The Saga of Indefinitely Detained Mariel Cubans: Garcia Mir v. Meese

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The Saga of Indefinitely Detained Mariel Cubans: *Garcia Mir v. Meese*

I. INTRODUCTION

In April 1980 approximately 115,000 to 130,000 Cubans arrived by boat on the Florida coast seeking admission to the United States.¹ These Cubans are commonly referred to as Mariel Cubans, or "Marielitos," taken from Mariel Bay, the Cuban port of departure.² Most of the new arrivals were placed in detention centers while waiting for sponsors to be located.³ After screening, many of the detainees were paroled pursuant to immigration law.⁴ However, over 14,000 Cubans remained detained as of August 1980.⁵ The Mariel Cubans were detained for many reasons. Many detainees merely lacked proper entry papers. While some Marielitos admitted committing crimes in Cuba, others were judged to be mental incompetents.⁶ In late 1980 those still detained were transferred from Florida to Leavenworth Federal Penitentiary in Kansas.⁷ In early 1981 all Mariel Cubans detained in Kansas were moved to the Federal Penitentiary in Atlanta.⁸

This Note first analyzes the struggle between the United States Attorney General, the district court, and the Eleventh Circuit Court of Appeals to find a workable policy for the release of detained Mariel

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³ See Boswell, *supra* note 1, at 929.
⁴ The applicable statute regarding parole is 8 U.S.C. § 1182(d)(5) which reads: The Attorney General may in his discretion parole into United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purpose of such parole shall, in the opinion of the Attorney General, has been served the alien shall forthwith return or be returned to the custody from which he was paroled . . . .
⁶ Boswell, *supra* note 1, at 929.
⁷ Id. at 930, 934.

Cubans. Second, this Note analyzes and critiques plaintiffs' (Mariel Cubans) arguments of entitlement to parole hearings with due process rights under the United States Constitution because the federal government created a liberty interest for each Mariel Cuban. Finally, this Note critiques the Eleventh Circuits' ruling on plaintiffs' claims.

This Note concludes that a portion of the Mariel Cubans were invited to come to the United States. This invitation coupled with government regulations created a liberty interest which could be extinguished only by meeting procedural due process requirements.

A. Distinctions Between Exclusion and Deportation

Under United States immigration law, the distinction between excludable and deportable aliens is of crucial importance. An alien who has "entered" the United States can be expelled only through a deportation hearing, whereas the alien who has not entered the United States is subject to an exclusion hearing. An "entry" occurs when the alien gains physical admission either by an Immigration and Naturalization Service (INS) grant, or through an unlawful border crossing. In contrast, an excludable alien has not entered the United States, but rather, is seeking admission at the border. Even though many border crossings are technically within the United States, for legal purposes, the alien is treated as stopped at the border. Likewise, the parole statute under which the Mariel Cubans were released specifically states that the parole of an alien into the United States does not constitute admission (entry) and despite the alien's physical presence, the alien is treated as if stopped at the border.

The importance of the distinction between deportation and exclusion lies in the constitutional protections required at deportation hearings which are not required at exclusion hearings. In deportation hearings the alien is given important procedural protections,

9. Id.
16. See supra note 4; Leng May Ma v. Barber, 357 U.S. at 186; see also C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 1.32 (1987).
whereas in exclusion hearings the alien is granted only those protections which Congress has chosen to give.\textsuperscript{18}

\textbf{II. PRIOR PROCEEDINGS}

\textit{A. Plaintiffs' Claim of Constitutional Due Process Rights in Parole Hearings}

On January 8, 1981 the long judicial saga of \textit{Fernandez-Roque/Garcia-Mir} began in the United States District Court in Kansas when a complaint was filed on behalf of all Mariel Cubans held in Leavenworth Federal Penitentiary.\textsuperscript{19} The case was transferred from Kansas to Georgia when the Attorney General moved the detained Cubans from Leavenworth, Kansas to the Atlanta Federal Penitentiary.\textsuperscript{20}

On June 5, 1981 Rafael Fernandez-Roque filed a habeas corpus action on behalf of all Cuban detainees incarcerated at the Atlanta Federal Penitentiary "who were excludable solely on the basis of lack of entry papers, 8 U.S.C. section 1182(a)(20)."\textsuperscript{21}

After the Attorney General reviewed the files of all Cubans incarcerated at Atlanta Federal Penitentiary and determined certain Mariel Cubans to be non-parolable, the plaintiffs renewed their motion for habeas corpus relief.\textsuperscript{22} Since the plaintiffs could not be returned to their home country and no other country would accept them,\textsuperscript{23} and because the INS determined them to be non-parolable,
the incarcerated Cubans were faced with the prospect of indefinite detention.\textsuperscript{24}

The plaintiffs argued that the Attorney General lacked the statutory authority to indefinitely incarcerate excludable aliens (Mariel Cubans),\textsuperscript{25} but the plaintiffs conceded that the Attorney General has statutory authority to temporarily detain an excludable alien while waiting to return the alien to the country of his or her origin.\textsuperscript{26} If an excludable alien could not be expelled from the United States, the plaintiffs argued that the alien was entitled to a parole hearing with due process rights.\textsuperscript{27}

In contrast, the government claimed that it could indefinitely detain, without due process requirements, any excludable Mariel Cuban who it determined to be non-parolable.\textsuperscript{28} The government relied on \textit{Palma v. Verdeyen}\textsuperscript{29} which held that the Attorney General had the statutory authority to indefinitely incarcerate excluded Cubans who the INS determined to be non-parolable.\textsuperscript{30}

The district court held that although the Attorney General does not hold express statutory power to indefinitely detain excludable aliens who could not be returned to the country from which they came, the Attorney General "does possess an implied statutory authority to detain for an indefinite period excludable aliens who cannot

\textsuperscript{24} Fernandez-Roque v. Smith, 567 F. Supp. at 1122. The Attorney General determined that for certain Mariel Cubans there were no "emergent reasons" for parole and the parole was not "strictly in the public interest." See 8 U.S.C. § 1182(d)(5).

\textsuperscript{25} Fernandez-Roque v. Smith, 567 F. Supp. at 1122. The Attorney General has the discretion to parole an alien applying for admission. See supra note 4. However, the Attorney General is not given express authority to indefinitely detain. See infra note 197.

\textsuperscript{26} Fernandez-Roque v. Smith at 1122-23. The Tenth Circuit in \textit{Rodriguez-Fernandez v. Wilkinson} found that the statute allowed the Attorney General to detain excludable aliens while awaiting deportation. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981). For an argument that Congress authorized only temporary detention of excludable aliens, see Helton, supra note 23, at 372-379. Indeed, section 1127 provides for the immediate physical removal of excludable aliens. 8 U.S.C. § 1127(a)(1) (Supp. 1986). However, if no country is willing to accept the excludable alien the code is silent. See 8 U.S.C. § 1127(b) (Supp. 1986).

