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NOTES

The Indefinite Detention of Excluded Aliens: Statutory and Constitutional Justifications and Limitations

INTRODUCTION

In the spring of 1980, approximately 125,000 Cuban aliens reached the shores of the United States in what was labeled the "Freedom Flotilla." Although these aliens were inadmissible under United States immigration law, the overwhelming majority were granted special permission to stay in the United States. However,


   After 10,000 Cubans sought refuge in the Peruvian Embassy in Havana in the first week in April, the United States agreed to admit 3,500 of those in the compound. They were to be screened first in Costa Rica, but on April 18, Cuban Premier Fidel Castro halted flights to Costa Rica. On April 20, Castro announced that Cubans wishing to emigrate to the U.S. could do so by boarding boats at Mariel Harbor. This prompted a flotilla of private boats from the United States to go to Mariel and transport thousands of the Cuban Nationals back to this country each day. Threats and seizures of vessels by our government failed to stem the flow of boats.

   On May 6, President Carter declared an emergency in the State of Florida resulting from the Cuban emigration wave, thus making the Federal Emergency Management Agency responsible for providing reimbursements to Federal, State and local agencies for extraordinary expenses and for coordinating the activities of government and private agencies involved in the emergency.

   Four United States military facilities were designated as processing centers for those Cubans who lacked sponsorship pending the determination of their asylum status. A massive resettlement effort involving public and private agencies began.

   On May 14, President Carter announced his program aimed at the safe and orderly exodus of all Cubans wishing to leave Cuba, but the Castro government did not accept this plan. U.S. Customs officials eventually seized about 1,000 vessels, and by mid-June the flow of boats from Cuba had abated.

   By the time the boatlift ended, approximately 125,000 Cubans had come to the United States.


3. The aliens were allowed to remain pursuant to the Attorney General's parole power. See 8 U.S.C. § 1182(d)(5)(A) (1982); see also Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982).
aliens who admitted to committing crimes in Cuba were detained by the immigration authorities pending an exclusion hearing. Those aliens who have since been found excludable are required by statute to be "immediately deported" unless the Attorney General determines that such deportation is not "practicable or proper." Because Cuba's refusal to accept these aliens renders deportation impractica-

8 U.S.C. § 1127(a)(1) (1982). If the country from which the alien departed is adjacent to the
ble, a significant number of Cubans remain in detention.

The continued imprisonment of these excluded Cuban aliens raises statutory and constitutional questions regarding the power of the federal government to detain aliens that it chooses not to admit. The answers to these questions are important not only for the Cuban aliens presently detained but also for future American policy toward the problem of mass illegal immigration.

United States and the alien is not a native or national thereof, the alien will be deported to the country from which he originally embarked. § 1227(a)(1) (1982).

Before 1981, the INA required that an excluded alien be deported to “the country whence he came.” § 1227(a) (1982). In 1981, Congress amended the law to provide a series of alternative destination points in case an excluded alien’s native country refuses his return. See § 1227(a)(3) (1982).

8. See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384, 1385-86 (10th Cir. 1981) (noting that Cuba has refused at least six times to reaccept Cuban nationals denied admittance to the United States). More recently, Thomas Enders, Assistant Secretary of State for Inter-American Affairs, told the House Foreign Affairs Committee that “there is no good evidence to support [the] conjecture” that Cuba might accept the return of Cubans detained in the United States. Nazario, Cubans Jailed in U.S. Start a Court Fight, Wall St. J., Jan. 21, 1983, at 17, col. 3.

9. For example, about 1,100 of the Cubans who came to the United States in the Freedom Flotilla remain in custody at the federal penitentiary in Atlanta. Approximately 950 of these were classified as dangerous; the rest are to be released on parole as soon as sponsors become available. Nazario, Cubans Jailed in U.S. Start a Court Fight, Wall St. J., Jan. 21, 1983, at 17, col. 3.

These detainees are apparently those who remain in detention following the district court’s order in Fernandez-Roque v. Smith, 91 F.R.D. 239 (N.D. Ga. 1981), remanded with directions, 871 F.2d 426 (11th Cir. 1982). Fernandez-Roque involved a class action on behalf of 1,800 Cuban aliens, each of whom had been detained at the Atlanta penitentiary for at least 15 months. Fernandez-Roque v. Smith, 539 F. Supp. 925, 929 (N.D. Ga. 1982). The court ordered their release on parole unless the government could show that a particular alien was a threat to national security or the public interest, or that the alien was likely to abscond. 91 F.R.D. at 243.

10. The United States is by far the world’s largest recipient of refugees and immigrants. In 1978, over 600,000 legal immigrants and refugees were admitted for permanent settlement in the United States. Teitelbaum, Right versus Right: Immigration and Refugee Policy in the United States, FOREIGN AFF., Fall 1980, 21, 24. In addition, most responsible estimates place the number of illegal aliens in the United States at from four to six million as of the mid-1970’s, and the number has probably risen substantially since then. Id. at 25.

Moreover, the pressures for international migration can be expected to increase greatly in the coming decades. Id. at 27. The International Labour Organization estimates that the developing world must generate between 600 and 700 million new jobs in the next 20 years just to keep its unemployment rate from rising. Id. This number represents more jobs than currently exist in the entire industrialized world. Id.

A more precise idea of the prospects for large-scale migration to the United States can be gleaned by examining the rate of population growth in the developing countries that have been the primary sources of migration to the United States. Aside from Jamaica and Cuba, these countries can expect population growth ranging from about 30% to nearly 90% in the next 20 years. Mexico alone must generate an estimated 31 to 33 million new jobs in the next 20 years to absorb its growing work force. A New and Secure System to Verify that Job Applicants are Authorized to Work in the United States: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 130 (1981) (statement of Ray Marshall, former Secretary of Labor). Moreover, massive flows of refugees from the Caribbean Basin are likely because of economic and political pressures. See The Immigration Reform and Control Act of 1982; Hearings on S. 2222 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary and the Subcomm. on Immigration, Refugees, and the International Law of the House Comm. on the Judiciary, 97th
The most vexing of these questions arises because the Immigration and Nationality Act of 1952 (INA) does not expressly authorize or limit the detention of those Cuban aliens who have not yet been paroled and who cannot be deported. Courts faced with the resulting statutory uncertainty have disagreed on whether the INA permits the indefinite detention of undeportable excluded aliens.

12. The Attorney General may temporarily parole aliens pending their exclusion hearings. 8 U.S.C. § 1182(D)(5)(A) (1982); see note 3 supra. If a paroled alien is later found excludable, an Immigration and Naturalization Service (INS) regulation limits the alien's detention when deportation is impracticable:

If the exclusion order cannot be executed by deportation within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director the public interest requires that the alien be continued in custody.

8 C.F.R. § 212.5(b)(2) (1982), amended, 47 Fed. Reg. 30,045 (1982) (to be codified at 8 C.F.R. § 212.5). Neither statute nor regulation requires the release of an undeportable alien who has not been paroled by the time he or she is found excludable.

14. Unless otherwise indicated, this Note will use the term "excluded" alien to refer to aliens who were not paroled pending their exclusion hearing and for whom deportation is either impracticable or improper.
15. Compare Palma v. Verdeyen, 676 F.2d 100, 104-05 (4th Cir. 1982) (indefinite detention of undeportable, excluded alien is permissible), with Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (undeportable, excluded alien must be released after a reasonable period of negotiations for the return of the alien to the country of origin).
October 1983] Note — Indefinite Detention of Excluded Aliens

Part I of this Note examines the statutory authority for the indefinite detention of excluded aliens. It concludes that although the INA does not explicitly authorize such detention, the statute's purposes and specific provisions imply that Congress intended to establish a statutory preference for the detention of excluded aliens. The Note then argues in Part II that indefinite detention is constitutionally permissible when it is necessary to vindicate the government's sovereign right to exclude aliens. The Note concludes, however, that the Constitution requires the government to make a continuing good faith effort to deport a detained, excluded alien.

I. INDEFINITE DETENTION UNDER THE INA

A. The Statutory Preference for Detention

Specific aspects of the INA support the conclusion that Congress intended to establish a statutory preference for the detention of excluded aliens. Congress placed limits only on the detention of expelled aliens. An alien who enters the country by crossing the border, whether legally or illegally, is subject to expulsion proceedings under the INA.17 If the Attorney General does not deport an alien detention of Haitians are closely related to those concerning the detention of Cubans, the factual differences between these two situations call for separate consideration of the legal issues involved. The fundamental difference is that the Haitians can be deported if ultimately found inadmissible, Bertrand v. Sava, 684 F.2d at 207 n.5, whereas the Cubans cannot be at the present time. See note 8 supra.

