. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:3 (2d ed. 1979).

127. *See* National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365, 1370-71 (9th Cir. 1984); National Center for Immigrants' Rights, Inc. v. INS, No. CV 83-7927-KN (C.D. Cal. Mar. 7, 1985) (order granting plaintiffs' summary judgment, holding blanket employment ban imposed indiscriminately on whole class of aliens to be invalid).

128. *National Center for Immigrants' Rights*, 743 F.2d 1365; *see also* Broz v. Schweiker, 677 F.2d 1351, 1357 (11th Cir. 1982), *vacated sub nom.*, Heckler v. Broz, 461 U.S. 952, *aff'd in relevant part*, 711 F.2d 957 (11th Cir. 1983) (invalidating Social Security regulations determining the effect of an individual's age on his ability to adapt in the job market); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1297 (1972) ("discretion is often needed to enable administrators to respond creatively to the circumstances of individual cases").

129. Fook Hong Mak v. INS, 435 F.2d 728, 730 (2d Cir. 1970).

130. Mastrapasqua v. Shaughnessy, 180 F.2d 999, 1002 (2d Cir. 1950); *Fook Hong Mak*, 435 F.2d at 730; *see also*, Sofaer, *supra* note 128, at 1326 (endorsing the *Mastrapasqua* test).

131. *See, e.g.*, H.R. REP. NO. 1365, 82d Cong., 2d Sess. 51-52, *reprinted in* 1952 U.S.

Nationality Act, through numerous provisions, allows the Attorney General to exercise her discretion in favor of undocumented aliens. For example, aliens without documents are eligible for withholding of deportation,[132] and for political asylum.[133] The Attorney General also has the power to waive the requirement of documents to permit entry in specified circumstances.[134] Indeed, aside from undocumented aliens who are stopped at the border, most other undocumented aliens are specifically eligible for release pending adjudication of their cases.[135] Thus, the statutory scheme demonstrates that lack of travel documents is not dispositive for immigration purposes.

Although lack of documents is relevant to the release decision in terms of identifying an alien, it cannot reasonably be concluded that lack of documents is of "such determinative negative force that no possible combination" of other factors could outweigh it.[136] Before 1982, the INS treated lack of documents as but one among several relevant factors in deciding whether an alien would be likely to abscond if paroled. The other factors included: the alien's likelihood of success on her application for admission; prior immigration history; financial ability to support herself while on parole; sponsorship by a family member or an organization, and ability to post bond.[137] These factors are still used to determine the likelihood of absconding for all aliens other than excludable undocumented aliens.

There is no basis for believing that undocumented aliens are more likely to abscond than other aliens. Thus, administrative experience with the parole provision, and current practice with respect to all aliens other than undocumented excludable aliens, demonstrate that the INS does not consider lack of documents to be a dispositive negative factor in parole decisions. Therefore, the current regulations which make an entire class of aliens ineligible for release because of lack of documentation constitute an impermissible restriction on the Attorney General's discretionary authority.[138]

Furthermore, there is no rational justification for subjecting undocumented excludable aliens to a rule of detention while all other aliens, docu-

---

CODE CONG. & AD. NEWS 1653, 1706; 111 CONG. REC. 21,586 (1965) (remarks of Rep. Feighan concerning H.R. 2580).

132. 8 U.S.C. § 1253(h) (1982).

133. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1982).

134. 8 U.S.C. § 1182(d)(4) (1982).

135. 8 U.S.C. § 1252(a) (1982).

136. *See Fook Hong Mak*, 435 F.2d at 730.

137. *See Bertrand*, 684 F.2d at 214.

138. In the only decision that addresses this administrative law issue, a federal district court determined that while the argument that the lack of documents should not be a "dispositive negative factor" in parole decisons held "superficial appeal," it was ultimately "unpersuasive" since there is a "rational basis" for the classification—deterrence of certain irregular immigration. *Singh*, 623 F. Supp. at 555-56. The court also found the regulations to be consistent with the Refugee Act of 1980, the Constitution, and the United Nations Protocol relating to the Status of Refugees. *Id.* at 562. *Singh* was recently cited with approval in Bedredin v. Sava, No. 85 Civ. 8627 (S.D.N.Y. Jan. 31, 1986), a habeas case that concerned the validity of the detention of Ethiopian and Syrian petitioners under the terms of the regulations.

