86-8010
86-8011

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

MOISES GARCIA-MIR, et al.,

Appellees,

v.

EDWIN MEESE, III, et al.,

Appellants.

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

BRIEF FOR APPELLANTS

HABEAS CORPUS PREFERENCE

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STATEMENT REGARDING PREFERENCE

This case appears to fall under this Court's habeas corpus preference category. Rules of the Eleventh Circuit, Appendix I(a)(3). This Court's order of January 21, 1986 requires expedited briefing and argument in any event.

STATEMENT REGARDING ORAL ARGUMENT

Appellants desire oral argument of this appeal, in view of the extraordinary degree to which the public interest is affected by the resolution of the issues presented.

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STATEMENT OF THE ISSUES

1. Whether any excludable Mariel Cubans have a federally-created liberty interest because of an alleged "invitation" by President Carter for them to come to the United States, which requires that they be given criminal trial-like hearings at which the government must justify their detention by proving that they are "likely to abscond, to pose a risk to the national security, or to pose a serious and significant threat to persons or property within the United States."

2. Whether the district court erred in failing to decertify the class pursuant to this Court's order in Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), pet. for cert. pending sub nom. Marquez-Medina v. Meese, No. 85-5874 (filed Nov. 13, 1985).

STATEMENT OF THE CASE

Proceedings Below

This case, consisting of two class actions which have been consolidated for disposition, pertains to those excludable Cuban aliens who came to the United States during the 1980 Mariel Flotilla and who have been detained under our immigration laws in the Atlanta Federal Penitentiary. In 1981, the district court certified a class consisting of "all Cuban nationals who are presently incarcerated at the Atlanta Federal Penitentiary or who will be incarcerated there and who arrived in the United States from Cuba as part of the 'Freedom Flotilla' in 1980." Fernandez-Roque v. Smith, 91 F.R.D. 117, 123, as modified, 91 F.R.D. 239, 244 (N.D. Ga. 1981).

As this litigation has progressed, the aliens have advanced a wide array of theories in support of their two principal goals, namely release from detention and protection from deportation to Cuba, and this case has been before this Court on three prior occasions.[1] In Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984), this Court reversed the district court's ruling that the alien class possessed a constitutionally based liberty interest, which the district court had found to require procedurally elaborate, criminal trial-like hearings before the government could continue to detain aliens whose removal from the United States was impracticable. This Court, however, remanded the case for further proceedings on such issues as the aliens' claims that they have a federally-created, nonconstitutional liberty interest and that their detention was in violation of international law. 734 F.2d 582, n.10.

The district court, on remand, considered the "federally-created liberty interest" issue on the pleadings and exhibits filed by the parties. However, at the aliens' request, an evidentiary hearing was held as to the "international law" issue. The aliens

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[1] See Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982) (dealing with jurisdictional issues pertaining to a TRO which had enjoined the government from deporting these Mariel Cuban class members); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984)(ruling that Mariel Cubans have no constitutionally based liberty interest); Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), pet. for cert. pending sub. nom. Marquez-Medina v. Meese, No. 85-5874 (filed Nov. 13, 1985)(dealing with the aliens' class-wide asylum claim and with questions pertaining to the parole of 34 alien detainees under the now extinguished provisions of the Attorney General's Status Review Plan, which had previously governed the release of class members).

argued that a number of domestic sources supported their federally-created liberty interest theory, namely, the Attorney General's extinguished Status Review Plan which once had governed the parole of Mariel Cubans, the statements and policies of President Carter, the 1967 Protocol Relating To The Status of Refugees (19 U.S.T. 6223, T.I.A.S. 6577), and the parole of Mariel Cubans under the "Cuban/Haitian Entrant (Status Pending)" parole terminology.

In an order dated November 25, 1985, the district court rejected the detainees' international law argument, as well as several of their liberty interest contentions. However, the district court ruled that Executive Branch actions at the time of the flotilla gave rise to a protected liberty interest in continued parole for Mariel Cubans who, prior to arrival, were not mentally incompetent and had not committed serious crimes in Cuba. Order at 15, 24, 27, 37. On the basis of its view of the government's reaction to the 1980 boatlift, especially President Carter's so-called "open heart and open arms" statement of May 5, 1980, the district court ruled that the President had extended an "invitation" to Mariel Cubans which placed "'substantive limitations on official discretion'" to the extent of creating a liberty interest in parole. Order at 20-21, 27.