16. The statute as a whole should be considered in determining legislative intent: A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1973) (footnotes omitted); United States v. Snider, 502 F.2d 645, 653 (4th Cir. 1974); United States v. Firestone Tire & Rubber Co., 455 F. Supp. 1072, 1079 (D.D.C. 1978).

17. The INA provides two different kinds of administrative proceedings for aliens whom the government seeks to deport: exclusion and expulsion. See Leng May Ma v. Barber, 357 U.S. 185, 189-90 (1958) (referring to separate administrative procedures for exclusion and expulsion). Courts have applied the different proceedings by distinguishing between those aliens who have "entered" the country and those who have not. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213 (1953); United States v. Ju Toy, 198 U.S. 253, 263 (1905); United States v. Oscar, 496 F.2d 492, 493-94 (9th Cir. 1974). 8 U.S.C. § 1101(a)(13) (1982) defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise .... " Cf. 8 U.S.C. § 1225 (1982) (empowering immigration officials to inspect all aliens seeking admission); 8 U.S.C. § 1226 (1982) (estimating the procedures relating to the exclusion of aliens); 8 C.F.R. §§ 235.1-236.8 (1982) (detailing the procedures for inspection and exclusion of aliens); 47 Fed. Reg. 30,046 (1982) (to be codified at 8 C.F.R. § 235.3 (revising 8 C.F.R. 235.3 (1982)) (relating to detention and deferred inspection). Aliens who have entered are called expellable aliens and are subject to expulsion proceedings under the INA. See 8 U.S.C. § 1252 (1982); 8 C.F.R. §§ 242.1-242.23 (1982). This Note will describe aliens who have been adjudged deportable at expulsion proceedings as "expelled" aliens.

18. The INA refers to aliens subject to expulsion proceedings as "deportable" aliens. See 8 U.S.C. § 1252(d) (1982) (entitled "Supervision of deportable alien; violation by alien"). This nomenclature is confusing because the INA also uses the term "deportation" when referring to
expelled under these proceedings within six months of a final order of deportation, the alien must be released from detention. In contrast, the INA does not expressly limit the detention of excluded aliens — those who have not entered the United States because they were stopped at the border by immigration authorities. At the time of the INA's passage and in the years since, Congress has doubtless been aware of cases in which an excluded alien was detained simply because he or she could not be deported. If Congress

the removal of excluded aliens. See 8 U.S.C. § 1227(a)(1) (1982) (deportation of excluded aliens); 8 U.S.C. § 1252(c) (1976) (deportation of expelled aliens). This Note will use the term "deportation" to refer to both expelled and excluded aliens.

19. 8 U.S.C. § 1252(c) (1982). However, "[A]n alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement." 8 U.S.C. § 1252(b) (1982).

The six-month limit on detention begins to run on the date that the immigration judge enters the final deportation order, or, if judicial review is had, from the date of the court's final order. 8 U.S.C. § 1252(c) (1982). During the six-month period itself, a court may review through habeas corpus the Attorney General's decision to detain if the Attorney General is not acting with "reasonable dispatch" to deport the alien. 8 U.S.C. § 1252(c) (1982).

Even if released, the alien is subject to the supervision of the Attorney General pending eventual deportation. 8 U.S.C. § 1252(d) (1982). In addition, any alien who violates the release conditions set forth by the Attorney General is subject to a fine of not more than $1,000 and imprisonment for not more than one year. 8 U.S.C. § 1252(d) (1982). A willful failure or refusal to depart is a felony, punishable by not more than ten years' imprisonment. 8 U.S.C. § 1252(e) (1982).

20. See note 13 supra and accompanying text. Prior to an exclusion hearing, the INA requires that an alien be detained, although he or she may be paroled in the Attorney General's discretion. See note 5 supra. This detention requirement indicates the general concern that motivated Congress in enacting the INA — ensuring that the country be protected from undesirable aliens. See note 31 infra and accompanying text.

21. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213 (1953) ("harborage at Ellis Island is not an entry into the United States"); United States v. Ju Toy, 198 U.S. 253, 263 (1905) (although physically within United States, alien treated as if stopped at border); United States v. Oscar, 496 F.2d 492, 493-94 (9th Cir. 1974) (alien who had never crossed border free of official restraint had not entered); see also Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality.") Because the Cubans were stopped at the border by American immigration authorities, they did not "enter" the United States within the meaning of the INA. They are, therefore, excluded rather than expelled aliens.

22. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). The alien in Shaughnessy had been detained upon his arrival in New York on February 9, 1950. 345 U.S. at 208. After he was permanently excluded in May of that year, efforts to deport him were unsuccessful. 345 U.S. at 208-09. Such efforts ended in June 1951. 345 U.S. at 209. Mezei remained in detention until August 1954, when he was released through executive action. Trop v. Dulles, 356 U.S. 86, 102 n.36 (1958).

Despite single incidents like the one in Shaughnessy and the mass detention arising out of the Freedom Flotilla, Congress has not expressly limited the period during which an undetachable, excluded alien can be detained. See note 13 supra and accompanying text. Congress' refusal to alter its statutory formula in the face of such occurrences implies that it is satisfied with the results produced by the INA.

The Tenth Circuit drew the opposite inference from congressional silence in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). The court construed the INA's provisions to require that excluded, undetachable aliens be released following entry of a final order of exclusion and, thereafter, the passage of a reasonable period for negotiations for deportation of the alien. 654 F.2d at 1389-90. Noting that the INA places a six-month restriction on the
had intended to do so, it could have expressly limited the detention of excluded as well as expelled aliens.

Moreover, the resulting distinction between the two classes of aliens is consistent with sound policy and thus cannot be attributed to a mere congressional failure to consider the issue. Expellable aliens who have entered and resided in the United States generally have greater ties to the community than do excludable aliens who have been stopped at the border. Consequently, expellable aliens require the greater procedural protections that the INA provides

detention of expellable aliens and that no similar provision exists for excludable aliens, the court emphasized that when Congress considered the INA, it was confronted with many expellable aliens who could not be deported.

Congress was painfully aware of more than 3,000 warrants of deportation made unenforceable by the refusals of the countries of origin to grant passports for these persons'. Despite these facts, or because of them, the Act provides for detention no longer than six months in deportation [expulsion] cases.

654 F.2d at 1389. The court then posited that no similar problem had faced Congress with respect to excludable aliens: "There is no evidence to suggest that prior to the instant case a significant number of excludable aliens have been physically detained for periods of long duration." 654 F.2d at 1389. The Rodriguez-Fernandez court implied that because Congress had no reason to consider the problem of prolonged detention of excludable aliens, its silence on the subject should not be interpreted as approval. The court therefore viewed a "reasonable period" limitation on detention of excludable aliens as "consistent" with the statutory treatment given expellable aliens by Congress. See generally Note, Statutory and Constitutional Limitations on the Indefinite Detention of Excluded Aliens, 82 B.U. L. Rev. 553, 571-72 n.134 (1982).

The notion that Congress did not consider the indefinite detention of excluded aliens when it passed the INA has not gone uncontested. In Louis v. Nelson, 544 F. Supp. 973, 980 n.18 (S.D. Fla. 1982), affd. in part, revd. in part and remanded sub nom. Jean v. Nelson, 711 F.2d 1455, reheg. granted, 714 F.2d 96 (11th Cir. 1983), the court pointed out that detention is not a new concept in the field of immigration law. During the late 1940's and early 1950's it was a routine practice. However, in 1954, when the Ellis Island detention facility was closed, the policy was established that aliens seeking admission into the United States should not be placed in physical incarceration unless they were a security risk or likely to abscond.

Thus, Congress may well have considered the detention issue when the INA was passed. Its silence in the face of such events suggests that it did not intend to limit the detention of deportable, excluded aliens.

23. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215-16 (1953) (case under pre-INA statute providing for parole of expellable aliens only); Carlson v. Landon, 342 U.S. 524, 537-38 (1952) (expulsion a drastic remedy after absorption into community, so right to hearing provided); see also Note, supra note 22, at 572 n.138.