mented or not, can be considered for release on an individualized basis. The paradigmatic parole case involves undocumented aliens, including those simply seeking employment in the United States, who enter the country illegally by evading inspection at the border or by misrepresenting their true intentions at the time of inspection. They differ from excludable aliens only in that they effected a technical "entry" into the United States.[139] Excludable aliens cannot rationally be viewed as more likely to abscond than other aliens who lack documents and who are deportable. Similarly, a general governmental policy of deterring irregular immigration does not justify differentiating between excludable and deportable aliens in making release decisions.[140] Nevertheless, under the new regulations, undocumented deportable aliens are routinely released while many excludable aliens, including asylum applicants, must remain incarcerated. Application of the new regulations thus results in inconsistent treatment of aliens who cannot be rationally differentiated. Since the regulations are not based on a rational classification, they improperly curtail the Attorney General's discretion.[141]

Congress, furthermore, has not authorized detention of aliens as a deterrent device but as a necessary, temporary measure to effectuate exclusion.[142] Where Congress has perceived the need for penalties or deterrence in the immigration area, it has enacted criminal provisions.[143] To the extent that the current detention and parole regulations authorize detention of undocumented excludable aliens to deter such immigration, and not as a necessary measure to effectuate exclusion, the regulations are not rationally related to the statutory authority pursuant to which they were enacted.[144]

---

139. The Immigration and Nationality Act distinguishes between aliens who have come to the United States seeking admission and those "in" the United States after an "entry," irrespective of its legality. *In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1983). Under 8 U.S.C. § 1226(a) (1982), aliens seeking admission are subjected to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." Aliens who have made an entry are subject to "expulsion" if they fall within the categories of aliens who may be "deported" under 8 U.S.C. § 1251 (1982). Proceedings for expulsion are commonly referred to as "deportation proceedings." *Phelisna*, 551 F. Supp. at 962. An alien who crosses the border where there are not inspection facilities, such as along the Mexican or Canadian borders, ordinarily has "entered" the United States, even if she lacks valid travel documents. *Id.*

140. Categorical distinctions which are drawn without purpose in a regulatory scheme are an invitation to harshness and injustice in the application of the regulations. *Cf. Mastrapasqua,* 180 F.2d at 1002 (citing with approval BIA's opinion that general policy with respect to a class of aliens seeking admission "should be administered in such a manner as not to bring about harsh consequences").

141. *See supra* note 138.

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

143. *See, e.g.*, 8 U.S.C. § 1325 (1982) (criminal sanctions for obtaining entry to the U.S. by willful, false, or misleading representation); 18 U.S.C. §§ 1541-1546 (1982) (criminal sanctions for use of fraudulent passports and visas).

144. A few lower courts, while not ruling on the validity of the regulations, have upheld parole denials under the regulations. *See* St. Fleur v. Sava, 617 F. Supp. 403 (S.D.N.Y. 1985) (habeas corpus denied by court to Haitian detainee in view of prior escape from INS custody which presented a risk of absconding); Ledesma-Valdes v. Sava, 604 F. Supp. 675, 680 (S.D.N.Y. 1985) (habeas corpus application of Cubans denied by court based on its finding that

2. The Refugee Act

The Refugee Act of 1980[145] created a statutory right to apply for political asylum. Congress required the Attorney General to "establish a procedure for an alien physically present in the United States or at a local border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum . . . if the Attorney General determines that such alien is a refugee . . . ."[146] Prior to the enactment of the asylum provision, the Immigration and Nationality Act contained no provision that allowed aliens already within the United States or at its borders to apply for asylum. Asylum had been available only through regulations issued by the Attorney General.[147]

The Refugee Act as originally proposed did not contain any asylum provision. Congress added it after hearing extensive testimony about the importance of specifically including within the legislation the right to apply for political asylum.[148] The House Report emphasized Congress's humanitarian reasons for enacting this provision:

> The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation. The Committee intends to monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect.[149]

The courts have interpreted the provisions and legislative history of the Refugee Act as manifesting Congress's " 'intention of hearing the pleas of aliens