\textsuperscript{27} Fernandez-Roque v. Smith, 567 F. Supp. at 1123. The plaintiffs relied primarily on \textit{Rodriguez-Fernandez v. Wilkinson}, 654 F.2d 1382 (10th Cir. 1981). The Rodriguez-Fernandez court held that because Cuba would not accept the aliens back, the Mariels were in essence confined for an indefinite term. Such imprisonment was punishment rather than detainment while awaiting deportation. Without good cause these Cubans could not be held. Id. at 1387.

\textsuperscript{28} Fernandez-Roque v. Smith, 567 F. Supp. at 1122.

\textsuperscript{29} 676 F.2d 100 (4th Cir. 1982).

\textsuperscript{30} Id. at 104.
be returned to their country of origin.” However, the court went further to rule that “all persons are entitled to their liberty absent some legally sufficient reason for detaining them.” The court held that although excludable aliens have no constitutional rights regarding their admission, they do have constitutional rights regarding their parole. The court reasoned that merely because excludable aliens are treated as if they were stopped at the border, it did not follow that once within the United States boundaries the alien could not claim any of the rights given to United States citizens. The court relied on Jean v. Nelson which rejected the fiction that an excludable alien does not possess any constitutional rights because the alien in theory remains outside the country. In addition, the court cited Plyler v. Doe which held that all aliens are “persons” for fifth and fourteenth amendment purposes.

According to the court, “[the plaintiffs] simply assert a right to be free from arbitrary detention despite the government’s determination that they are excludable.” The court distinguished Greenholtz v. Nebraska, which held that a convicted person has no constitutional right to be paroled before expiration of his sentence. The court reasoned that excludable aliens, unlike convicted prisoners, were not afforded due process rights before being imprisoned and thus were entitled to due process rights in parole determinations.

Thus, the court concluded that if the Attorney General determines that an alien is excludable, but expulsion is impracticable, the Attorney General can exercise the authority to detain:

only for an initial, temporary period of time . . . . Thereafter, a liberty interest arises on behalf of the alien detainee requiring that the continued exercise of the detention power be justified on the

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32. Id. at 1128.
33. Id. at 1125 (citing Landon v. Plasencia, 459 U.S. 21 (1982)).
34. Id., at 1125.
35. Id. at 1125-26.
39. Id. at 210.
42. Id. at 16.
basis of a procedurally adequate finding that the detainee, if released, is likely to abscond, or to pose a threat to persons or property within the United States.\textsuperscript{44}

The court ruled that to insure that the continued detention of excludable aliens is procedurally adequate, the aliens have the following rights: (1) the right to written notice of allegations supporting continued detention;\textsuperscript{45} (2) the right to present witnesses;\textsuperscript{46} (3) the right to cross-examination;\textsuperscript{47} (4) the right to a neutral decision-maker;\textsuperscript{48} (5) the privilege against self-incrimination;\textsuperscript{49} and (6) the right to counsel.\textsuperscript{50}

\textbf{B. The Eleventh Circuit Denial of Plaintiffs' Constitutional Claim}

The Eleventh Circuit, in reversing the district court decision,\textsuperscript{51} held that since parole is an integral part of the admission process, an excludable alien has no constitutional rights regarding his parole.\textsuperscript{52} According to the court, a prior Eleventh Circuit en banc ruling\textsuperscript{53} determined that parole was an integral part of the admission process and hence no constitutional rights were available to the excludable alien for purposes of challenging parole determinations.\textsuperscript{54} The court quoted the policy rationale of Jean v. Nelson: "A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."\textsuperscript{55}

\begin{itemize}
\item[44.] \textit{Id.} at 1128 (footnote omitted).
\item[45.] \textit{Id.} at 1136.
\item[46.] \textit{Id.}
\item[47.] \textit{Id.}
\item[48.] \textit{Id.} at 1137.
\item[49.] \textit{Id.} at 1138.
\item[50.] \textit{Id.} at 1136.
\item[51.] Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984).
\item[52.] \textit{Id.} at 581.
\item[53.] Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985). The Supreme Court decided Jean on non constitutional grounds. Jean v. Nelson, 472 U.S. at 854-57. The Court, per Justice Rehnquist, refused to rule on whether parole was part of the admission process. \textit{Id.}
\item[54.] Jean v. Nelson, 727 F.2d at 982.
\item[55.] Fernandez-Roque v. Smith, 734 F.2d at 582 (quoting Jean v. Nelson, 727 F.2d at 975). A plausible explanation for the policy of indefinite detention is the resulting theoretical deterrent effect on future aliens coming to the United States without proper documents. \textit{See infra} note 62.
\end{itemize}
C. Analysis of the Eleventh Circuit Decision

This policy rational is unpersuasive when applied to the district court's decision. It is simply not true that under the district court's guidelines a foreign leader could compel the release of any alien sent to the United States. For example, criminals and mental incompetents would most likely pose a threat to society and hence be unreleasable. The plaintiffs argued, and the district court held, that absent sufficient reasons the detainees were required to be paroled. Nothing in the district court's order required the release of aliens who pose a danger to life or property. Further, although the Supreme Court has ruled that excludable aliens have no constitutional rights regarding their admission, the Court has never decided whether parole is part of the admissions process and thus subject to the same limitations.

The Supreme Court long ago ruled that the Constitution is appli-
cable to aliens in some situations:\textsuperscript{59}

The Fourteenth Amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law . . . .' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color or nationality.\textsuperscript{60}

The Court recently affirmed this notion in \textit{Plyler v. Doe}.\textsuperscript{61}

In \textit{Fernandez-Roque v. Smith} (Fernandez-Roque I), it is important to remember that the plaintiffs were not seeking a change in their status as excludable aliens, but rather plaintiffs argued that they were entitled to due process rights in parole hearings. The plaintiffs in essence were asserting a right thought to be possessed by all people in free nations—the right to be free from arbitrary detention.\textsuperscript{62} Since all aliens are constitutionally protected from government abuse when in United States territory, it is logical to extend this protection when an alien, regardless of whether he is deportable or excludable, is threatened with \textit{indefinite} detention.\textsuperscript{63}

\begin{footnotes}
\item 60. \textit{Yick Wo v. Hopkins}, 118 U.S. at 369. \textit{See also} Mathews v. Diaz, 426 U.S. 67, 77 (1976). (The fifth amendment applies to all aliens, even if their presence is "unlawful, involuntary, or transitory . . . "); \textit{See generally} C. GORDON & H. ROSENFIELD, supra note 16, at \$ 1.31.
\item 61. 457 U.S. 202, 210 (1981). In \textit{Plyler} the Supreme Court ruled that all aliens are "persons" for fifth and fourteenth amendment purposes. \textit{Id}.
\item 62. "Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond . . . . Certainly this policy reflects the humane qualities of an enlightened civilization." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

While detention was the exception in 1958 the same is not true today. In 1982 the Department of Justice published an interim rule that declared in part: "However, in exercising this [parole] discretion, district directors should be guided by the fact that the statutory rule is one of detention, and that the use of parole authority is an exception to that rule and should be "carefully and narrowly exercised . . . ." 49 Fed. Reg. 30,045 (1982) (codified at 8 C.F.R. pts. 212 & 235). This change in detention policy is probably grounded in the assumption that detention works as a deterrent to such mass migrations as the Mariel boat lift. \textit{See} C. GORDON & H. ROSENFIELD, supra note 16, at \$ 3.17c. According to one author the result of this change in policy has led to the imprisonment of aliens from over seventy countries. \textit{See} Helton, supra note 23, at 360 n.58.
\end{footnotes}
III. PLAINTIFFS' RENEWED HABEAS CORPUS CLAIM

In 1985, the plaintiffs filed a renewed motion for habeas corpus relief. The plaintiffs, narrowed to those who the Attorney General determined to be non-parolable but not physically removable from the United States, had limited options. They had no constitutional rights regarding their parole. Further, they had to bring individual appeals to petition for the reopening of their asylum claims.