The courts, however, have granted constitutional protection to expellable aliens who entered the United States illegally and whose ties to the country may be very tenuous. See, e.g., Mathews v. Diaz, 426 U.S. 67, 77 (1976) (fifth amendment, as well as fourteenth amendment, protects aliens whose presence in the country is unlawful, involuntary, or transitory from deprivation of life, liberty, or property without due process of law); United States v. Otherson, 480 F. Supp. 1369, 1374 (S.D. Cal. 1979) (fourteenth amendment protection extending to "persons" applies to all people within jurisdiction of the United States, whether present legally or illegally), affd., 637 F.2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981); Arias v. Examining Bd. of Refrig. & Air Conditioning Technicians, 353 F. Supp. 857, 861 (D.P.R. 1972) (due process and equal protection of laws applies to all persons, including aliens within territorial jurisdiction of United States); cf. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment provisions "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality").
Because Congress had a reasonable basis for distinguishing between these two classes of aliens, courts should not attribute Congress' failure to limit the detention of excluded aliens to forgetfulness.\textsuperscript{25}

The notion that Congress equipped the INA with a statutory preference for detention finds additional support in the legislative history underlying the six-month limit on the detention of expellable aliens. Congress was concerned that the Attorney General might be forced to release expelled aliens if he were unable to negotiate their deportation.\textsuperscript{26} It established the six-month limit on detention not to encourage the release of affected aliens, but instead to provide a more effective means of detaining them while deportation arrange-

\begin{itemize}
  \item \textsuperscript{24} Neither expelled nor excluded aliens may question the government's power to deport them. \textit{See}, \textit{e.g.}, \textit{Fiallo v. Bell}, 430 U.S. 787, 792 (1977) (power to expel or exclude aliens long recognized as a fundamental sovereign attribute exercised by the Government's political departments). Expellable aliens, however, are entitled to a hearing that meets the requirements of procedural due process under the Constitution before they may be deported. \textit{See}, \textit{e.g.}, The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903). On the other hand, excluded aliens, who have not effected an entry into the country, have been held to have no constitutional right to object to their exclusion. \textit{See} \textit{Shaughnessy v. United States ex rel. Mezei}, 345 U.S. 206, 215 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.") (quoting \textit{United States ex rel. Knauff v. Shaughnessy}, 338 U.S. 537, 544 (1950)).

The immigration statutes and regulations also accord greater procedural rights to expellable aliens than to excludable ones. \textit{See} Note, \textit{supra} note 22, at 558 n.37.

\item \textsuperscript{25} The INA's differing treatment of expelled and excluded aliens can be explained as a distinction that accounts for qualitative differences in the two categories. Expelled aliens, who may have lived in the United States for some time, are more likely to have homes to return to if they are not detained. Newly arrived, excluded aliens, however, probably have few ties to the United States and may have no place to go if they are released. \textit{See} notes 23-24, \textit{supra} and accompanying text. Courts should be reluctant to disturb an explicable distinction, especially when the statutory pattern strongly suggests a preference for a particular outcome — in this case, detention.

\item \textsuperscript{26} The House committee report on the bill that first enacted the six-month provision stated:

\begin{quote}
Existing law does not grant the Attorney General any specified period within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad. Some courts have ordered the release of such deportable aliens by means of the writ of habeas corpus in less than 6 months, even though the delay in their deportation was being caused by continuing negotiations between this Government and foreign governments. The Committee considers that 6 months is a reasonable time to grant to our Government within which to conclude the necessary detail work involved in some cases before deportation of an alien can be effected.
\end{quote}

H.R. REP. No. 1192, 81st Cong., 1st Sess. 6 (1949). Senator McCarran made a similar point in the Senate:

\begin{quote}
If the country of the deportable alien's last residence, the country of his citizenship, or the country in which he was born refuses to accept back such deportable alien there is nothing further that can be done under existing law and the alien is free to roam the country at will . . . . Existing law does not grant the Attorney General any specified period within which he may hold deportable aliens in custody or under his supervision while he negotiates for their return abroad. As a result, even though the delay in the deportation is in many cases caused by continuing negotiation between our Government and foreign governments, the Attorney General is unable to maintain any control over aliens during this period in which he is undertaking to effect their deportation.
\end{quote}

ments were being made. Thus, this provision does not indicate the existence of a general statutory policy of limiting detention, but rather supports the notion that the INA was designed to favor detention over release.

Further, if Congress had preferred release over detention, it would have circumscribed the Executive's inherent power to detain excluded aliens. Just two years prior to the passage of the INA, the Supreme Court held that the Executive branch possesses inherent power to exclude aliens. In circumstances where deportation is impracticable, the power to exclude necessarily implies the power to detain. By failing to limit explicitly the detention of excluded aliens, Congress established a statutory preference that permits the Executive Branch to exercise its inherent power to detain them.

Ultimately, even though the INA does not expressly permit the indefinite detention of undeportable, excluded aliens, the statute's underlying purposes implicitly authorize such detention. One of

27. [A] close examination of the history of [the six-month provision relating to detention of expellable aliens] reveals that the provision was designed to affirm rather than limit the government's power to detain expelled aliens while deportation is being negotiated. Prior to the enactment of [this provision], the lower courts had challenged the authority of the Attorney General to detain expelled aliens beyond a brief period of time. Note, supra note 22, 570-71 (footnotes omitted).

The lower courts have frequently challenged the Attorney General's authority to detain expellable aliens. Note, supra note 22, at 571 n.133. One reason for the scarcity of challenges to detention of excludable aliens may be that in the past, fewer such aliens were detained. Id. at 571-72 n.134; see also note 22 supra. Aliens generally applied for admission to the United States before leaving their country of residence and, if denied admission, stayed in that country. See Note, supra note 22, at 571-72 n.134. This does not mean that aliens had never been indefinitely detained before Congress passed the INA. See note 22 supra. However, because the detention of excluded aliens had rarely been challenged, no provision was needed to assert the government's power to detain them. Thus, the six-month provision was evidently intended to secure the government's power to detain expellable aliens rather than to insure their release. See note 26 supra.


The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation [citations omitted]. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

338 U.S. at 542.

29. See notes 91-94 infra and accompanying text.

30. See Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982). The court in Palma posited that although continued detention of an undetachable, excluded alien was not expressly permitted by statute, Congress' failure to limit such detention reflects an intent to authorize restrictions on the freedom of excluded aliens. 676 F.2d at 104. The court held that since Congress has not expressly denied the Attorney General authority to detain undeportable, excluded aliens, the Attorney General has implicit authority to order such detention. 676 F.2d at 104.

The court also reasoned that because Congress did not specifically provide for judicial review of exclusion decisions, as it had for expulsion decisions, see 8 U.S.C. § 1252(c) (1982), it probably intended to impose greater restrictions on excluded aliens than on expelled aliens. 676 F.2d at 104. Although this conclusion may be fairly inferred from the statute, one should note that the exclusion decision is subject to judicial review by writ of habeas corpus. See 8 U.S.C. § 1105a(b) (1982).
Congress' basic goals in passing the INA was to strengthen provisions relating to excludable aliens in order "to provide added assurance that undesirable aliens will not gain admission to the United States." Any construction that requires the release of undeportable, excluded aliens would interfere with this purpose by effectively depriving the United States of its ability to control immigration. Such a construction would be suspect because it would impair an essential element of the nation's independence, its sovereign ability to exclude potentially undesirable aliens. More important, courts should avoid interpreting the INA in a manner that interferes with the government's ability to control the admission of aliens, an interpretation that would undermine the statute's basic purposes. Courts should instead defer to the congressional policy underlying the INA by permitting the indefinite detention of undeportable, excluded aliens.

B. The Statutory Preference for Detention and the Attorney General's Parole Power

The INA grants the Attorney General discretionary authority to parole excluded aliens from detention for "emergent reasons" or for

32. In arguing that the government should have the power to order the continued detention of undeportable, excluded aliens, one commentator has noted that without the power to detain "the country is vulnerable to the whim of foreign countries who might empty their jails or rid themselves of unemployment by sending their undesirables to the United States." Note, The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees, 70 Geo. L.J. 1303, 1330 (1982); see also The Immigration Reform and Control Act of 1982: Hearings on S. 2222 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 344 (1982) (statement of Sen. Walter D. Huddleston) (asserting that Premier Castro has identified at least two million people who might be expelled if such an action proves expedient in the future).
33. That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If [the government] could not exclude aliens, it would be to that extent subject to the control of another power. The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889).
34. See, e.g., New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").
35. This reading of congressional intent is consistent with 18 U.S.C. § 4001(a) (1976), which was designed to restrict imprisonment of U.S. citizens to situations where statutory authorization for detention exists and to repeal the Emergency Detention Act of 1950, Pub. L. No. 81-831, §§ 100-116, 64 Stat. 1019 (1950). H.R. Rep. No. 116, 92d Cong., 1st Sess. 1, 2, reprinted in 1971 U.S. Code Cong. & Ad. News 1435, 1435. Section 4001(a) provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." (emphasis added) The use of the word "citizen" implies that detention of aliens may be permissible even if not authorized by statute. The case for such detention should be even stronger when authority for it can be inferred from the purposes of a statute, as is the case with the INA.
“reasons deemed strictly in the public interest.” 36 This parole authority has been delegated by regulation to district directors of the Immigration and Naturalization Service (INS). 37 Release on parole is not considered an admission into the country and affords no additional rights to an affected alien. 38

In *Fernandez-Roque v. Smith*, 39 the District Court for the Northern District of Georgia held that the indefinite detention of undetectable, nondangerous, inadmissible Cuban aliens was an abuse of the Attorney General’s parole discretion under the INA. 40 In effect, the court required the release of such aliens. 41

In finding an abuse of discretion, the *Fernandez-Roque* court betrayed a misunderstanding of the role that Congress intended parole...
to play in the immigration process. The INA makes parole purely discretionary by providing that the Attorney General "may" parole aliens into the United States. Thus, the Attorney General is not required to decide in favor of parole even in the face of an "emergent" reason or a reason "in the public interest." This discretion, coupled with the vast powers that Congress and the Executive exercise over immigration, should cause a court to refrain from finding an abuse of discretion simply because it disagrees with the Attorney General's decision to deny parole to a validly excluded alien.