---

the INS District Director had not abused his discretion in denying their request for parole in view of prior escapes); Abu Lavan v. Sava, 564 F. Supp. 30, 34 (S.D.N.Y. 1982) (acting District Director did not abuse his discretion in denying parole in view of administrative finding that the aliens posed "a legitimate risk of absconding"); Paulis v. Sava, 544 F. Supp. 819, 820-21 (S.D.N.Y. 1982) (INS District Director did not abuse discretion in denying release, but the petitioners had not alleged any "procedural or substantive defects" in the parole regulations). The Supreme Court's decision in *Jean*, 105 S. Ct. 2992, did not concern the validity of the regulations. While the majority affirmed a remand to the district court to ascertain the justification for detention under the non-discriminatory terms of the regulations, the Court did not have occasion to discuss the legality of the regulations themselves. The mere mention of the regulations in the Court's disposition does not immunize them from challenge on a proper record.

145. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

146. 8 U.S.C. § 1158(a) (1982) (incorporating the refugee definition set forth in 8 U.S.C. § 1101(a)(42)(A) (1982)).

147. *See* H.R. REP. No. 608, 96th Cong., 1st Sess. 17 (1979).

148. *Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary, House of Representatives, Refugee Act of 1979*, 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International); *id.* at 187-88 (testimony of David Carliner, American Civil Liberties Union); *see also* H.R. REP. No. 608, *supra* note 147, at 17-18.

149. H.R. REP. No. 608, *supra* note 147 at 17-18.

who come to this country claiming a fear of being persecuted in their homelands.' "[150]

Congress's desire to institute a fair and workable asylum policy is manifested in the Refugee Act's requirement that the opportunity to apply for asylum be available to all aliens present in the United States "irrespective of . . . status."[151] The Second Circuit's recent decision in *Yiu Sing Chun v. Sava*[152] interprets this "irrespective of . . . status" language to prohibit differential treatment of asylum applicants based on immigration status. *Chun* held that two stowaways from the People's Republic of China were entitled to a hearing regarding their asylum applications notwithstanding the explicit denial of exclusion hearings for stowaways under the statute.[153] The Second Circuit found that Congress intended all asylum seekers to have the same procedural opportunities regarding their asylum applications.[154]

The decision in *Chun* made clear that the Refugee Act prohibits asylum applicants from receiving disfavored treatment because of their immigration status. There was apparent justification for the differential treatment the INS wanted to accord the stowaways in *Chun* since stowaways are explicitly denied exclusion hearings by statute. By comparison, the disadvantages that detained asylum seekers must endure are founded only on INS regulations implementing a detention policy. Since *Chun* subordinated the provision denying hearings to stowaways to the "irrespective of . . . status" provision of the statute, the detention regulations should, *a fortiori*, yield to the requirement that all aliens be treated equally in the application process irrespective of whether they have valid travel documents.

The detention regulations are inconsistent with the purpose of the Refugee Act. The avowed purpose of the detention regulations is to deter prospective asylum applicants who lack valid travel documents from applying for asylum. This motive is stated in the INS comments accompanying the interim rule formally establishing the detention regime.[155] Those comments document the INS contention that immediate enforcement of its new detention rule was necessary because "a significant number of persons who were previously deterred from attempting to enter the United States illegally by the Service's detention policy may now enter the United States without fear of being detained . . . ."[156] Thus, by creating a "fear of being detained," the INS hopes to deter persons lacking valid travel documents from coming to the United States to seek asylum. The INS's attempt to deter such individuals especially affects

150. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 375 (C.D. Cal. 1982) (quoting Nunez v. Boldin, 537 F. Supp. 578, 584 (S.D. Tex. 1982)).

151. *See supra* note 146 and accompanying text.

152. 708 F.2d 869 (2d Cir. 1983).

153. 8 U.S.C. § 1323(d) (1982).

154. *Chun,* 708 F.2d at 874; *cf.* Azzouka v. Sava, No. 85-2109 (2d Cir. 1985) (discussing the *Chun* rationale where a national security exclusion is involved).

155. *See* 47 Fed. Reg. 30,044-45 (1982); *see also Singh,* 623 F. Supp. at 555-56 (finding the purpose of the detention policy to be deterrence).