The plaintiffs reasserted two causes of action which had not been decided. The plaintiffs claimed that they had a "federally created liberty interest in parole, not arising directly from the Constitution itself" and that their indefinite detention violated international

64. The district court in Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), did not reach both of the plaintiffs' causes of action. The court found that the plaintiffs had constitutional rights to parole hearings and did not rule on whether the federal government had created a liberty interest. Id. at 1128-29 n.5.

Between 1983 and 1985 the plaintiffs brought two other actions against the Attorney General. First, the plaintiffs attempted to get their asylum proceedings re-opened on a class wide basis. See Fernandez-Roque v. Smith, 599 F. Supp. 1103 (N.D. Ga. 1984), rev'd sub nom. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 106 S. Ct. 1213 (1986). The plaintiffs introduced evidence that if they were returned to Cuba they would be treated like those who voluntarily returned and were "incarcerated, tortured, indicted, and tried as 'Mariel scum' who illegally entered Cuba." Fernandez-Roque v. Smith, 599 F. Supp. at 1105. The district court ruled that the Board of Immigration Appeals abused its discretion in not considering "whether the aliens had demonstrated a well-founded fear of persecution." Id. at 1108.

The Eleventh Circuit reversed. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 106 S. Ct. 1213 (1986). The appellate court ruled that the petition for class wide opening of asylum cases was not proper. Each member of the class had to file separately for reopening. Garcia-Mir v. Smith, 766 F.2d at 1492.

In early 1985 the plaintiffs brought an action on behalf of 147 incarcerated Marielitos who the Attorney General had approved for release. Fernandez-Roque v. Smith, 600 F. Supp. 1500 (N.D. Ga.), rev'd sub nom. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 106 S. Ct. 1213 (1986). Apparently the Attorney General halted the release of these Marielitos because of the December 14, 1984 agreement between the United States and Cuba. See supra note 23. The district court ruled that by not releasing those approved for release, the Attorney General abused his discretion. Fernandez-Roque v. Smith, 600 F. Supp. at 1506. The Eleventh Circuit reversed, ruling that there was no abuse of discretion. Garcia-Mir v. Smith, 766 F.2d at 1485. The court reasoned that as a result of the United States-Cuba agreement, the Attorney General had a legitimate fear that if released, the Marielitos were likely to abscond. Id.

65. Those who were parolable were released upon finding suitable sponsors. Again, an agreement between Cuba and the United States in which Cuba was to accept the return of 2,700 Mariel Cubans was reached in 1984. The agreement was suspended soon thereafter. See supra note 23.


69. Id.
This Note addresses the first claim.

A. Federally Created Liberty Interests

The plaintiffs comprised two groups. Group One consisted of Mariel Cubans who were immediately detained upon arrival and continued to be detained either because they were mentally incompetent or because they admitted committing crimes in Cuba. Group Two contained Mariel Cubans who were initially paroled and subsequently had their parole revoked. Although each group asserted that the government had created a liberty interest, different criteria were used to support each claim.

1. Creation of Liberty Interests—Limits on Discretion

One way for the government to create a liberty interest is by placing substantive limits on official discretion. To establish that a liberty interest exists, the claimant must show that a regulation, statute, or administrative practice provides the official decision-maker with standards which limit his discretion. In contrast, if the official decision-maker has unfettered discretion in making a decision, no liberty interest may be created.

According to the Fifth Circuit, rarely, if ever, would a government admit that a liberty interest was created by governmental action. A court should look to the essence of the governmental action

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70. Id. The international law cause of action was rejected by both the district court and also Eleventh Circuit. This cause of action will not be discussed in this Note. For an analysis of international law applied to indefinite exclusion, see Boswell, supra note 1, at 953-69.
72. Id. at 895. The INS parole revocation policy stated that parole would be revoked if the Cuban alien is one “who has been convicted in the United States of a felony or a serious misdemeanor and who has completed the imprisonment portion of the sentence; or . . . who presents a clear and imminent danger to the community or himself.” Id. (quoting Declaration of John A. Simon, Exhibit 15 to the Plaintiffs' Nov. 30, 1984 Brief). However, the court noted that although some parole revocations resulted from convictions of serious felonies, other Mariel Cubans had their parole revoked for committing lesser offenses and had served their sentences. Other Mariel Cubans had their parole revoked for merely being charged with a crime. Id.
75. See Olim v. Wakinekona, 461 U.S. at 248-49.
to consider whether a liberty interest was created.\textsuperscript{77} The significance of finding that a liberty interest exists is, that once created, this interest can be taken away only by meeting procedural due process requirements.\textsuperscript{78}

2. An Alternative: Grievous Loss and Liberty Interests

Initially, the Supreme Court held that the right to procedural due process protections depended "on the extent to which an individual will be 'condemned to suffer grievous loss.'"\textsuperscript{79} Later, in an about face, the Court categorically rejected "the notion that any grievous loss visited upon a person by the State is sufficient to invoke procedural protections of the Due Process Clause."\textsuperscript{80}

However, the Court has never repudiated the theory that substantial grievous loss alone is enough to give rise to a liberty interest. Indeed, there are Supreme Court decisions which support this position. In \textit{Morrissey v. Brewer}\textsuperscript{81} plaintiffs were paroled and subsequently had their parole revoked. The parolees argued that in order to revoke their parole, the state must provide procedural due process requirements.\textsuperscript{82} In ruling that a liberty interest was created by the parole of a prisoner, the Court failed to cite any statute, decision, or state law which limited the discretion to the official decision-maker.\textsuperscript{83} The \textit{Morrissey} Court seemed to look at the essence of the state action and determined that parole was a protected liberty interest.\textsuperscript{84} In \textit{Morrissey}, the loss inflicted by the state was that of a person's physical liberty; perhaps the most important interest of all.\textsuperscript{85}

\textsuperscript{77} Id.
\textsuperscript{79} Morrissey v. Brewer, 408 U.S. 471 (1972).
\textsuperscript{81} 408 U.S. 471 (1972).
\textsuperscript{82} Id. at 474.
\textsuperscript{83} See Herman, supra note 73, at 505.
\textsuperscript{84} Id.
\textsuperscript{85} See Friendly, \textit{"Some Kind of Hearing"}, 123 U. PA. L. REV. 1267, 1296 (1975) (deprivation of liberty is the harshest action the state can take against the individual).
B. Group One's Claim

Group One alleged that the liberty interest was created by the Status Review Plan, the policies of the executive regarding Mariel Cubans, and the 1967 Protocol Relating to the Status of Refugees.