The holding in Fernandez-Roque is also unsound because it fails to take note of the INA's preference for detention. The statute does not contemplate that parole will be used as a means to admit excluded aliens into the United States. To the contrary, the INA requires that parole shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody

42. 8 U.S.C. § 1182(d)(5)(A) (1982). See also 2 K. Davis, Administrative Law Treatise § 8:10, at 200 (2d ed. 1979) (underlying scheme of INA was to avoid conferring legal rights on aliens).
44. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (citations omitted).
45. See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (Where the Executive exercises discretionary authority in the field of immigration "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.").

In the case of an alien who has been found excludable, a "facially legitimate and bona fide reason" for the denial of parole lies in the finding of excludability. An alien who has been excluded has failed to meet the requirements for entry provided for in the INA. Consequently, it would be a perverse result to say that the Attorney General cannot deny parole to such an alien, or must seek a reason to deny parole in addition to the fact of excludability itself. To do so would effectively provide a right of entry for some excluded aliens that the INA intended to deny them.

Moreover, the fact that exclusion was based on a "technical" reason such as lack of proper entry documents should not affect this conclusion. The Supreme Court stated in Fiallo v. Bell: 
"The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control."

430 U.S. 787, 797 (1977) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)). Given this, in reviewing the Attorney General's decision to deny parole, it is improper to distinguish among aliens based on the grounds for their exclusion as the Fernandez-Roque court did. See notes 40-41 supra and accompanying text.
from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.\(^{46}\)

Because the statute contemplates a return to custody upon the Attorney General's order, it effectively indicates that Congress intended to favor detention over release. This interpretation is consistent with the INS' treatment of the parole provision.\(^{47}\) Similarly, courts should honor congressional intent by rejecting attempts to release undeportable, excluded aliens under the INA's parole provisions.

The extraordinary nature of the parole provision also implies that it should not be used to require the release of excluded aliens. Congress originally intended the parole power to be used only in unusual circumstances — for example, to enable an alien to seek medical care or to testify in a judicial proceeding.\(^{48}\) But its use soon expanded, so that by 1958 the Supreme Court described parole as


\(^{47}\) An INS regulation that limits the detention of excluded aliens who were paroled pending their exclusion hearings, see note 12 supra, does not support an inference that the agency interprets the INA to prohibit indefinite detention. In promulgating that regulation, the agency addressed only the exceptional case where an alien is paroled pending his exclusion hearing:

\[\text{[The only exception to detention [of an alien detained at the port of arrival] is through the exercise of parole authority under section 212(d)(5) of the Act. [8 U.S.C. 1182(d)(5) (Supp. V 1981).]}\]

However, in exercising this discretion [to parole aliens pending exclusion hearings], 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 to be in conformity with the statutory purpose and legislative intent.\(^{47}\) Fed. Reg. 30,044-45 (1982) (emphasis added). If the INS had intended to prohibit indefinite detention, it would have addressed the normal case where the alien is detained pending his exclusion hearing. The fact that the agency permits parole only for exceptional cases implies that it does not prefer parole in typical cases.

\(^{48}\) The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution.

H.R. REP. No. 1365, U.S. CODE CONG. & AD. NEWS at 1706 supra note 31. In 1965, in a report to a bill that amended the INA, the Senate Judiciary Committee observed that the INA's parole provisions "were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law." S. REP. No. 748, 89th Cong., 1st Sess. 17 (1965). The committee stated its "express intent" that "the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation."

Arguably, indefinite detention is an "emergent circumstance" justifying parole under the statute. See 8 U.S.C. § 1182(d)(5)(A). Just because such parole would be justified, however, does not mean that the statute would require it. The parole decision still remains in the sound discretion of the Attorney General under the statute. See notes 42-45 supra and accompanying text.
“simply a device through which needless confinement is avoided . . . . 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 . . . .”

Congress did not ignore this contravention of its intent but instead attempted in the Refugee Act of 1980 to limit the parole

49. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). Although Congress intended the Attorney General’s parole power to be exercised only in extraordinary situations, see note 48 supra, and note 50 infra, presidents “have broadly interpreted this power, requesting admission into the United States for entire classes of immigrants.” Note, A Comparative Overview of the Vietnamese and Cuban Refugee Crises: Did the Refugee Act of 1980 Change Anything?, 6 Suffolk Transnatl. L.J. 25, 35 (1982) (footnote omitted). Figures on the number of refugees who entered the United States on parole from 1956 through 1979 are as follows:

1956
Orphans from Eastern European countries ........................................... 925
1956-57
Refugees from Hungary .................................................................. 38,045
1960-65
Refugee escapees from Eastern Europe .............................................. 19,754
1962
Chinese refugees from Hong Kong & Macao ........................................ 14,741
1962-5/31/79
Refugees from Cuba .......................................................................... 692,219
1973-5/31/79
Refugees from the Soviet Union .......................................................... 35,758
1965-5/31/79
Indo-Chinese refugees ........................................................................ 208,200
1975-77
Chilean detainees .................................................................................. 1,310
1975-77
Chilean refugees from Peru ................................................................. 112
1976-77
Latin American refugees ...................................................................... 343
1978-79
Lebanese refugees ............................................................................... 1,000
1979
Cuban prisoners and families ............................................................... 15,000
TOTAL .................................................................................................. 1,027,407
Average per year .................................................................................... 44,670


50. Pub. L. No. 96-212, 94 Stat. 102 (1980). The admission process for refugees differs from that for immigrants in general. Essentially, a refugee is a person outside of his country of nationality or residence who is unable to return due to racial, religious, or political persecution. See 8 U.S.C. § 1101(a)(42) (1982). As such, a refugee need not meet all of the normal immigration requirements, such as those pertaining to ability to support one’s self, possession of proper documents for admission, and literacy; the Attorney General can waive most other requirements as well. See 8 U.S.C. § 1157(c)(3) (1982). Those meeting the refugee definition are granted conditional entry under the asylum procedures prescribed by law. See 8 C.F.R. § 207.4 (1982); 8 U.S.C. § 1158 (1982); 8 C.F.R. §§ 208.1-208.16 (1982). After a one-year waiting period, those granted asylum who continue to be refugees, who have been physically present in the United States, and who have not become firmly resettled in a foreign country may apply for permanent residency in the United States. See 8 U.S.C. § 1159 (1982); 8 C.F.R. §§ 209.1-209.2 (1982).
power to its original scope. The Act raised the ceiling on refugee admission from 17,400 to 50,000 annually for three years, after which the President, in consultation with Congress, was to determine the ceiling annually. The Refugee Act also outlined certain procedures under which the President was to consult with Congress when emergency refugee situations arose. Thus, the restraints embodied in the most recent congressional attempt to deal with immigration problems reflect an intent to prevent circumvention of the ordinary mechanism for admission.

51. The Senate committee report accompanying the bill that became the Refugee Act of 1980 stated:

The central feature of S. 643 is the establishment of statutory provisions for the admission of refugees during "normal flow" periods and during emergency situations. Sections 207 through 210 of the bill also write into the Immigration and Nationality Act the role of Congress in the admission process — ending years of ad hoc use of the parole authority, which has been implemented by custom rather than clearly defined by law.

52. 8 U.S.C. § 1157(a)(1) (1982). The Senate committee report stated:

The 50,000 annual numbers under the bill will be obtained by reallocating to refugees 20,000 numbers from the worldwide limitation of 290,000. (17,400 of these numbers of [sic] currently allocated to conditional entrants under section 203(a)(7), which the bill eliminates.) In addition, 30,000 numbers will be added over and above the current worldwide limitation. As a result, total immigration subject to numerical limitation will be 320,000 annually, except in those years when refugee admissions are increased by Presidential determination, after consultation with Congress.

This number, however, does not really increase over annual immigration flow, since by use of the parole authority over the past several decades the United States has accepted, on an average, some 40,000 refugees each year.