The district court held that this federally-created liberty interest entitled each class member to a hearing "at which his continued detention must be justified by a finding that he is likely to abscond, to pose a risk to the national security, or to pose a serious and significant threat to persons or property within the United States." Order at 37. The district court further ruled that this hearing would be governed by the procedures it had

specified in 1983 when it found a "core" liberty interest stemming directly from the Constitution. Fernandez-Roque v.Smith, 567 F.Supp. 1115, 1129-45 (N.D. Ga. 1983), rev'd on other grounds, 734 F.2d 576 (11th Cir. 1984). Those procedures, among other things, place a "clear and convincing evidence" burden of proof on the government (id. at 1139-40), give indigent detainees the right to counsel appointed at taxpayer expense (id. at 1138-39), allow detainees to invoke without adverse inference a privilege against self-incrimination with respect to United States criminal activity (id. at 1137-38), and give them the rights to compel the attendance of witnesses (id. at 1135), and "to confront and cross-examine witnesses who provide evidence in support of continued detention" (id. at 1136).

The district court required that the government submit a plan for the implementation of these detention hearings, and ruled that the hearings themselves were to begin 60 days after the date of its order. Order at 38. The district court subsequently extended the date for submission of a plan (Order of December 24, 1985), and this Court stayed implementation of the plan pending resolution of this appeal, although it denied the government's request to stay the filing of a plan with the district court. Garcia-Mir v. Meese, ___ F.2d ___ (11th Cir. Jan. 21, 1986). On January 24, 1986, the government submitted to the district court a plan containing the procedural elements it had mandated for the detention hearings.

This Court was faced with a separate but related aspect of this litigation in Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), petition for cert. pending sub nom. Marquez-Medina v.

Meese, No. 85-5874 (filed Nov. 13, 1985). The issues in Garcia-Mir concerned the aliens' class-wide asylum claim and the release, as ordered by the district court, of 34 detainees who had been found to be releaseable under the now extinguished provisions of the Attorney General's Status Review Plan. As part of its reversal of the district court on the asylum and parole issues, this Court criticized the maintenance of the case as a class action, stating:

> Decisions regarding parole, asylum, and withholding of deportation must be made only after considering the particular circumstances of each individual's case. . . . We, therefore, find that further class-wide treatment on these issues is inappropriate. We also note that continuing to treat these issues on a class-wide basis will necessarily result in some individual class members, at least temporarily, receiving relief that they are not entitled to under any circumstances, ... Rule 23 was not designed to produce such results.

766 F.2d at 1487-88, n.11. The government, in keeping with the expressions of this Court in Garcia-Mir, moved for decertification of the class on the ground that both the mandate and the reasoning of this Court precluded the continuation of this case as a class action. The government further moved the district court "to rule promptly on this decertification motion, and to take no further action respecting the class of Cuban detainees pending that ruling." Government's Motion For Decertification Of The Class, p.2, filed Sept. 23, 1985. The district court, however, did not specifically address either the government's motion for decertification or the implication of this Court's Garcia-Mir decision on the continuation of the case as a class action when the district court rendered its November 25, 1985 Order finding the existence of a federally-created liberty interest.

Background And Facts

The district court recognized that a liberty interest, not of constitutional origin, may be created if a governmental body places "substantive limitations" on the broad official discretion it would otherwise enjoy in a particular area. Order at 7. As the Supreme Court has stated, those "substantive limitations on official discretion" occur when "'. . . particularized standards or criteria guide the . . . decisionmakers.'" Olim v. Wakinekona, 461 U.S. 238, 249 (1983). In this case, the district court ruled that the government had created a liberty interest for Mariel Cubans by extending an "invitation" to the entire sane and noncriminal population of Cuba to come to the United States. That "invitation" was found in the Executive Branch's response to the 1980 Cuban boatlift.