In rejecting these arguments, the district court noted that although the Status Review Plan seemed to place some limits on the Attorney General's discretion, the Eleventh Circuit had determined that the Plan did not limit the discretion of the Attorney General. Further, the court ruled that the executive policies pertaining to Mariel Cubans who admitted committing serious crimes in Cuba, did not place any limits on official discretion. Finally, the court ruled that the plaintiffs' political asylum claims could not be heard on a class-wide basis. Thus, the court did not decide whether the Protocol Agreement created a liberty interest in parole.

C. Group Two's Claim

The previously paroled Mariel Cubans (Group Two) argued that they had a:

federally created liberty interest in their continued parole by virtue of (1) the Attorney General's Status Review Plan; (2) the general parole regulations at 8 C.F.R. 212.5(d)(2); (3) the creation

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The Status Review Plan required the INS to first individually review each detainee's file. Then if the reviewing official did not recommend parole, the review went before a panel consisting of immigration officials and Department of Justice personnel who personally interviewed the detainee. To be implemented, the panel recommendations for parole required approval by the Commissioner of the INS. Palma v. Verdeyen, 676 F.2d 100, 102 (4th Cir. 1982).

87. Fernandez-Roque v. Smith, 622 F. Supp. at 894. The executive pronouncement ordered Mariel Cubans who committed serious crimes in Cuba to be securely confined and subject to exclusion proceedings according with "Constitutional requirements for due process." Those Mariel Cubans who violated United States law after arrival would be confined and subject to exclusion. Id.

88. Id. at 893. The Protocol is found in 19 U.S.T. 6223, T.I.A.S. No. 6557. For a discussion of the Protocol applied to indefinite detention, see Helton, supra note 23, at 377-78.


91. Id. at 895.

92. See supra note 86.

93. 8 C.F.R. § 212.5(a)(d)(2) reads:
of a special "Cuban/Haitian entrant" status for Mariel Cubans,\footnote{In June of 1980 the Carter Administration announced that it would seek special legislation to deal with the unique circumstances of the Mariel Cubans. Pending congressional approval, Mariel Cubans would be entitled to a six month parole renewal which would enable them to qualify for public assistance. \textit{57} Interpreter Releases 305 (June 30, 1980).} and (4) the Presidential invitation to Mariel Cubans to come to this country.\footnote{In October 1984, the INS conceded that Mariel Cubans qualified for permanent resident visas under a 1966 Congressional Act. \textit{61} Interpreter Releases 847-50 (Oct. 19, 1984); \textit{see} Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).}

The court rejected the Status Review Plan creating a liberty interest because of Eleventh Circuit precedent.\footnote{Fernandez-Roque \textit{v. Smith}, 622 F. Supp. 887, 895 (N.D. Ga. 1985), \textit{rev'd sub nom. Garcia-Mir \textit{v. Meese}, 788 F.2d 1446 (11th Cir.), cert. denied, 107 S. Ct. 289 (1986). Group One could not logically assert that the President of the United States invited criminals and mental incompetents to come to the United States. \textit{96}. \textit{See supra} note 89 and accompanying text.} Likewise, the court found that since the parole regulations contained at 8 C.F.R. section 212.5(d) placed fewer restrictions on discretion than did the Status Review Plan, no liberty interest was created.\footnote{\textit{Fernandez-Roque \textit{v. Smith}, 622 F. Supp. at 896. The court ruled that the parole regulations in 8 C.F.R. § 212.5(d) placed fewer restrictions on the discretion of the Attorney General than did the Status Review Plan. Since the Eleventh Circuit ruled that the Status Review Plan did not place substantive limits on official discretion, it followed that the regulations in 8 C.F.R. section 212.5(d) did not place substantive limits on official discretion. \textit{Fernandez-Roque \textit{v. Smith}}, 622 F. Supp. at 896.} The district court reasoned that Eleventh Circuit precedent required the court to hold that neither the Status Review Plan nor the C.F.R. parole regulations required this ruling.\footnote{\textit{Fernandez-Roque \textit{v. Smith}}, 622 F. Supp. at 896. \textit{"To hold otherwise would be inconsistent with the Eleventh Circuit's decision in Garcia-Mir \textit{v. Smith."} \textit{Id.}}}

The Cuban/Haitian entrant status posed a different question. The court found that President Carter sought congressional legislation that would have treated Mariel Cubans differently from ordinary excludable aliens.\footnote{The legislation sought would entitle Mariel Cubans to be allowed to remain in the United States instead of being excluded and deported. \textit{Fernandez-Roque \textit{v. Smith}}, 622 F. Supp. at 896.} According INS policy, Mariel Cubans "were to
be ‘paroled or granted extended voluntary departure or stay of deportation as appropriate’ instead of being processed under the ordinary exclusion or deportation procedures.” 100 Although Congress failed to enact the proposed legislation, 101 the government accepted the policy as set forth by the INS. 102 Upon locating suitable sponsors, the Mariel Cubans were paroled rather than placed in exclusion proceedings. 103 Thus, the discretion of the administrative decision-maker was limited.

1. The Presidential Invitation to Mariel Cubans

The district court found that via specific announcements, President Carter invited to the United States “‘tens of thousands’ of Cubans who had not committed serious crimes in Cuba and who were not mentally incompetent.” 104 Established facts support this finding.

In April of 1980, when over 10,000 Cubans sought refuge in the Peruvian embassy claiming status as political refugees, President Carter declared that those Cubans in the Peruvian Embassy in Cuba “may be considered refugees even though they are within their country of nationality or habitual residence.” 105 Further, President Carter requested the appropriation of up to $4.25 million to aid Cuban resettlement. 106

In late April, an airlift of Cubans to Costa Rica, arranged by the United States, began, only to be suspended three days later by Fidel Castro. 107 On May 5, 1980 President Carter held a news conference which was reported in the Cuban newspaper Granma. 108 The President was asked what his “administration intend[ed] to do about enforcing current immigration laws and providing funds and programs for dealing with these newcomers [Mariel Cubans], who are presently a great burden on local communities?” 109 The President replied “We, as a nation, have always had our arms open to receiving refugees in accordance with American Law. . . . [W]e’ll continue to provide an

100. Id. (quoting INS Telexes).
101. Id.
102. Id. at n.14.
107. United States v. Frade, 709 F.2d 1387, 1389 (11th Cir. 1983).
109. Id. at 897-98 n.16.
Mariel Cubans

open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.”

Emphasizing that mainstream opinion considered this response to be an invitation, the district court quoted from the front page headline of the May 6, 1980 edition of the New York Times:

“PRESIDENT SAYS U.S. OFFERS ‘OPEN ARMS’ TO CUBAN REFUGEES... WARM RECEPTION IS PROMISED”

To support the claim of invitation, the plaintiffs presented documentary evidence that as a result of this statement, the number of Cubans that came to the United States increased dramatically. The plaintiffs’ evidence revealed that at the time of the above statement, there were approximately 16,000 Mariel Cubans in the United States. After the speech, about 16,000 to 20,000 arrived per week.