54. See 8 U.S.C. § 1157(e) (1982). The Senate Committee report described these procedures as follows:

For the first time, the bill provides procedures governing the admission of refugees in unforeseen emergency situations. If the President determines, following consultations with the Judiciary Committees, that an emergency refugee situation exists — that the admission of refugees in response to such an emergency is justified by grave humanitarian concerns or is otherwise in the national interest — he may fix a number of refugees to be admitted. Allocation of those admissions will be in accordance with a Presidential determination, after consultation with Congress.

Thereafter, the Attorney General will admit to the United States emergency situation refugees who establish that they meet the refugee definition and that they are not firmly resettled in any foreign country.

55. Because the Refugee Act amended the INA and deals with the same subject matter — immigration control — it is in pari materia with the INA. See 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 51.03 (4th ed. 1973). Thus, [on] the assumption that persons both in and out of legislatures would naturally tend to think about and have their thinking influenced by other statutes on the same subject when faced with the necessity of making a judgment about what a legislative text means, statutes in pari materia are relevant to decisions in terms of either legislative intent or meaning to others as the criterion of decision.
Ignoring this expression of intent, the Fernandez-Roque court effectively ordered the Attorney General to exercise his discretion in favor of parole. The court emphasized that many detained Cubans were no different from 122,000 others who had been released on parole. Admittedly, when the influx of Cuban aliens in the Freedom Flotilla took place, the Executive Branch ignored the emergency procedures that Congress had established in the Refugee Act. Instead, the Executive once again turned to the parole power as a means of permitting some 122,000 otherwise inadmissible aliens to enter the country. Congress deliberately overlooked this disregard of the law. Nevertheless, the INS was adhering to congressional intent when it began to deny parole. Absent a discriminatory or otherwise impermissible motive, observance of the law should not constitute an abuse of discretion. If Congress decides that parole is a more effective way to deal with emergencies than the Refugee Act, it can change the relevant statutes accordingly. Until Congress does so, courts should not interfere with the INS' attempts to comply with existing law.

The succession of legislation on parole reveals a congressional intent to limit its use. Thus, the Fernandez-Roque court's reliance on the parole provision to require release of undeportable, excluded aliens improperly contravenes the congressional intent regarding the use of parole. Unless Congress chooses to amend existing law, future courts confronted with similar situations should resolve the issue in favor of the statutory preference for detention.

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*Id.* at §51.01 (footnote omitted). The fact that Congress clearly disfavored release on parole in the Refugee Act thus should inform a court's interpretation of the INA.


57. See note 1 *supra* and accompanying text.

58. Because the number of Cubans arriving exceeded the refugee quota, President Carter permitted them to stay under the Attorney General's parole power. See *Note*, *supra* note 49, at 51. Approximately 122,000 of the 125,000 who came in the Freedom Flotilla had been paroled by the summer of 1981. See note 3 *supra*. Because this overwhelming tide clogged the asylum process — practically none of the Cubans were eligible for admission as regular immigrants due to lack of entry documents — the INS created a special "Cuban/Haitian entrant" status, see *Note*, *supra* note 49, at 51 n.148, to avoid the Refugee Act's requirement that individual refugees prove they are in reasonable fear of persecution in their homeland. See *Note*, *supra* note 49, at 53.


60. See *Jean v. Nelson*, 711 F.2d 1455, 1458, *rehg. granted*, 714 F.2d 96 (11th Cir. 1983). It is also useful to note that, it is highly unlikely that the doctrine of estoppel could be invoked against the government by detained aliens seeking release on parole based on the past liberal use of parole. See generally *Comment*, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).
II. INDEFINITE DETENTION UNDER THE CONSTITUTION

A. The Constitutional Permissibility of the Detention of Excluded Aliens

Although the statutory preference embodied in the INA implicitly authorizes the indefinite detention of excluded aliens, such incarceration must also pass constitutional scrutiny. The Supreme Court has held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."61 This formulation has been severely criticized by legal commentators62 and may no longer be an entirely accurate statement of the law.63 Because recent cases suggest that aliens are entitled to some due process protection, at least in the course of determining their excludability,64 the question that remains is the breadth of that protection. The

63. Professor Tribe has pointed out that "recent cases cast at least some doubt on any rule so absolute," observing that the exclusion of aliens has in fact been scrutinized, albeit in a very limited fashion. L. Tribe, American Constitutional Law 282 n.31 (1978); cf. Plyler v. Doe, 457 U.S. 202, 210-11 (1982) (an alien is a "person" under fifth and fourteenth amendments); Jean v. Nelson, 711 F.2d 1455, 1484, rehgd. granted, 714 F.2d 96 (11th Cir. 1983) ("t[he] strains of credulity to maintain that an alien within our territorial limits may claim none of the rights accorded our citizens."). But cf. Landon v. Plasencia, 103 S. Ct. 321, 329 (1982) (an alien seeking admission has no constitutional rights regarding his application).
64. See note 63 supra.
Supreme Court's current "instrumental" approach suggests that what is due an alien is the process required to prevent unfair deprivation of an entitlement conferred upon him by law.\textsuperscript{65} Thus, because existing statutes create an expectation that an alien will be allowed to enter the United States if he fulfills certain criteria,\textsuperscript{66} exclusion proceedings must conform to the requirements of due process.\textsuperscript{67} Once an alien has been excluded and is awaiting deportation, however, his entitlement is limited, as is the scope of his due process right.\textsuperscript{68} Because the law does not entitle the excluded alien to release, his due process rights are not impaired when he is detained without notice or hearing.\textsuperscript{69}

Nevertheless, the fifth amendment\textsuperscript{70} imposes substantive limits on the government's power to detain inadmissible aliens. Excluded aliens cannot be punished simply because they are inadmissible; the fifth amendment requires that an alien first be convicted of a crime in the United States.\textsuperscript{71} For those excluded aliens who have been

\begin{footnotes}
\item 66. See note 2 supra.
\item 67. "It would be inconsistent with any intelligible rationale underlying due process protection to deny all procedural safeguards to the new applicant where the law provides that all individuals meeting certain objective criteria are entitled to, say, welfare." L. Tribe, supra note 63, at 519. Similarly, due process protection should not be denied to aliens who, if they meet certain objective criteria, may be admitted into the United States. See Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1127-28 (N.D. Ga. 1983) (subjecting exclusion proceedings to due process scrutiny); note 2 supra.
\item 68. After he has been excluded, an undeportable alien is not "entitled" to go free. The INA creates a preference for detention, see Part I-A supra, so it does not give rise to a legitimate expectation of freedom. Similarly, parole is a narrowly designed, discretionary authority, see Part I-B supra; an undeportable, excluded alien cannot expect that he will be paroled.
\item 69. See 8 U.S.C. § 1182(d)(5)(A) (1982) (providing for parole of "any alien applying for admission" in the discretion of the Attorney General); see also 2 K. Davis, Administrative Law Treatise § 8:10, at 206 (2d ed. 1979) (underlying scheme of INA was to avoid conferring legal rights on aliens). The court in Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), reached a different result by reasoning that inadequate procedural protections in exclusion proceedings gave rise to "a legitimate expectation . . . that the detention [would] end unless some new justification for continuing the detention is established." 567 F. Supp. at 1128. Although the court properly criticized what it perceived to be procedural defects in the exclusion process, see note 67 supra, it went too far when it concluded that these procedural problems give rise to an expectation of freedom. Regardless of how the aliens were detained, they were never entitled to go free in the United States. Thus, even if the Attorney General does not exercise his discretion to parole aliens after they have been excluded, his discretion cannot be reviewed on purely procedural grounds. The entitlement that such procedural protections would vindicate — the alien's expectation that he will go free if he cannot be deported — simply does not exist. See Part I supra.
\item 70. The fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.
\item 71. See Wong Wing v. United States, 163 U.S. 228, 233-38 (1896). In Wong Wing, the
convicted of crimes in Cuba but not in the United States,\textsuperscript{72} indefinite detention arguably violates the fifth amendment.

Whether indefinite detention runs afoul of the Constitution, however, depends on whether such detention amounts to "punishment" in the constitutional sense. To resolve this issue, a court "must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate government purpose."\textsuperscript{73} The Supreme Court has indicated that this decision involves a two-pronged test: first, "whether an alternative purpose to which the sanction may rationally be connected is assignable for it, and [second] whether [the sanction] appears excessive in relation to the alternative purpose assigned."\textsuperscript{74} The first prong requires that the restriction be designed to achieve a nonpunitive objective. The second prong has two components. To determine whether a restriction is "excessive," a court must first inquire into the availability of less onerous alternatives;\textsuperscript{75} in the absence of such alternatives, the court

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\textsuperscript{72} American courts have traditionally refused to execute the penal judgments of foreign countries against their own citizens. See Paust, The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government, 12 VAND. J. OF TRANSNATL. L. 67, 71 (1979).