156. 47 Fed. Reg. at 30,044 (1982).

the "oppressed of other nations" whom Congress sought to welcome by establishing the right to seek asylum. Asylum seekers frequently flee their home countries without travel documents. As the Office of the United Nations High Commissioner for Refugees stated: "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."[157]

Indeed, it would be folly to expect a person fleeing persecution to seek a passport or exit visa from the persecuting government. The obvious consequence of using the specter of prolonged detention to deter asylum seekers is to encourage persons in danger of persecution in their home countries to run the grave risk of remaining where they are or to induce them to give up their pursuit of asylum in the United States and return to their countries where they face the prospect of death or imprisonment. One Afghan refugee who had been in detention for six months in New York put the matter eloquently:

> From this jail and the mental torture I have been put through, it has become clear to me that what I had heard about the United States and what we had hoped for and what they promised us and announced to the world is not anything other than a dream and propaganda. The United States will never extend a helping hand to me. I feel that I will never be free nor be granted political asylum. Since there is no hope for me here, I give up my case and request that I be sent back to our beloved and invaded country under the Russian torture. Although it is very clear that I will be killed in Afghanistan, I am sure that by my death our poor people who suffer under Russian atrocities will recognize the United States' true humanitarian feelings. Before I die, I will tell them that there is no hope for their safety and that it would be better to be killed by the Russians before leaving the country and coming to a foreign land where they will face jail, torture and be treated like animals.[158]

No statement could provide a more direct contradiction to the generous and humanitarian purpose of the Refugee Act. The INS's detention policy frustrates Congress's humanitarian objective in establishing the right to seek asylum and providing a haven for those who risk persecution in their home countries.

---

157. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, 47, para. 196 (1979). The Board of Immigration Appeals has cited provisions of the Handbook as persuasive authority in the analysis of asylum claims. *In re* Frentescu, 18 I. & N. Dec. 244, 246 (BIA 1982); *In re* Rodriguez-Palma, 17 I. & N. Dec. 465, 468 (BIA 1980). The Second Circuit has found it to be a restatement of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), *rev'd on other grounds sub nom.* INS v. Stevic, 467 U.S. 407 (1984); *see also* Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984); Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 512 (D.D.C. 1984).

158. Reply Memorandum of Petitioners in Support of Habeas Corpus Petition at Exhibit B, *Singh,* 623 F. Supp. 545 (affidavit of Sayed Mohammad Saleh).

The detention regulations are also at odds with Congress's goal of providing a fair and workable asylum procedure. The regulations are doubly unfair to asylum applicants who come under their sweep. First, asylum applicants are generally held for longer periods than other aliens, since asylum cases for detainees typically require more than a year to adjudicate. In effect, many detained asylum applicants are being penalized for applying for asylum, since they may become eligible for release if they do not apply.

Deciding whether to exercise the right to appeal an adverse decision of an immigration judge is a difficult choice for an incarcerated asylum applicant. On the one hand, the opportunity to appeal is an important right, since the Board of Immigration Appeals may conduct a *de novo* review of the facts and may even make an independent determination of whether discretionary relief should be granted.[159] On the other hand, if the applicant forgoes her right to appeal, she may become eligible for release under INS guidelines since a final order of exclusion will be entered against her. In most cases, the INS will be unable to enforce such an order. Thus, the applicant may forego appeal and the possibility of winning asylum and ultimately becoming a permanent resident or citizen in favor of the chance for release from incarceration. One Afghan described his dilemma as follows:

> I have now been detained in the United States for over 18 months .... I understand that I have a right to appeal the recent immigration judge decision denying asylum to me, and my lawyer has advised me that I have good grounds for appeal in order to gain political asylum in the United States. However, I cannot stand any further imprisonment. I feel I have no choice except to give up my appeal and hope for release.[160]

The regulations are also unfair because they single out for adverse treatment asylum applicants who are undocumented excludable aliens. Other asylum applicants, such as undocumented aliens who have made an "entry" into this country,[161] are not affected by the detention regulations and thus do not suffer the same disadvantages in the asylum application process. Additionally, detained asylum seekers must contend with limited access to their lawyers and the resulting difficulties in assembling documentation from abroad to support their asylum applications. Such differential treatment is inconsistent with the Refugee Act.

3. The Constitution

The fifth amendment provides that "no person shall be deprived of . . .

159. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 1.10e(2) (rev. ed. 1985).

160. Petition for a Writ of Habeas Corpus at Exhibit E, *Singh*, 623 F. Supp. 545 (statement of Mohammad Ishtyaq Khugiani).