2. United States ex rel. Paktorovics v. Murff

The plaintiffs argued that the invitation together with the special Cuban/Haitian entrant status created a liberty interest in parole which could not be taken away without procedural due process. The plaintiffs claimed that this liberty interest placed the case within the scope of United States ex rel. Paktorovics v. Murff. In Paktorovics the alien was a Hungarian refugee who was released on

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110. Id. (emphasis in original).
111. Id. at 898 n.17. “As we go to press, the newspapers carry a story that the President has announced an ‘open arms’ policy for those fleeing Cuba...” 57 Interpreter Releases 201 (May 5, 1980).
112. See Brief for Appellees, supra note 103, at 18; see also Boswell, supra note 1, at 928 n.13.
113. See Brief for Appellees, supra note 103, at 18.
114. Id.
115. United States v. Frade, 709 F.2d 1387, 1394-95 (11th Cir. 1983). Further, the Frade court noted that at no time did the Carter Administration oppose the exodus from Cuba, but rather encouraged the mass departure. Id. at 1395-96.
116. 260 F.2d 610 (2d Cir. 1958).
117. See Brief for Appellees, supra note 103, at 20.
In August of 1957, the INS revoked Paktorovics' parole because of his alleged concealment of membership in the Hungarian Communist Party. When Paktorovics admitted he had no visa, the special inquiry officer found that Paktorovics was not admissible to the United States. The INS detained Paktorovics while waiting to deport him. Paktorovics filed a writ of habeas corpus after the Board of Immigration Appeals (BIA) dismissed his appeal of the exclusion order.

In the habeas corpus action, Paktorovics argued that a message delivered by President Eisenhower to Congress which "invited" Hungarians to seek refuge in the United States coupled with subsequent congressional action created a liberty interest for Paktorovics in his continued parole. The presidential message stated that thousands of Hungarians who fled their homeland after the Soviet invasion desired to remain in the United States. President Eisenhower went further to encourage Congress to revise the Immigration and Naturalization Act to deal with the influx of Hungarian refugees. The subsequent legislation enacted by Congress merely exempted Hungarian refugees from being excluded solely because of lack of proper entry papers.

In contrast, the government in Paktorovics argued that the case was an ordinary exclusion proceeding in which the Attorney General had discretionary authority to revoke parole. The government contended that the Attorney General was only required to provide a rev-

119. United States ex rel. Paktorovics v. Murff, 260 F.2d at 611. For a discussion regarding the parole provisions contained in 8 U.S.C. Section 1182(d)(5), see supra note 4 and accompanying text.
120. United States ex rel. Paktorovics v. Murff, 260 F.2d at 611.
121. Id. at 612.
122. Id. 8 U.S.C. § 1182(a)(20) allows the Attorney General to exclude those aliens paroled who do not have proper entry papers.
123. United States ex rel. Paktorovics v. Murff, 260 F.2d at 611.
124. Id. at 612.
125. Id. at 613-15.
126. Id. at 613.
127. Hungarian Refugees-Immigration Status-Adjustment, Pub. L. No. 85-559, 72 Stat. 419 (1958). Although this provision seemingly covered Paktorovics, the court did not use the statute to reach its decision. Since the statute was not enacted until after Paktorovics' order of exclusion was entered, the statute was not applicable.
ocation hearing to determine the basis for expulsion.\textsuperscript{129}

The Second Circuit ruled that despite the fact that Paktorovics' hearing was an exclusion hearing, the case was similar to a situation where an alien who is in the United States illegally is caught and is entitled to procedural due process in his deportation proceedings.\textsuperscript{130}

According to the court, the factor which made Paktorovics different from an ordinary case "is that Paktorovics was invited here pursuant to the announced foreign policy of the United States formulated in his [the President's] directive . . . [and] referred to in his Message to Congress. . ."\textsuperscript{131} Further, the court held that although the President lacked the power to alter the law by an invitation to Hungarian refugees, he could, by an invitation and acceptance by the alien, "change the status of the invited alien 'sufficient[ly] to entitle him to the protection of our constitution.'"\textsuperscript{132} The court concluded that in order to revoke Paktorovics' parole, the Attorney General must provide a hearing which would satisfy the requirements of procedural due process.\textsuperscript{133}

\textbf{D. The District Court Opinion}\textsuperscript{134}

The district court in Fernandez-Roque v. Smith (Fernandez-Roque II) followed Eleventh Circuit precedent\textsuperscript{135} and found that the President had invited the Mariel Cubans who had not committed serious crimes in Cuba and who were not mental incompetents.\textsuperscript{136} The court rejected the government's contention that the invitation implied that those Cubans coming to the United States shores would be treated just like any alien caught trying to sneak across the border.\textsuperscript{137}

The question that the court had to resolve was whether the invi-

\begin{itemize}
  \item \textsuperscript{129} Id. The procedure of the hearing could be as extensive as the Attorney General desired. \textit{Id.}
  \item \textsuperscript{130} Id. at 614.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id. at 615.
  \item \textsuperscript{135} United States v. Frade, 709 F.2d 1387 (11th Cir. 1983).
  \item \textsuperscript{136} Fernandez-Roque v. Smith, 622 F. Supp. at 899.
  \item \textsuperscript{137} Id.
\end{itemize}

[It is nonsensical to suggest that the President invited plaintiffs to the United States to be treated no differently than unadmitted aliens who are caught attempting to steal past our borders. Nor can it be argued with any reason of logic that plaintiffs were invited to face indefinite confinement until Castro agreed to their return to Cuba . . . .]

\textit{Id.} at 899-900.
tation and the special status created a protected liberty interest. The court framed the question as whether the invitation and special status placed substantive limitations on official discretion. The court followed Paktorovics and ruled that the invitation afforded the plaintiffs some status greater than that which is normally given to aliens stopped at the border.

Thus, the Attorney General's discretion was limited regarding the parole of Mariel Cubans: "The invitation concerned the substantive right to be 'assimilated into American society' not merely the right to demand that certain procedures be followed by the Attorney General in determining whether these plaintiffs should be detained." The court distinguished previous Supreme Court and Eleventh Circuit cases which dealt with excludable aliens. The court determined that none of these cases considered the creation of liberty interests and thus were distinguishable. Instead, the court followed the Paktorovics' conclusion "that such an invitation altered an excludable alien's status 'sufficient to entitle him to the protection of our constitution.'"

By finding that a liberty interest was created, the only question left was what process was due before that liberty interest could be taken away. The court followed its previously enunciated due process protections. In addition, the court ordered the Attorney General to file a plan within thirty days that would provide the plaintiffs of Group Two with hearings according to the due process standards outlined by the court in Fernandez-Roque I.