\textsuperscript{73} Bell v. Wolfish, 441 U.S. 520, 538 (1979); see also Flemming v. Nestor, 363 U.S. 603, 613-17 (1960); Trop v. Dulles, 356 U.S. 86, 96 (1958) (plurality opinion) (look to statute's "evident purpose" in determining whether it is punitive or not); United States v. Lovett, 328 U.S. 303, 324 (1946) ("The fact that harm is inflicted by governmental authority does not make it punishment. . . . [T]here may be reasons other than punitive for such deprivation.") (Frankfurter, J., concurring).


\textsuperscript{75} See, e.g., Bell v. Wolfish, 441 U.S. 520, 538-39 (1979); Wooley v. Maynard, 430 U.S. 705, 716-17 (1977) (requiring a legislature to use the least drastic means to achieve a governmental purpose that infringes a liberty interest protected by the Constitution); Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980); cf. Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (requiring that a statute affecting constitutional rights be narrowly drawn to achieve legitimate governmental objectives).
must balance the governmental interest at stake against the extent of the restriction.\textsuperscript{76}

In applying this two-pronged test to the indefinite detention of excluded aliens, the analysis begins with the well-established propositions that deportation and detention pending deportation do not constitute punishment.\textsuperscript{77} The reasoning underlying these propositions illustrates the way in which the Supreme Court strikes the balance between the government's sovereignty interest and the individual's liberty interest. The method by which the Court has approached these issues supports the conclusion that indefinite detention of excluded aliens does not amount to punishment.

Under the two-pronged test, deportation itself does not amount to punishment.\textsuperscript{78} First, it serves a legitimate nonpunitive purpose: protection of the government's sovereign interest in controlling the admission of aliens.\textsuperscript{79} Second, deportation is not "excessive:" it pro-

\textsuperscript{76} Bell v. Wolfish, 441 U.S. 520, 536-37 (1979) (using the example of pretrial detention, where the incursion on the detainee's liberty is outweighed by the government's interest in ensuring the presence of the detainee at trial); see also Zablocki v. Redhail, 434 U.S. 374, 396 (1978) (Stewart, J., concurring); Moore v. City of East Cleveland, 431 U.S. 494, 499, 502 (1977) (plurality opinion) ("certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement") (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)); Williams v. Illinois, 399 U.S. 235, 260 (1970) (Harlan, J., concurring); Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980) ("Recent [Supreme Court] decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.").

\textsuperscript{77} See notes 78 & 86 infra.

\textsuperscript{78} The courts have long held that deportation does not amount to punishment. See, e.g., Trop v. Dulles, 356 U.S. 86, 98 (1958) (plurality opinion) ("While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country."); Carlson v. Landon, 342 U.S. 524, 537 (1952); Wong Wing v. United States, 163 U.S. 228, 235 (1896) (deportation of illegal aliens within constitutional power of Congress); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

\textsuperscript{79} It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). Under the separation of powers doctrine, this inherent power over immigration belongs to the political departments of government, and it may be exercised either through treaties or through statutes enacted by Congress. See Nishimura Ekiu v. United States, 142 U.S. at 659.

Modern cases agree with Nishimura Ekiu's suggestion that the government's power over immigration is inherent rather than enumerated in the Constitution. See, e.g., Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 123 (1967); Carlson v. Landon, 342 U.S. 524, 537 (1952); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); see also Gordon, The Alien and the Constitution, 9 CAL. W. L. REV. 1, 21-22 (1972) (by characterizing power over immigration as inherent, Court was enabled to bypass constitutional restraints); Teitelbaum, Right versus Right: Immigration and Refugee Policy in the United States, 59 FOREIGN AFF., Fall 1980, 21, 21 (control over entry by noncitizens generally considered one of the two or three universal attributes of national sovereignty).
tects the nation's sovereignty interest by the simple device of removing those whom the government does not wish to admit. Assuming that deportation is less onerous than detention, the only alternative less onerous than deportation is the conditional release of illegal aliens by parole. A release requirement, however, prevents the government from exercising its sovereign power to exclude aliens whose presence it deems undesirable. Release also encourages illegal immigration because it allows aliens to settle, at least temporarily, in the United States. To the extent that release encourages the influx of illegal immigrants, it limits the government's future ability to exercise its sovereign power to exclude them.

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80. If one instead concludes that deportation is more onerous than detention, then the constitutional permissibility of indefinite detention follows a fortiori from the permissibility of deportation. The balancing of the governmental interest against the harshness of detention, see notes 95-100 infra and accompanying text, would therefore be resolved in the government's favor.


82. Parole, though not a formal “admission” to the country, see note 38 supra and accompanying text, as a practical matter permits physical presence outside confinement within the country.

83. Increased illegal immigration prevents the effective exercise of the nation's sovereign power to exclude. The courts, a presidential task force, and the INA have all concluded that laxity in enforcing the immigration laws reduces control over illegal immigration. The predictable consequence is an increase in the number of illegal aliens. In Haitian Refugee Center v. Smith, 676 F.2d 1023 (11th Cir. 1982), for example, the court observed that [it] is highly likely that INS' inaction provided the greatest inducement to the ultimate swollen tide of incoming, undocumented Haitians. Record material suggests that a large percentage of the aliens bought passage to the United States from promoters in Haiti whose best sales pitch was the large number of the prospect's compatriots who, without visas or other documents, had reached Florida and were residing there undisturbed. Protestations by INS of the illegality of such operations could hardly be expected to prevail against the proprietary reasoning that Haitians who reached southern Florida were living, working and earning in the United States. “The proof of the pudding” was surely seen as being in the eating; those deciding whether or not to make the trip were not dissuaded by witnessing the return of earlier emigres. 676 F.2d at 1029 n. 11; accord Louis v. Nelson, 544 F. Supp. 973, 978 n.17 (S.D. Fla. 1982), aff'd in part, revd in part and remanded sub nom. Jean v. Nelson, 711 F.2d 1455, rehg. granted, 714 F.2d 96 (11th Cir. 1983); 47 Fed. Reg. 30,044 (1982) (“The appearance of an inability on behalf of the United States Government to control unlawful immigration into this country is ‘the greatest inducement to the ultimate swollen tide of undocumented aliens.’ ”) (statement of the INA); cf. Louis, 544 F. Supp. at 979 (presidential task force expressed concern that release of illegal aliens would encourage even more illegal immigration).

Detention excludes an otherwise unremovable alien by preventing the alien from entering into American society. Detention also discourages aliens from attempting to emigrate, thus reducing the risk that the sovereign power to exclude will be overwhelmed by sheer numbers. The INS has pointed out that “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 [after a court order nullifying that policy] enter the United States without fear of being detained . . . .” 47 Fed. Reg. 30,044 (1982).

One commentator has concluded that detention amounts to punishment to the extent that it deters:

In reality, the continued detention of an alien excluded for lack of proper documentation, who does not pose a threat to the public, can only be explained as a deterrent to other
Because release is not a viable alternative, deportation cannot be viewed as punishment unless the deprivation that it imposes outweighs the government’s sovereign interest in excluding aliens. In striking this balance, the Supreme Court has not ignored the harshness of deportation. Nevertheless, the Court has consistently upheld deportation because the nation’s sovereign power to exclude clearly outweighs the deprivation imposed. Inasmuch as deporta-

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Note, supra note 22, at 587-88 (footnotes omitted). This argument implies that deportation, which specifically deter the alien deported, would also be unconstitutional. But see note 78 supra (indicating that deportation is constitutional). In addition, the Supreme Court has identified several factors to help courts determine whether a restriction serves to punish in the constitutional sense:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted). The factors are not, however, highly predictive. The court itself admitted that the factors may cut in opposite directions and that no single factor is dispositive. 372 U.S. at 169. Thus, even if the main purpose of detention were deterrence — as opposed to exclusion — the existence of such a purpose would not conclusively render detention punitive. Such a view makes one factor — promotion of the traditional aims of punishment — decisive, contrary to the Court’s own admonition and practice.

84. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (“A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visit a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.”); note 78 supra.

85. In Wong Wing v. United States, 163 U.S. 228, 237 (1896), the Supreme Court indicated that

[no limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.]

163 U.S. at 237. In addition, the Supreme Court has “repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.’” Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations omitted); see also Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 3.1 (1983) (the power of Congress over immigration is “vast, perhaps limitless”) (footnote omitted).

However, Congress shares this power with the executive branch. The Supreme Court stated in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950):

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

338 U.S. at 542 (citations omitted). Congress has specifically provided broad powers to the President to exclude aliens. See 8 U.S.C. § 1182(f) (1982).