161. *See supra* note 139 and accompanying text.

liberty . . . without due process of law."[162] The due process clause protects all persons physically present within the territory of the United States, including excludable aliens.[163] The legal fiction that excludable aliens are stopped at the border does not limit the application of the Constitution to them except with respect to the question of admission.[164]

Administrative detention of aliens has been approved only as a means of effecting exclusion or deportation,[165] or to protect society from aliens found to be security risks.[166] The Tenth Circuit has concluded that "[d]etention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus, justifiable only as a necessary, temporary measure."[167]

The detention rule is unrelated to the question of effectuating deportation or protecting society. The prior liberal release policy indicates that the INS can protect its ability to deport aliens without requiring widespread detention. Under the traditional release policy, the INS released aliens seeking admission to this country absent a demonstrable security risk or likelihood of absconding.[168] Purposeless detention, such as that prescribed by the regulations, violates the due process guarantee of the fifth amendment.

4. The Protocol

The detention policy also violates basic obligations under the United Nations Protocol relating to the Status of Refugees, a multilateral treaty to which the United States is a party.[169] The signers of the Protocol agree not to impose "penalties" on refugees illegally present in their country who come directly and who present themselves promptly to the proper authorities and show good cause for their illegal entry or presence.[170] The Protocol also prohibits the

162. U.S. CONST. amend. V.

163. Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term"). In Mathews v. Diaz, 426 U.S. 67, 77 (1976), the Court stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection (citations omitted).

164. *See* Reid v. Covert, 354 U.S. 1 (1957) (extraterritorial reach of the Constitution); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (property of alien outside the United States cannot be taken without compensation); *Rodriguez-Fernandez*, 654 F.2d at 1387 (excludable alien within the United States may not be punished without being accorded due process); United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979) (excludable alien entitled to receive *Miranda* warnings once criminal proceedings against him have commenced); *cf.* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (excludable aliens have no constitutional rights regarding their admission).

165. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896).

166. *See Mezei*, 345 U.S. at 215-16; Carlson v. Landon, 342 U.S. 524, 538 (1952).

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

168. *See supra* note 17 and accompanying text.

169. *See supra* note 119.

170. Article 31(1) states:

unnecessary restriction of such refugees' freedom of movement.[171] The detention policy violates these provisions to the extent it burdens those refugees to whom they are applicable with incarceration without the possibility of release.[172] Also, to the extent that such incarceration encourages refugees to abandon their asylum claims and return to territories where they will face persecution, it violates the non-refoulement provision of the Protocol, which prohibits the return of refugees to face such risks.[173] These treaty provisions provide additional bases on which to invalidate the regulations.[174]

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

19 U.S.T. 6223, 6275, T.I.A.S. No. 6577, at 53, 189 U.N.T.S. 137, 174.

171. Article 31(2) states:

> The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

19 U.S.T. 6223, 6275, T.I.A.S. No. 6577, at 53, 189 U.N.T.S. 137, 174.

172. Domestic law, of course, should be interpreted, if fairly possible, in a manner consistent with our nation's obligations under international law, including the Protocol relating to the Status of Refugees. *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 (Tent. Final Draft, 1985). The interpretation of the statute provided by the INS regulations would appear to countenance arbitrary and purposeless detention in violation of settled principles of the Protocol and the international law of human rights. *See infra* text accompanying notes 181-186.

173. Article 33(1) states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577, at 54, 189 U.N.T.S. 137, 176.

174. A related question, outside the scope of this article, is whether Article 31 of the Protocol is self-executing, i.e., enforceable in United States courts. The courts have recognized that provisions of the Protocol are enforceable. *See* Kashani v. INS, 547 F.2d 376 (7th Cir. 1977) (holding that the Protocol is binding on the United States and requires the United States to adopt the Protocol's "well founded fear of persecution" standard in cases under 8 U.S.C. § 1253(h) (1982)); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (the Attorney General's authority to withhold deportation of aliens must be measured "in light of the Protocol"); Fernandez-Roque v. Smith, 91 F.R.D. 117 (N.D. Ga. 1981) (claims under Article 33 of Protocol state a valid cause of action upon which relief may be granted); Pierre v. United States, 525 F.2d 933, 935 (5th Cir. 1976), *vacated and remanded as moot*, 434 U.S. 962 (1977) (barring job certification requirements where they would undercut employment granted to refugees under the Protocol); Sannon v. United States, 427 F. Supp. 1270, 1274 (S.D. Fla. 1977), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir. 1978) (holding that the Protocol established a right to a hearing for aliens threatened with exclusion).