138. Id. at 900.
139. Id. (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).
141. Id.
142. Id.
145. Id. (quoting United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958)).
146. Id.
147. For the procedural due process standards required by the district court, see supra text accompanying notes 45-50.
148. Fernandez-Roque v. Smith, 622 F. Supp. at 904. The court also ordered the Attorney General to begin hearings within sixty days of the order. Id.
E. Eleventh Circuit Holding

The government filed an appeal with the Eleventh Circuit.\textsuperscript{149} After briefing and oral arguments, the Eleventh Circuit reversed.\textsuperscript{150} Unlike the district court, the Eleventh Circuit refused to treat the case as unique.\textsuperscript{151} From the beginning of the opinion, and before reaching the merits, the court indicated that even if a liberty interest was created, the appellees (Mariel Cubans) still had no viable claim: "The question is made more difficult by the fact that, once we enter the rarefied domain of non-constitutionally based due process rights, the appellees here are excludable aliens and hence have virtually no constitutional rights in any event."\textsuperscript{152}

The court proceeded to outline how non-constitutional liberty interests are created. The court said that the usual method for creating this liberty interest was via a rule or regulation which placed substantive limitations on the discretion of official decision makers.\textsuperscript{153} According to the court, the plaintiffs failed to "demonstrate the existence of the particularized standards of review that yield a protected liberty interest . . . ."\textsuperscript{154} The court stated that by deciding the case on these narrow grounds, it properly avoided the constitutional issue of whether there was an actionable non-constitutional based due process claim.\textsuperscript{155}

Specifically, the court held that although the Cuban/Haitian entrant status\textsuperscript{156} afforded the appellees more generous treatment than was afforded to other excludable aliens, this special treatment was

\textsuperscript{149}. Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986). The appeal sought an emergency stay of the district court's order to prepare and implement a plan for parole hearings. \textit{Id.} at 1452-53. The Eleventh Circuit denied the stay of the order to prepare the plan, granted the stay of implementation of the plan, and finally, denied summary reversal. \textit{Id.} at 1457. The court ruled that it would decide the appeal on the merits when the parties fully briefed the issues. \textit{Id.}

The plaintiffs filed a cross appeal for Group One to whom the district court denied parole hearings. \textit{See supra} texts accompanying note 67-70. The Eleventh Circuit affirmed the district court regarding Group One. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), \textit{cert. denied}, 107 S. Ct. 289 (1986). This part of the opinion will not be discussed in this Note.


\textsuperscript{151}. Garcia-Mir v. Meese, 788 F.2d at 1449.

\textsuperscript{152}. \textit{Id.}

\textsuperscript{153}. \textit{Id.} at 1450 (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

\textsuperscript{154}. Garcia-Mir v. Meese, 788 F.2d at 1450.

\textsuperscript{155}. \textit{Id.} at 1450-51. The court said this despite the fact that it had seemingly decided this issue. \textit{See supra} text accompanying note 152.

\textsuperscript{156}. \textit{See supra} note 94.
wholly discretionary.\textsuperscript{157} The court found that the 1980 legislation gave Cubans certain benefits,\textsuperscript{158} but the legislation did not provide any guidelines for parole.\textsuperscript{159} To the court, this case was indistinguishable from the recent Supreme Court decision in \textit{Connecticut Board of Pardons v. Dumschat}.\textsuperscript{160} 

In \textit{Dumschat}, the Supreme Court ruled that early release from prison created no actionable interest by the statistical showing that there was a great likelihood that a prisoner would obtain an early release.\textsuperscript{161} The Supreme Court ruled that because "a wholly and expressly discretionary state privilege [in early parole] has been granted generously in the past" an actionable liberty interest is not automatically created.\textsuperscript{162} The Supreme Court distinguished between the initial parole of a prisoner and revocation of that parole.\textsuperscript{163} The Court concluded that there was no actionable liberty interest in parole, absent statutory restrictions that limit the official decision-maker's discretion.\textsuperscript{164} Because the Eleventh Circuit found that the treatment afforded the plaintiffs was wholly discretionary, it ruled that no liberty interest was created.\textsuperscript{165} 

Applying \textit{Dumschat}, the Eleventh Circuit held that the executive could not by himself create an actionable liberty interest.\textsuperscript{166} The court reasoned that the appellees "provide us with no precedent or logical basis that the President or one of his subordinates could create actionable liberty interests."\textsuperscript{167} The court distinguished \textit{Paktorovics} saying, Congress had acted along with the President and only the two branches combined could create an actionable liberty interest.\textsuperscript{168}

The appellees also argued that the case came under the scope of \textit{Morrissey v. Brewer}.\textsuperscript{169} In \textit{Morrissey}, the Supreme Court held that a

\begin{itemize}
  \item \textsuperscript{157} \textit{Garcia-Mir v. Meese}, 788 F.2d at 1452.
  \item \textsuperscript{158} \textit{Id.} The court found that the purpose of the Special Status was "to aid in resettlement, not to effect parole." \textit{Id.}
  \item \textsuperscript{159} \textit{Id.} The court held that this legislation provided for the executive to retain authority to act according to the Immigration and Nationality Act. \textit{Id.}
  \item \textsuperscript{160} 452 U.S. 458 (1981).
  \item \textsuperscript{161} \textit{Id.} at 464.
  \item \textsuperscript{162} \textit{Id.} at 465 (quoting Leis v. Flynt, 439 U.S. 438, 444 n.5 (1979)).
  \item \textsuperscript{163} \textit{Id.}
  \item \textsuperscript{164} \textit{Id.} at 465-66.
  \item \textsuperscript{165} Garcia-Mir v. Meese, 788 F.2d 1446, 1452 (11th Cir.), \textit{cert. denied}, 107 S. Ct. 289 (1986).
  \item \textsuperscript{166} \textit{Garcia-Mir v. Meese}, 788 F.2d at 1451.
  \item \textsuperscript{167} \textit{Id.} at 1451 (footnotes omitted).
  \item \textsuperscript{168} \textit{Id.} at n.5.
  \item \textsuperscript{169} 408 U.S. 471 (1972).
\end{itemize}
prisoner released on parole has certain due process rights regarding the revocation of his parole.\textsuperscript{170} This liberty interest exists regardless of whether the state provided for particularized standards of review regarding parole revocations.\textsuperscript{171} Despite the identical interests in \textit{Morrissey} and \textit{Garcia-Mir}, the Eleventh Circuit ruled that \textit{Morrissey} was distinguishable: "Careful review of \textit{Morrissey} and \textit{Greenholtz v. Nebraska Penal Inmates},\textsuperscript{172} [citations omitted] the case that limited \textit{Morrissey}'s reach, makes clear that the liberty interest extant in the parole revocation context is derived \textit{directly} from the Due Process Clause itself . . . . It is simply not a nonconstitutional interest."\textsuperscript{173}

Thus, according to the Eleventh Circuit, in \textit{Morrissey} the rights of paroled prisoners "are directly derived from the Due Process Clause. We have held the Due Process Clause yields to these aliens no liberty interest in a parole revocation hearing.\textsuperscript{174}

The court concluded, and all parties to the case agreed, that "with today's decision we have reached the point in this long-standing controversy where we have rejected all legal theories, constitutional and otherwise, advanced by the appellees."\textsuperscript{175} Unless the appellees sought, and the Supreme Court granted certiorari, the cases would be dismissed: "[i]nterest reipublicae ut sit finis litium."\textsuperscript{176}