This power over immigration extends even to the exclusion or expulsion of aliens for considerations of race, politics, activities, or associations that would be constitutionally prohibited
tion is not an excessive means of accomplishing the legitimate government objective of protecting national sovereignty, it does not constitute punishment and is therefore constitutionally permissible. Similarly, temporary detention pending deportation does not amount to punishment under the Supreme Court's two-pronged test. 86 First, such detention serves a legitimate nonpunitive governmental purpose. Its immediate purpose is to ensure that an alien will be available for deportation upon the issuance of an exclusion order, 87 and, thus, its ultimate purpose is the same as that of deportation: protection of the nation's sovereignty interest by controlling immigration. 88 Second, the Supreme Court has not regarded temporary detention as "excessive." Indeed, such a conclusion would render the use of detention punitive and, absent conviction for a crime in the United States, unconstitutional. 89 Apparently, the government's sovereignty interest is sufficiently compelling that it outweighs an alien's interest in going free while awaiting exclusion.

Given that deportation and detention pending deportation have been held constitutional, indefinite detention of undeportable aliens should also pass the Court's two-pronged test. First, indefinite detention serves the same nonpunitive governmental purpose as does deportation: protection of the nation's sovereign interest in controlling immigration. 90 Second, indefinite detention is not an "excessive" way to protect this interest. Apart from physically forcing aliens to

86. The courts have long recognized that detention pending deportation is an essential element of the government's power to exclude or expel aliens. See Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). The Wong Wing court analogized such detention to pretrial detention, which ensures the availability of the accused for trial but is not considered punishment. 163 U.S. at 235 ("Detention is usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongly accused; but it is not imprisonment in a legal sense."); cf. The Japanese Immigrant Case, 189 U.S. 86 (1903) (detention pending deportation incidental to enforcement of deportation provisions); see also Wong Wing v. United States, 163 U.S. 228 (1896); Fong Yue Ting v. United States, 149 U.S. 698 (1893). See generally 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 8.16a (1983).

87. Detention guarantees that an alien will be available for deportation upon the issuance of an exclusion order. Carlson v. Landon, 342 U.S. 524, 538 (1952) (detention necessarily a part of the deportation process); Wong Wing v. United States, 163 U.S. at 235 ("Proceedings to exclude or expel would be vain if those accused could not be held in custody . . . while arrangements were being made for their deportation.").

88. See note 79 supra and accompanying text.

89. See text at note 74 supra.

90. See note 79 supra. One commentator has argued that "[t]he denial of parole to an alien who was excluded only for lack of proper entry documents should constitute . . . a violation of the punishment without prosecution prohibition, since such an alien would not seem to pose any threat to the public." Note, Limitations on Indefinite Detention, supra note 22, at 588.
leave the country even when no nation will accept them — a potentially harsh policy\(^91\) — the only other way to deal with undeportable, excluded aliens is to release them into the United States on parole. But mandatory release would preclude the government from exercising its sovereign power to control immigration: it would cause the decision to admit or expel an alien to turn entirely on the willingness of other countries to accept him.\(^92\) In addition, mandatory release would expose the country to the consequences that another mass influx like the Cuban Freedom Flotilla might bring.\(^93\) In short,

This argument misperceives the primary goal of detention to be the protection of the public; rather, detention protects the sovereign interest in controlling immigration.

\(^91\) If the United States were faced with another mass migration of illegal aliens in the future, then the assumption made throughout this Note, that another nation can, in fact, prevent the United States from returning illegal aliens to their homeland, might be severely tested. The President might allow these aliens to settle here under the Refugee Act, 8 U.S.C. \(\S\) 1157(b) (1982) (President may admit refugees in emergency situations where justified by "grave humanitarian concerns" or the "national interest"). However, the United States might be less hospitable. For example, President Reagan's policy is that of interdiction at sea: "The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). The United States also might provide aliens with a seaworthy ship and escort the ship back to the waters of the country from which the aliens departed. Both interdiction and escort-back protect sovereignty through exclusion.

Moreover, either of these alternatives would probably be less expensive than detention. The annual cost of detaining Cuban aliens at the federal penitentiary in Atlanta is estimated at $10,000 per detainee. Nazario, Cubans Jailed in U.S. Start A Court Fight, Wall St. J., Jan. 21, 1983, at 17, col. 3. The Department of Justice requested $58.735 million in funds for fiscal year 1983 for detention, medical services, and care for Cuban and Haitian entrants. Dept. of Justice Authorization for Fiscal Year 1983: Hearings Before the House Comm. on the Judiciary, 97th Cong., 2d Sess. 78 (1982) (letter of Robert A. McConnell, Assistant Attorney General).

\(^92\) One commentator has argued that even indefinite detention does not protect the nation's sovereignty interest:

The physical presence of an alien who cannot be deported from this country frustrates the goals of the sovereignty doctrine, whether or not the alien remains in confinement. The alien has successfully imposed himself upon the United States and the government must devote considerable resources to his detention or permit him to enter American society.

Note, supra note 22, at 587-88 (footnotes omitted). True, the government must spend money for the incarceration and care of aliens, an expense it would not incur if it released the aliens into the United States. But this cost is a policy reason for favoring release, not a constitutional one.

Moreover, the physical presence of an alien does not "frustrate" the goals of sovereignty. The commentator has overlooked the exclusion effect of detention and the systemic consequences of mandatory release. See note 83 supra and accompanying text. If one undeportable alien intrudes on sovereignty, the intrusion will increase in volume as more undeportables arrive.

Another commentator has argued that "[t]he case of the alien indefinitely in detention is analogous to that of an individual charged with a criminal offense and facing incarceration. After detention has dragged on for months, it can no longer be considered a temporary measure necessary to effectuate deportation, but must be considered punishment . . . ." Note, supra note 65, at 997. Again, this ignores the exclusion effect of detention where an alien cannot be deported. Under such circumstances, detention is not incidental to deportation; it is the only practical means by which the government can vindicate its sovereign right to exclude aliens. The mere assertion that it is "punishment" in such instances does not withstand the constitutional analysis presented in this Note.

\(^93\) A recent magazine article described some of the problems faced by members of the
mandatory release would eviscerate sovereignty by effectively granting undeportable, excluded aliens a constitutional right to enter the country.\textsuperscript{94} Indefinite detention is therefore the only practicable means of vindicating the nation's sovereign power to exclude aliens as it sees fit.

Because indefinite detention is calculated to achieve a nonpunitive objective in a manner that is not excessive, the remaining step is to balance the government's sovereignty interest against the harshness of indefinite detention. Because temporary detention pending deportation does not violate the Constitution,\textsuperscript{95} the relevant "harshness" is the increased deprivation resulting from the longer detention of undeportables.\textsuperscript{96} The extent of this greater deprivation is minimal

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\textsuperscript{94} Id. at 24, col. 3.

\textsuperscript{95} See notes 86-89 supra and accompanying text.

\textsuperscript{96} The constitutional infirmity of indefinite detention must lie in the duration of the restraint, not in its nature. The fact that temporary detention is permissible means that unconstitutionality cannot be inherent in detention itself. However, one commentator has taken the opposite position, hinting that detention itself may be punitive: "The nature of detention generally creates an inference of punitive purpose. Detention in a locked security facility is a severe restraint on liberty and traditionally has been regarded as punishment." Note, supra
for three reasons. First, because the United States has a strong incentive to deport affected aliens at the first available opportunity, the "indefinite" detention of those who are undeportable need not be longer than the temporary detention of aliens awaiting an exclusion hearing. Second, affected aliens may be better off detained than they would be under the constitutionally permissible alternative of deportation. Third, the Constitution imposes limits on the conditions of an alien's detention, thus reducing the risk that such detention will take on harshly punitive characteristics. On balance, then, the additional deprivation that indefinite detention imposes on aliens should not outweigh the nation's extremely strong sovereignty interest.

B. Constitutional Limitations on the Detention of Excluded Aliens

Despite the fact that indefinite detention may be permissible under certain conditions, the Constitution should require that deportation take place if "practicable and proper" and impose on the

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note 22, at 584. But the commentator undermines his own argument by conceding the well-established proposition that detention pending deportation is not punishment in the constitutional sense, id. at 585-87, thereby conceding that punishment cannot inhere in detention itself.

97. Indefinite detention does not imply unending detention. First, the Constitution does place limits on detention, requiring that the government make a good faith effort to deport the alien while he is detained. If the government does not make this effort, it must release the alien. See notes 100-09 infra and accompanying text. Second, there is no reason to presume that the government's efforts to deport will prove fruitless, especially when the government has strong incentives to deport. See note 91 supra.

98. Deportation is itself a harsh sanction. See note 84 supra. Given an announced policy of detention, the circumstances under which aliens are nevertheless likely to try to enter the United States are those in which they face extreme economic deprivation or persecution in their own land. For those so affected, detention may be a less onerous burden than deportation, which is clearly permitted by the Constitution.