Bertrand, 684 F.2d 204, might be cited to the contrary regarding the ability of an individual to invoke the Protocol. In *Bertrand*, the Second Circuit concluded that there was no abuse of discretion by an INS District Director in denying parole to Haitian asylum seekers and, therefore, that there was also no substantive claim under the Protocol which could be established. The right of an individual to invoke the Protocol was neither necessary to the decision, nor decided. Any reference to the Protocol was gratuitous and probably incorrect. The *Bertrand* court relied on its prior decision in Stevic v. Sava, 678 F.2d 401, to the effect that since the Refugee Act of 1980 was designed, at least in part, to bring the United States into compliance

B. Detention Unassociated with Adjudication

The INS has no legislative authority to detain indefinitely excludable aliens who cannot be sent back to their home country. The Immigration and Nationality Act presumably allows for the detention of excludable aliens only to facilitate their return.[175] In fact, Congress has explicitly rejected a provision for indefinite detention in the Immigration Act on at least four occasions.[176]

Even apart from the statute, the fifth amendment guarantees that no person's right to liberty can be limited without due process of law.[177] This protection is not restricted to citizens, but rather extends to all persons within the jurisdiction of the United States.[178] It forbids arbitrary detention and prevents the imposition of criminal penalties without a trial before a court of law.[179] Indefinite detention of aliens simply because their home country refuses to reaccept them violates the fifth amendment.[180]

Aliens are also protected against arbitrary, prolonged detention by the leading embodiments of customary international law. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides in Articles 3 and 9, respectively, that "[e]veryone has the right to life, liberty and the security of person," and that "[n]o one shall be subjected to arbitrary arrest, detention or exile."[181] The American Convention on Human Rights guarantees that punishment "shall not be extended to any person other than the criminal," and further that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human

---

with the Protocol, then the Protocol's provisions were not themselves a source of rights until implemented by Congress. 684 F.2d at 218-19. *Stevic*, however, was reversed by the Supreme Court, which appeared to recognize that provisions of the Protocol may be self-executing. 104 S. Ct. 2489, 2500 n.22 (1984). The *Bertrand* analysis respecting the Protocol is no longer valid.

175. *See* H.R. REP. No. 1192, 81st Cong., 1st Sess. 1 (1949). This Report concerns a proposed bill, H.R. 10, 81st Cong., 1st Sess. (1949), which would have greatly increased the Attorney General's power and discretion to detain and exclude undocumented aliens. The drafters of H.R. 10 also included a provision significantly reducing federal court jurisdiction over habeas corpus petitions filed by detainees. Although the Judiciary Committee favored passage of H.R. 10, the bill was never enacted. *See* H.R. REP. No. 1192 at 17-20 (minority disapproval of H.R. 10, signed by Emanuel Celler and Martin Groski); *see also Rodriguez-Fernandez*, 654 F.2d 1382 (10th Cir. 1981) (Immigration and Nationality Act does not permit indefinite detention as an alternative to exclusion). *But cf. Fernandez-Roque*, 734 F.2d 576 (under the Immigration and Nationality Act, the government has the authority to detain excludable aliens indefinitely when exclusion is impractical.); *Jean*, 727 F.2d at 974-75 (same).

176. *See* H.R. 10, 81st Cong., 1st Sess. (1949); H.R. 6333, 80th Cong., 2d Sess. (1948); H.R. 3, 77th Cong., 1st Sess. (1941); H.R. 5643, 76th Cong., 1st Sess. (1939); *see also* H.R. REP. No. 1192, at 7-8.

177. U.S. CONST. amend. V.

178. *See supra* note 163.

179. *Wong Wing*, 163 U.S. 228.

180. The application of the due process clause is to be distinguished from the question of what process is due to determine whether the individuals in question pose a threat to public order or national security.