\textbf{F. Analysis and Criticism of the Eleventh Circuit Decision}

1. Excludable Aliens and Invocation of the Constitution

From the outset, the Eleventh Circuit misstated the question at issue. Contrary to the Eleventh Circuit opinion, the appellees did not argue that the claimed liberty interest arose from the Constitution, rather, they argued that it arose from limitations on the Attorney General's discretion.\textsuperscript{177} It is irrelevant whether the Mariel Cubans had any Constitutional rights apart from their liberty interest claim.

\begin{footnotes}
\item[170] \textit{Id.} at 484-90.
\item[171] \textit{Id.} at 482.
\item[172] 442 U.S. 1 (1979).
\item[173] \textit{Garcia-Mir v. Meese}, 788 F.2d at 1452.
\item[174] \textit{Id.} at 1453 (citing Fernandez-Roque v. Smith, 734 F.2d 576, 581-82 n.8 (11th Cir. 1984)).
\item[175] \textit{Garcia-Mir v. Meese}, 788 F.2d at 1455.
\item[176] "It is in the interest of the state that there should be an end of a lawsuit." \textit{Id.} (translated from Latin text).
\item[177] See Brief for Appellees \textit{supra} note 103, at 1-28. The court's statement that excludable aliens "have virtually no constitutional rights" has been interpreted by the Fifth Circuit as dicta and "not mean[ing] that such aliens have no constitutional protection whatever." Lynch v. Cannatella, 810 F.2d 1363, 1372 (5th Cir. 1987).
\end{footnotes}
Indeed, according to the Supreme Court, a plaintiff need not show that the claimed liberty interest arose directly from the Constitution. The Court ruled that although the Constitution itself offers plaintiffs no original protection, once a state or the federal government grants a liberty interest, that interest cannot be taken away without constitutional due process protection. That is, once the liberty interest is created, the person to whom the liberty interest is granted can use the Constitution to insures that a deprivation of liberty is subject to due process protection. The ability to invoke the Constitution becomes viable when the liberty interest is granted. Thus, it is irrelevant whether the Mariel Cubans had any constitutional rights apart from their claimed liberty interest.

2. Connecticut Board of Pardons v. Dumschat

In applying Dumschat to this case, the Eleventh Circuit again misstated the plaintiffs argument. The court considered only whether the Cuban/Haitian Special Status provided the necessary restrictions on the discretion of the official decision-maker. The court ignored the plaintiffs' contention that the discretion of the official decision-maker was limited by both the Presidential invitation and the Cuban/Haitian Special Status. Further, the plaintiffs' contention was that they had a liberty interest in their continued parole, not whether they


It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison . . . . But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment liberty to entitle him to those minimum procedures appropriate under the circumstances are required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated.

Id. (emphasis added).

The Court went further to add: "[w]e think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." Id. at 588; see also Meachum v. Fano, 427 U.S. 215, 227 (1976) ("[b]ut the liberty interest there [in Wolff] did not originate in the constitution . . . .").

179. See supra note 178.

180. See Meachum v. Fano, 427 U.S. at 227 (The predicate for invoking the protection of the fourteenth amendment is a creation of a liberty interest.).

181. Id.

182. See Garcia-Mir v. Meese, 788 F.2d 1446, 1451-52 (11th Cir.), cert. denied, 107 S. Ct. 289 (1986). The court did this by first ruling that benefits from the Cuban/Haitian Special Status were discretionary. See supra note 157 and accompanying text. The court, however, did not consider whether the Special Status and the invitation taken together created a liberty interest.
should have initially been paroled.\(^{183}\)

3. \textit{Morrissey v. Brewer}  

Contrary to the court's opinion, \textit{Greenholtz} did not "make clear" that the liberty interest in \textit{Morrissey} was derived directly from the due process clause of the Constitution. Again, \textit{Morrissey} dealt with a situation where a state had paroled a prisoner.\(^{184}\) In order to revoke the granted parole, the state had to afford the parolee a revocation hearing with due process rights.\(^{185}\) Thus, until the state paroled the prisoner, the prisoner had no ability to use the Constitution.\(^{186}\) The Court in \textit{Greenholtz} limited \textit{Morrissey} to its facts—a prisoner can use the Constitution to attain due process rights only when he is granted parole.\(^{187}\)

4. \textit{United States ex rel. Paktorovics v. Murff}  

The Eleventh Circuit misstated the holding in \textit{Paktorovics}. The Second Circuit in \textit{Paktorovics} held that via President Eisenhower's statements, Paktorovics was invited and hence had an actionable liberty interest.\(^{188}\) Although the Eleventh Circuit distinguished \textit{Paktorovics}, the court's ruling is dramatically opposed to \textit{Paktorovics}:

"[b]ut to give countenance to the notion that one of the political branches can simply waive a magic wand and 'create' (and by implication extinguish) constitutional rights would be to completely undo the notion of limited government through separated, checked and balanced powers."\(^{189}\)  

While the precedent supplied by the district court was scant,\(^{190}\) the logical basis for the court's ruling is solid.\(^{191}\) Indeed, no previous

\(^{183}\) Brief for Appellees \textit{supra} note 103, at 11-29.  
\(^{184}\) \textit{Morrissey v. Brewer}, 408 U.S. 471, 482 (1972); see also \textit{supra} text accompanying notes 169-171.  
\(^{185}\) \textit{Morrissey v. Brewer}, 408 U.S. at 482.  
\(^{186}\) \textit{See} \textit{Greenholtz v. Inmates of Neb. Penal \& Correctional Complex}, 442 U.S. 1, 11 (1979). In \textit{Greenholtz} the Court ruled "that the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained." \textit{Id.} (emphasis in original).  
\(^{187}\) \textit{Id.}; \textit{see} Herman, \textit{supra} note 73, at 512-15. In contrast, a prisoner has no constitutional claim to early parole unless state regulations limit the discretion of the parole board. \textit{See} \textit{Greenholtz v. Inmates of Neb. Penal \& Correctional Complex}, 442 U.S. at 12.  
\(^{188}\) United States \textit{ex rel. Paktorovics v. Murff}, 260 F.2d 610, 614 (2d Cir. 1958). The Second Circuit held that the Presidential invitation changed Paktorovic's status. \textit{Id.}  
\(^{190}\) Although the district court cited similar cases, the only case on point was \textit{Paktorovics}.  
\(^{191}\) Since the Eleventh Circuit was obliged to follow its own precedent, the court in \textit{Gar-
set of facts compares with the events that led to the arrival of over 120,000 Cubans in 1980.192 The documentary evidence provided by the plaintiffs and the Eleventh Circuit’s own precedent support the district court’s finding that the Cubans were *invited* to come to the United States.193 Is it logical to find that the Cubans who accepted the President’s invitation could be imprisoned indefinitely without cause upon arrival?

5. Separation of Powers

Nothing in prior Supreme Court rulings on the creation of liberty interests indicate that the executive branch lacks the power to create liberty interests. Since the power to exclude is “inherent in the executive department of the sovereign,” Congress may delegate to the executive enormous zones of power in the immigration field without giving rise to delegation problems.194 The Eleventh Circuit has already found that Congress, in the Immigration and Nationality Act, gave the executive “sweeping delegations of Congressional authority.”195 Given this finding, separation of powers is not an issue when the executive uses its delegated authority not to change the law regarding admission, but only to create a liberty interest for a selected group of foreign nationals by inviting them to come to the United States.