99. See Note, supra note 22, at 592-93 (constitutional prohibition against punishment without due process imposes restrictions on the conditions of an alien's detention). The eighth amendment's prohibition of "cruel and unusual punishments" does not, however, apply to indefinitely detained aliens. This provision applies only to convicted criminals. See, e.g., Bell v. Wolfish, 441 U.S. 520, 535 n. 16 (1979).

100. Cf. notes 86-89 supra and accompanying text (detention pending deportation is constitutionally permissible). In the case of detention pending deportation, prevention of even minimal incursion on the nation's sovereignty interest justifies detention. The incursion is minimal because it involves only individual absconders; it would not provide an inducement to illegal immigration, as would a policy of nondetention. See note 83 supra.

When an excluded alien cannot be deported, sovereignty is obliterated without indefinite detention. See notes 97-99 supra and accompanying text. Thus, the constitutional permissibility of indefinite detention arguably follows a fortiori from the permissibility of detention pending deportation.

101. The "practicable or proper" standard is borrowed from the current statute dealing with deportation of excluded aliens. See 8 U.S.C. § 1227(a)(1) (1982). This provision of the INA requires that an excluded alien must be deported immediately unless the Attorney General, in his discretion, determines that immediate deportation is not practicable or proper.

The practicable or proper standard is useful in analyzing the constitutional issues involved, because it covers the two situations in which the government may not be able to deport an excluded alien. Deportation is not "practicable," for example, where no other country is willing to accept the excluded alien. See note 8 supra. Deportation is not "proper," for instance,
government a good faith obligation to try to deport excluded, detained aliens. Deportation provides the government with a constitutional,102 less onerous103 means of protecting sovereignty. Once deportation becomes practicable and proper, detention becomes excessive and therefore unconstitutional.104

To say that the Constitution mandates deportation when practicable and proper, though, does not ensure compliance with this requirement. The government could circumvent this standard simply by making no effort to deport a detained alien. To ensure compliance with the Constitution, therefore, the government should be under an obligation to make a good faith effort to deport an excluded alien.105

If the government detains an excluded alien after his exclusion hearing, the alien may then rely on the writ of habeas corpus to challenge his detention.106 The writ enables the courts to review the gov-

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102. See note 78 supra.

103. If deportation were more onerous than detention, the constitutional permissibility of indefinite detention would follow a fortiori from the permissibility of deportation. See notes 75-76 supra and accompanying text.

104. See text at note 74 supra.

105. The good faith standard proposed here is analogous to that in the current statute dealing with deportation of expellable aliens. Under 8 U.S.C. § 1252(c) (1982), such aliens may be detained for six months while the Attorney General arranges their deportation. However, expellable aliens may challenge their detention if within this period “the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case.” 8 U.S.C. § 1252(c) (1982). If an excluded alien cannot be deported to his native country or the country from which he departed for the United States, see 8 U.S.C. § 1227(a)(2) (1982), he can be deported to a series of alternative countries, including ultimately “any country which is willing to accept the alien into its territory.” 8 U.S.C. § 1227(a)(2)(D) (1982); see also notes 7 and 17 supra. The statutory requirement that deportation to any country be attempted before indefinite detention is authorized also has a constitutional dimension, because detention would otherwise be an excessive means of protecting the government’s sovereignty. See note 72 supra and accompanying text.

Finally, the standard proposed here is consistent with the result in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). In Mezei, an excluded alien who had been detained for 21 months sought relief in a habeas corpus proceeding. See 345 U.S. at 207-09. The alien had been excluded by the Attorney General without a hearing on national security grounds. 345 U.S. at 208. By a five-to-four vote, the Supreme Court overturned a lower court decision ordering the alien’s parole. The Court held that the alien, as an excludable, was to be “treated as if stopped at the border,” 345 U.S. at 215, and had no constitutional due process right to a hearing on the grounds for his exclusion. 345 U.S. at 212. In Mezei, however, repeated, unsuccessful efforts to deport the alien involved were made, see 345 U.S. 208-09, before he was ultimately detained for over four years. Compare 345 U.S. at 208 (detained upon arrival in New York in February 1950), with Trop v. Dulles, 356 U.S. 86, 102 n.36 (1958) (released by an act of executive grace in August 1954). Such efforts would have been sufficient to meet the constitutional “good faith” standard proposed in this Note, assuming the alien was validly excluded.

106. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
ermental restraint on an alien's liberty. 107 Upon review by writ of habeas corpus, the government would have to show that it was making a good faith effort to deport the detained alien. 108 Because efforts to deport generally involve negotiations with foreign countries, the


The INA provides for habeas corpus proceedings as the exclusive mechanism for judicial review: "Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise." 8 U.S.C. § 1105a(b) (1982).

107. The writ of habeas corpus has for centuries been regarded as the best defense of personal freedom. See, e.g., Ex parte Yerger, 75 U.S. 85, 95 (1868).

The court in Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982), examined the issue of whether detained aliens were eligible for parole in a manner consistent with the good faith standard proposed in this Note. The Palma court held that the INA's requirement that deportation take place unless not "practicable or proper" mandated periodic review of the status of detained excluded aliens who could not be deported. 676 F.2d at 104.

The Palma court described the Attorney General's review plan as follows:

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The current plan, adopted in July 1981 and twice modified, calls first for a review of the detainee's file. If parole cannot be recommended on that basis, a panel composed of Immigration and Department of Justice officials personally interviews the detainee. The panel must determine if the detainee should be recommended for parole, considering such factors as his past criminal history, his record of disciplinary infractions while in custody, and his cooperativeness in institutional work and vocational programs. Release cannot be recommended unless the panel members agree that (1) the detainee is presently a nonviolent person, (2) he is likely to remain nonviolent, and (3) he is unlikely to commit any criminal offense following his release. Panel recommendations are not conclusive but must be approved by the Commissioner of the Immigration and Naturalization Service. The plan requires subsequent review of a detainee within one year after a decision denying him parole, and it allows earlier release on the recommendation of the staff of the institution where the alien is detained. The plan states that after all detainees have received subsequent reviews, the procedures will be reevaluated for the purpose of determining future review of the remaining detainees. 676 F.2d at 102.

Although release on parole would eliminate the indefinite detention of an undeportable, excluded alien, parole review is not a requirement of the INA's deportation provisions. Thus, the Palma court erred by taking the "not practicable or proper" proviso in 8 U.S.C. § 1227(a)(1) (1982), which deals with deportation, and holding that it was satisfied by review procedures designed to determine eligibility for parole. The problem with the Palma court's interpretation is that a determination that an excluded alien should be detained because he or she is ineligible for parole does not address the question whether deportation of that alien has become feasible in the interim.

108. This Note does not propose a comprehensive definition of good faith or an exhaustive list of "good faith" actions. The executive branch must be accorded a great deal of latitude in dealing with other nations. See note 109 infra. A rigid formulation of good faith would violate the Supreme Court's admonition that "[e]very rule of constitutional law that would inhibit the flexibility of the political branches to respond to changing world conditions should be adopted only with the greatest caution." Mathews v. Diaz, 426 U.S. 678, 681 (1976). In a similar vein, the Supreme Court said in Harisiades v. Shaughnessy, 342 U.S. 580 (1952): "However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision . . . ." 342 U.S. at 591.

Nevertheless, in the case of the excluded Cubans, the government's current efforts should satisfy the standard. The government is exerting pressure on Cuba to take back the detained aliens by refusing to issue immigration visas to Cubans. See, e.g., N.Y. Times, May 26, 1983, at 1, col. 1.
scope of judicial review must be relatively narrow: the executive branch must be accorded broad discretion in the conduct of foreign affairs. Nonetheless, should the government fail to make a sufficient showing, the writ should issue and the alien should be released. Only in this way can the courts enforce the constitutional prohibition against the use of detention as punishment.

**CONCLUSION**

To protect national sovereignty, Congress has broad power to control immigration. Congress has exercised this power in the INA. Construed in the light of its legislative history and purpose, the INA authorizes the indefinite detention of undeportable, excluded aliens. Such detention does not violate the fifth amendment's prohibition against "punishment." The Constitution does, however, limit the government's authority by imposing a good faith obligation to attempt the deportation of detained aliens.

This result is admittedly harsh. One can sympathize both with nondangerous detained aliens who have seen similarly situated persons go free and with the courts that have faced the plight of these detainees. Although this Note finds that existing law requires this harsh result, it does not necessarily endorse it. It does, however, conclude that the authority to change this result lies with Congress, not the courts.

109. See, e.g., Fiallo v. Bell, 430 U.S. 787, 796 (1977) (judicial deference to the executive branch required where the executive is dealing with immigration matters involving other countries); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892).