Aside from any deeper social and political causes, the immediate precursor to the 1980 flotilla was the occupation of the Peruvian Embassy in Havana by over 10,000 Cubans who desired to leave Cuba. See "A Report of the Cuban-Haitian Task Force," dated Nov. 1, 1980, at 99, attached to the Reply To Plaintiffs' Statement Concerning Invitation of Cubans To The United States, filed Sept. 18, 1981 (hereinafter referred to as "Task Force Report"). On April 14, 1980, in response to that situation, President Carter exercised his powers under sections 101(a)(42) and 207 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1101(a)(42) & 1157, and determined that the "persons who have taken sanctuary in the Peruvian Embassy in Havana who otherwise qualify may be considered refugees" and authorized the admission of a "maximum of 3,500" such refugees to the United States. 45 Fed.

Reg. 28079.

At first organized flights were allowed to transport would-be refugees from Havana to Costa Rica, but on April 20, 1980, the Cuban government, after having stopped those flights, announced that all Cubans wishing to go to the United States were free to board boats at the port of Mariel. Task Force Report 100-101. As the Report of the Cuban-Haitian Task Force notes, "[w]ithin hours of Castro's April 20 announcement, Cuban-Americans from Miami [were] on their way to Cuba to pick up relatives." Id. at 101. The first Mariel Cubans arrived in the United States on April 21, 1980. Id. at 86.

On April 23, 1980, the Coast Guard in Florida began radio broadcasts in English and Spanish warning that participation in the then mounting flotilla was illegal:

> All marine interests intending to transit to Cuba for the purpose of transporting aliens to the United States are advised that this activity is in violation of U.S. law. Violators may be arrested and vessels seized.

Addendum To Defendants' Memorandum In Opposition To Plaintiffs' Motion For Writ Of Habeas Corpus, at 93, filed Feb. 13, 1985 (hereinafter referred to as "Def. 1985 Add."). Similarly, on April 24, 1980, the Customs Service began distributing a warning to persons seeking outbound Customs clearances which quoted the INS' policy "that it will act to stop boat owners from bringing Cubans and other aliens to the United States without valid visas," and which explained that the civil sanctions and criminal penalties contained in our immigration laws for bringing visaless aliens to the United States and for failing to report for INS inspection would be enforced. Def. 1985 Add. at 101-103. The INS in Florida

began issuing civil fine notices immediately, and even seized three vessels in April. Id. at 66.

Also on April 23, 1980, at the outset of the flotilla, the State Department reiterated the illegality of bringing undocumented persons to this country, and urged the boat owners and captains to stop their "illegal transit" which was "playing into the hands of the Cuban authorities." Id. at 53. Our consular post in Cuba, the U.S. Interest Section attached to the Swiss Embassy, also expressed disapproval of Mariel, warning that entry into the United States was illegal absent valid documents. Id. at 119-120.[2]

A statement by Vice President Mondale on April 27, 1980, noted that Castro was luring members of the Cuban American community "into extraordinarily dangerous and unlawful boat trips," and called upon that community "to respect the law and to avoid these dangerous and illegal boat passages." The Vice President stated that "Cuba must agree to a policy that permits the orderly, safe, and humane evacuation of refugees," and that "if Castro wants to expel his people," he should begin by releasing certain political prisoners who would be transported to freedom by the United States. 16 WEEKLY COMP. OF PRES. DOC. 780 (hereinafter referred to as "WEEKLY COMP."), Def. 1985 Add. 14.

By the end of April over 7,500 Cubans had arrived and, with more on the way, the Navy began assisting the Coast Guard in the

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[2] At that time, there were a maximum of about 1,500 Cubans in Cuba with documents that would permit them to enter the United States (Def. 1985 Add. 125), and none of these aliens had to rely on the Mariel boatlift as a means of transportation to the United States. Id. at 115-120.

Florida Straits in rescue operations and in channelling inbound vessels to Key West. Task Force Report 101; Def. 1985 Add. 73, 80. As the United States Coordinator for Refugee Affairs, Ambassador Palmieri, explained in testimony before Congress, the Mariel boatlift was driven in large measure by the Cuban American community's "long-deferred hopes for family reunification" and, with the practical impossibility of preventing the already loaded vessels from returning to the United States, it was important to prevent loss of life and to keep control of the arriving Cubans at Key West. Def. 1985 Add. at 78-80. With Castro placing a variety of undesirable aliens onboard the large number of small vessels taken by United States citizens and residents to Mariel (id. at 74-76), it became even more important to ensure that every alien was screened upon arrival:

> . . . we place great importance in controlling certain elements which are entering the country with this flow.
>
> We have to get and maintain control at Key West. We cannot scatter these arrivals surreptitiously by night along the Florida Keys or along the Florida coast. We must have them come through inspection, we must have them come through lawful processing.