Thus, the Eleventh Circuit’s fear that giving countenance to the presidential invitation would “undo completely the notion of limited government through separated, checked and balanced powers” is unwarranted. As the district court observed, the finding that a liberty interest existed for invited Mariel Cubans does not change the law, but rather determines the status of aliens who were not covered by the Immigration and Naturalization Act.196 The recognition that the in-
vited Mariel Cubans had liberty interests made the United States accountable for its express foreign policy pronouncements.\textsuperscript{198} Further, the district court finding of a liberty interest did not free any Cuban. Instead, under the ruling, the Cubans who had their parole revoked would be entitled to due process before the Attorney General could lawfully detain them indefinitely.\textsuperscript{199}

Yet the Eleventh Circuit found otherwise. Under the Eleventh Circuit ruling, if the Attorney General decided to imprison all 120,000 Cubans, no legitimate challenge to this incarceration could be made. The \textit{invited} aliens had absolutely no liberty interest in their freedom. Further, if the Attorney General paroled any Cuban, this parole could be revoked without any semblance of due process for any reason detailed in 8 U.S.C. section 1182(a)(1-33), even for merely not possessing proper entry papers.

6. Conclusion

As outlined above, the rationale given by the Eleventh Circuit for denying the plaintiff's claim of a liberty interest is unpersuasive. Underlying the opinion is the sweeping proposition that excludable aliens "have virtually no constitutional rights in any event."\textsuperscript{200} This proposition allows for the President and the Attorney General to act in any manner when dealing with excludable aliens. Further, this proposition potentially allows courts to refuse to entertain any constitutional claims of excludable aliens.\textsuperscript{201}

\textbf{G. Landon v. Plasencia—An Alternative Rationale}

Group Two plaintiffs in \textit{Garcia-Mir v. Meese} are not ordinary excludable aliens. The Cuban aliens fell into a category that the Immigration and Naturalization Act does not directly address: excluda-
ble but not deportable. In *Landon v. Plasencia*, the Supreme Court extended due process rights in exclusion hearings to an alien who was technically excludable but who had unique circumstances.

In *Landon*, a resident alien (Ms. Plasencia), who entered the United States in March 1970, left the United States and entered Mexico in June 1975. Ms. Plasencia was stopped at the United States border when she tried to reenter the United States with six undocumented aliens. She was detained at the border for inquiry by Immigration officers. After inquiry, the INS gave Ms. Plasencia notice that they (the INS) were seeking to exclude her.

At the exclusion hearing, the Immigration Judge found that Ms. Plasencia was excludable, and ordered her “excluded and deported.” The BIA dismissed her appeal and Ms. Plasencia filed a habeas corpus petition in district court.

The district court vacated the decision of the BIA and found that Ms. Plasencia was entitled to deportation proceedings rather than an exclusion hearing. Specifically the district court found that Ms. Plasencia's departure to Tijuana was not a “meaningful departure” and therefore she was entitled to a deportation hearing rather than an exclusion hearing.

Upon review, the Supreme Court ruled that when an alien is stopped at the border, the alien’s status is to be determined in an exclusion proceeding. The Court held that Ms. Plasencia was stopped while trying to “enter” the United States and was only entitled to an exclusion proceeding. Again, in ordinary exclusion hear-

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202. *See supra* note 197 and accompanying text.
204. *Id.* at 32.
205. *Id.* at 23.
206. *Id.*
207. *Id.* at 24-25.
208. *Id.* The Immigration Judge found that Ms. Plasencia’s travels to Mexico constituted a “meaningful departure” and thus her return to the United States was an “entry.” *Id.* at 24. The Immigration Judge also found that Ms. Plasencia violated 8 U.S.C. Section 1182(a)(31) which allows for the exclusion of an alien seeking admission “who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.” *Landon v. Plasencia*, 459 U.S. at 23.
209. *Id.* at 25.
210. *Id.*
211. *Id.*
212. *Id.* at 32.
213. *Id.* at 31-32.
ings due process is whatever Congress determines is adequate.214

Nevertheless, the Court ruled that Ms. Plasencia was entitled to some due process rights regarding her exclusion hearing.215 The Court reasoned that once an alien gains admission to the United States and begins to develop the ties of permanent residence, the alien’s constitutional status changes accordingly.216 Likewise, those resident aliens returning from non-extended excursions to foreign countries are entitled to due process rights regarding any “attempt to exclude” them.217 The Court concluded that “the constitutional sufficiency of procedures provided in any situation, of course varies with the circumstances” and the district court is the proper place to decide the necessary procedural due process protections.218

The unique circumstances that led to the granting of due process rights in Ms. Plasencia’s exclusion proceeding can be analogized to the unique circumstances of the detained Mariel Cubans who were initially granted parole by the Attorney General (Group Two). These unique circumstances are sufficient to entitle Group Two Mariel Cubans to due process rights in their parole revocation hearings.

The plaintiffs in Group Two are indeed unique. They were invited to come to the United States, paroled, had their parole revoked, and were found to be excludable and deportable. Yet, because no country would take them, they are being indefinitely incarcerated in federal prison. Unlike the alien in Shaughnessy v. United States ex rel. Mezei, the Cubans were not being excluded because of “national security” reasons.219 Ordinarily, excludable aliens are paroled for a short period of time while waiting for their status to be determined or while waiting to be expelled.220 However, the Mariel Cubans of Group Two spent a substantial amount of time in the United States while paroled.221

Like Ms. Plasencia’s situation, these Cubans developed ties to the community in which they were paroled.222 Thus, even though the

214. See supra note 18 and accompanying text.
216. Id. at 32.
217. Id. at 33.
218. Id. at 36-37.
220. See supra note 197 and accompanying text.
222. Fernandez-Roque v. Smith, 622 F. Supp. at 895 n.12 (“Because these class members
Immigration and Nationality Act maintains parole of the alien does not constitute an admission, with Mariel Cubans the necessary ties required to create due process protections were formed by their lengthy parole in the community.

The finding of the Eleventh Circuit deprives the Cuban aliens not only of their physical liberty without due process, but also of their intimate ties to the community without due process. The Mariel Cubans of Group Two present a unique situation and, like Ms. Plasencia, they should not be treated as aliens who conveniently fit into the United States immigration laws.

III. CONCLUSION

As argued in this Note, the United States immigration laws do not specifically provide guidelines for the Attorney General, or the courts to follow when confronted with indefinitely detained excludable aliens who cannot be physically expelled from the United States. Since Congress has plenary power over immigration matters, it is up to that body to remedy this void.

The above analysis has shown that the acts of the executive branch created a liberty interest in the Mariel Cubans of Group Two. It is unthinkable that the courts of this country, which represent the "home of the free," would allow any person to be indefinitely incarcerated in prison without minimal due process. By denying certiorari in Garcia-Mir v. Meese that is exactly what the majority of the Supreme Court has done.223

Philip Erickson

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