181. G.A.Res. 217, U.N. Doc. A/810, at 72, 73 (1948).

person."[182] It expressly provides that "[n]o one shall be subject to arbitrary arrest or imprisonment."[183]

"[A]rbitrary arrest or detention" and deprivation of liberty "except on such grounds and in accordance with such procedure as are established by law" are prohibited under the International Convention on Civil and Political Rights.[184] These declarations recognize the basic principle of international law that no nation may subject an individual to prolonged and arbitrary detention,[185] a principle that has been recognized by United States courts.[186] The detention policy, which permits prolonged indefinite incarceration that is unassociated with immigration proceedings, contravenes these principles.

CONCLUSION

In a public statement discussing 1985 program priorities, the Commissioner of INS stated the intention to "[r]eevaluate [the] policy for alien detention and alternatives to detention before initiating new facilities projects."[187] Such an administrative "reevaluation" is compelled under domestic and international law. Arriving aliens who apply for asylum cannot, consistent with the Immigration and Nationality Act, Refugee Act, U.N. Protocol, and due process clause of the Constitution, be precluded from being released on parole under traditional administrative criteria. Asylum applicants should be permitted such release, either by interpreting current regulations to find such consideration to be in the "public interest,"[188] or by revising the regulations or enacting clarifying legislation.[189] Otherwise, the federal courts should declare the regulations void as inconsistent with statute, treaty, and Constitution.

In those instances where release is permitted, the filing of the asylum ap-

182. HOUSE COMM. ON FOREIGN AFFAIRS, HUMAN RIGHTS DOCUMENTS 170 (Comm. Print 1983).

183. *Id.* at 171.

184. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 54, U.N. Doc. A/6316 (1966).

185. Customary international law is a body of normative standards derived from the practices of countries and various international instruments. It is part of the law of the United States. *See* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

186. *Soroa-Gonzales*, 515 F. Supp. at 1061 n.18; Rodriguez-Fernandez v.Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *see also* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(e) (Tent. Final Draft 1985).

187. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, COMMISSIONER'S COMMUNIQUE, VOL. 7, NO. 3-8, at 2 (Mar.-Aug. 1984).

188. *See supra* note 55 and accompanying text. The immigration authorities construe this provision quite narrowly. *See* Reply Memorandum of Petitioners in Support of Habeas Corpus Petition at Exhibit A, *Singh*, 623 F. Supp. 545 (deposition of Benjamin Perlitsh).

189. Concern with the prospect of prolonged detention of asylum seekers prompted the House of Representatives to include a "speedy hearing" rule for asylum cases in proposed immigration reform legislation. The proposed rule would have provided that a detained applicant be released if a hearing on the claim was not held within 45 days after the application was filed and the detainee was not responsible for the delay. H.R. REP. NO. 115 PT. 1 , 98th Cong., 1st Sess. 57, 58 (1983). Immigration reform legislation foundered in the 98th Congress, however, and the 1985 initiative of Senator Simpson contains no provisions relating to asylum applicants. *See* S. 1200, 99th Cong., 1st Sess. (Immigration Reform and Control Act of 1985).

plication should be taken into consideration and, assuming a non-frivolous claim, liberal release conditions should be set, including release without the need to post bond under appropriate circumstances. The immigration authorities make such "non-frivolous" preliminary asylum determinations in other contexts,[190] and they are capable of such determinations in the detention context.

Finally, prolonged detention of an alien who cannot be returned to her home country should be permitted only if there is a reliable administrative determination that the individual in question poses a threat to public order or security. A full due process hearing and even the right to appointed counsel may be appropriate in this situation.[191] Judicial habeas corpus would be available to test the adequacy of the administrative decision.

The detention of refugees has recently become fashionable in some countries, including the United States. Such detention, moreover, has been divorced from immigration control and is now used to deter individuals from applying for or pursuing asylum in the United States. This policy of deterrence violates domestic and international law and it should be curtailed. Only by eliminating the detention policy will the human rights of refugees and other aliens be vindicated.

---

190. 8 C.F.R. § 208.4 (1985) (employment authorization).

191. *See, e.g.*, Morrisey v. Brewer, 408 U.S. 471 (1972); *In re* Gault, 387 U.S. 1 (1967). *But see* Perez-Perez v. Hanberry, No. 85-8552 (11th Cir. Jan. 27, 1986) (In habeas corpus actions brought by Cuban detainees, the Criminal Justice Act, 18 U.S.C. § 3006A (1982), does not authorize appointment and compensation of counsel).