Id. at 80 (testimony of Ambassador Palmeiri before the House Subcommittee on Immigration, Refugees and International Law).

On May 2, 1980, President Carter invoked his powers under the Migration and Refugee Assistance Act of 1962 to make ten million dollars available for processing, transporting and caring for the arriving Cubans. Pres. Determination No. 80-18 of May 2, 1980, 45

Fed. Reg. 29787.[3] That same day the White House announced that reception and processing facilities for the Cubans were being expanded along with the Coast Guard's rescue capability, but added that:

> Because the Cuban Government is including individuals with criminal records in the boatloads of departing Cubans, careful screening of all arrivals is being conducted by appropriate Federal officials. Under U.S. immigration laws, individuals with records of criminal activity who represent a threat to the country or whose presence would not be in the best interests of the United States are subject to arrest, detention, and deportation to their countries of origin. The United States will enforce these laws.

WEEKLY COMP. 819-20, Def. 1985 Add. 15-16.

As of May 5, 1980, just over 16,000 Cubans had arrived in the United States. Task Force Report 86. On that day, President Carter spoke before a League of Women Voters convention and responded to questions. The President's prepared remarks made no mention of the arriving Cubans. WEEKLY COMP. 628-31. The President, however, responded to a question with what has come to be known as his "open heart and open arms" statement, in which he stated:

> . . . We, as a nation, have always had our arms open to receiving refugees in accordance with American law. . . .
>
> I have a responsibility to administer the law, because I've taken an oath to do so, and to administer it in a fair and equitable way. . . .
>
> As you know, there are almost 400 of

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[3] Throughout the course of the Mariel boatlift, as the need became apparent, President Carter increased the amount of emergency funding available to deal with the evolving crisis. See Pres. Determinations of Aug. 7 and Sept. 21, 1980, 45 Fed. Reg. 62007, 65993.

> those [Cuban political prisoners] who have been issued visas by our country who are hiding from mob violence . . . . So those 400 plus literally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law.
>
> . . . We do have a need to go back to the Congress for additional funds to care for this unexpected influx of refugees. . . . But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

WEEKLY COMP. 834-35, Def. 1985 Add. 19-20. This Court noted in United States v. Frade, 709 F.2d 1387, 1395 (11th Cir. 1983), that the "'open heart and open arms' statement was broadly interpreted as governmental approval of the boatlift." However, Eugene Eidenberg, who was a "key coordinator of the government's policies during" the flotilla, has stated that "no senior advisor to the President was recommending that United States policy be to welcome, encourage, or stimulate the 'boat lift.' United States policy from beginning to end was to control and stop the 'boat lift.'" Declaration of Eugene Eidenberg, paras. 4 & 5, attached to Defendants' Response To "Plaintiffs' Post Oral Argument Memorandum," filed June 14, 1983 (hereinafter referred to as "Eidenberg Declaration"). As Mr. Eidenberg recounts, "President Carter himself explicitly reiterated the policies of attempting to stop the flotilla, to do so in a manner that did not result in a loss of life, and to process the arriving aliens under United States law at a meeting held in the Cabinet Room with the Florida Congressional delegation which I attended on May 6, 1980." Eidenberg Declaration, para. 12.

The Coast Guard radio warnings, the institution of INS civil fine proceedings, and the repeated governmental urgings to the Cuban American community failed to bring an end to the flotilla, and by May 14, 1980, over 43,000 aliens had arrived. Task Force Report 86. On that day, President Carter announced new measures both for bringing a halt to the boatlift and for accepting certain prescreened escapees from Cuba. Def. 1985 Add. 31-35, WEEKLY COMP. 914-18.

On the enforcement side, the Coast Guard was directed to communicate with boats in or en route to Mariel "to tell them to return to the United States without taking Cubans on board." Id. at 917. While the INS would continue commencing fine proceedings, all vessels unlawfully carrying Cubans to the United States were henceforth to be seized, persons making second trips were subject to criminal prosecutions and their vessels subject to forfeiture, and law enforcement agencies were instructed to "take additional steps, as necessary, to implement this policy and to discourage the unlawful boat traffic to Cuba." Id. Accordingly, the Coast Guard soon began attempting to intercept vessels heading to Mariel. Task Force Report 103; Def. 1985 Add. 85.

On the humanitarian side, President Carter offered to accept: (1) the people who sought freedom in the U.S. Interest Section in Havana; (2) political prisoners held many years by Castro; (3) those who sought refuge in the Peruvian Embassy; and (4) close family members of permanent residents of the United States. The President stated "we are ready to start an airlift and a sealift for these screened and qualified people to come to our country, and for no other escapees from Cuba." Id. at 31, WEEKLY COMP. 914. As

part of this stepped up effort to stop the flotilla, the President declared that:

> [I]n an unprecedented and irresponsible act, Castro has taken hardened criminals out of prison and forced some of the boatowners who have gone to Cuba from our country to bring these criminals back to the United States. Thus far over 400 such persons have been detained. I have instructed the Attorney General to commence exclusion proceedings immediately for these criminals and others who represent any danger to our country. We will ask also appropriate international agencies to negotiate their return to Cuba.

Id. at 915. In concluding his policy announcement, the President stated: "Our laws never contemplated and do not adequately provide for people coming to our shores directly for asylum . . . . I will work closely with the Congress to formulate a long-term solution to this problem and to determine the legal status of the boat people once this current emergency is under control." Id. at 916.

Castro responded to President Carter's overture by insisting that any negotiations respecting the flow of aliens also cover all bilateral issues between our two countries. Task Force Report 103. Towards the end of May, during a news interview, President Carter noted what was by then obvious, that the Cubans "who are already here will be assimilated into the American population," while observing that "[t]heir legal status has not yet been determined." WEEKLY COMP. 989.

In June, the President directed that "Cubans identified as having committed serious crimes in Cuba are to be securely confined," and that "exclusion proceedings . . . be started against those who have violated American law while waiting to be

reprocessed or relocated." WEEKLY COMP. 1053. The President later reiterated his stance as to the "hardened criminals" sent by Castro: "We will take all legal steps to ensure that under no circumstances will these criminals be resettled or relocated in American communities." Id. at 1072.

The flotilla continued, despite the stronger enforcement measures, although at a reduced level. Task Force Report 86-92. In a September, 1980 report to Congress, the government noted that "[d]espite the policy of arrests and seizures for forfeiture, the number of boats detected headed for Mariel, the number at Mariel and the number arriving back at Key West continues." Def. 1985 Add. 85. Finally, on September 26, 1980, Castro closed Mariel Harbor and ordered all boats awaiting passengers to depart. Task Force Report 109.

Almost 125,000 visaless Cubans arrived during the Mariel boatlift (id.), over 23,000 of whom admitted prior criminal convictions. Exhibit 1 to Plaintiffs' Motion For Entry Of Writ Of Habeas Corpus, filed Nov. 30, 1984 (hereinafter referred to as "Aliens' Exhibits"). Upon arrival, the aliens were screened on the basis of what they told us about themselves, because Cuba supplied no records. Id.; Def. 1985 Add. 77.

Except for the comparatively few who admitted sufficiently serious crimes to warrant immediate detention, or for those requiring medical and psychiatric care, the arriving Cubans were released under the Attorney General's parole powers contained in section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5), once suitable sponsorship could be arranged. Aliens' Exhibit 1. The INS instructed its officers to affix the phrase "Cuban/Haitian Entrant

(Status Pending)" to the parole documents. Aliens' Exhibits 33-37.

On several occasions the Executive Branch has proposed and Congress has considered legislation to regularize the immigration status of the aliens identified as "Cuban/Haitian Entrants," such as S. 3013, 96th Cong., 2d Sess. (1980)(see Task Force Report 107), but none of the bills have passed. Cubans released on parole, however, are eligible to apply for permanent resident status under the 1966 Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161. Such adjustment depends in part on the alien's ability to show that he is admissible for permanent residence in the United States. While no legislation respecting the immigration status of Mariel Cubans has been enacted, Congress has dealt with the financial assistance questions presented by the Mariel boatlift. Section 501 of the Refugee Education Assistance Act of 1980, Pub. L. 96-422, 94 Stat. 1799, has permitted the expenditure of funds for the processing and resettlement efforts undertaken with respect to the vast majority of the Cubans. The Refugee Education Assistance Act contains a definition of Cuban-Haitian Entrant which relies specifically on the immigration parole status of these aliens in determining eligibility for financial assistance.[4]

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[4] Section 501(e) of the Refugee Education Assistance Act of 1980 defines a "Cuban and Haitian entrant" as:

> (1) any individual granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and
> (2) any other national of Cuba or Haiti--(A) who--
> (i) was paroled into the United States and has not acquired any other status under the

(CONTINUED)

Although Congress recognized the need to provide funding to respond to the crisis generated by the Mariel boatlift, it also took notice of the undesirable elements placed on the returning boats by Castro. Thus, section 716 of the Act of Dec. 16, 1980, Pub. L. 96-533, 94 Stat. 3162, provided: "The Congress finds that the United States Government has already incarcerated recently arrived Cubans who are admitted criminals, are security threats, or have incited civil disturbances in Federal processing facilities. The Congress urges the Executive branch, consistent with United States law, to seek the deportation of such individuals."

It quickly became apparent that some Mariel Cubans who had been released on immigration parole were committing crimes in the United States and that there were also some breakdowns in sponsorship arrangements. See Task Force Report 55. Thus, on November 12, 1980, the INS issued parole revocation guidelines to its offices providing for revocation in sponsorship breakdown cases "if the alien has no means of support, no fixed address and no sponsor," and in criminal cases "if an alien is convicted of a serious

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[4] (FOOTNOTE CONTINUED)

Immigration and Nationality Act;
(ii) is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act; or
(iii) has an application for asylum pending with the Immigration and Naturalization Service; and
(B) with respect to whom a final, nonappealable, and legally enforceable order of deportation or exclusion has not been entered.

A peculiar funding problem for paroled Cubans under final exclusion orders was solved through the appropriations process. See Pub. L. 98-151, 97 Stat. 972 (Nov. 14, 1983).

misdemeanor or felony." Those guidelines were revised in May of 1982 and March of 1983, at which time it was the general "INS policy to revoke the parole of any Mariel Cuban: (1) who has been convicted in the United States of a felony or a serious misdemeanor and who has completed the imprisonment portion of [his] sentence . . . ; or (2) who presents a clear and imminent danger to the community or himself." The INS also had a special parole revocation policy to help support the sponsorship program for detainees released pursuant to the then existing Attorney General's Status Review Plan. Under this special program, parole could be revoked if the alien violated any of a number of restrictive parole conditions, such as possession of weapons or drugs, halfway house curfew violations, and failure to participate in treatment programs. Declaration of John A. Simon and exhibits, attached to Defendants' Response To "Plaintiffs' Post Oral Argument Memorandum," filed June 14, 1983.[5]

Throughout this time Cuba refused to take back excluded Mariel Cubans, see Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981), who consequently faced indefinite incarceration here. To deal with the resulting parole issues, the Attorney General adopted a Status Review Plan

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[5] In 1983, the district court considered these policies and, while concluding that they were procedurally flawed, declared "that the government's parole revocation policies are reasonable under the difficult circumstances presented by the Cuban entrants. It is not per se an abuse of discretion to revoke parole on the basis of behavior that is not criminal, or . . . after the parolee has served his full sentence . . . . " Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1141-42 (N.D. Ga. 1983), rev'd on other grounds, 734 F.2d 576 (11th Cir. 1984).

and Procedures ("Plan") in July of 1981, which was in keeping with President Carter's May 2, 1980 directive to detain and deport "individuals with records of criminal activity who represent a threat to the country or whose presence would not be in the best interest of the United States. . . ." WEEKLY COMP. 819-820. See Fernandez-Roque v. Smith, 91 F.R.D. 117, 121. Under the 1984 version of the Plan (filed in district court July 11, 1984), Justice Department panels made parole recommendations based on past criminal histories, prison disciplinary infractions, and progress in institutional work and vocational programs. Plan at 4-5. Release was recommended only if the panel agreed "that (1) the detainee is presently a non-violent person, (2) the detainee is likely to remain non-violent, and (3) the detainee is unlikely to commit any criminal offense following his release." Plan at 4. Consistent with President Carter's concern over hardened criminals "and others who represent any danger to our country" (WEEKLY COMP. 915, emphasis added), the Plan provided that "[d]isturbing doubts are . . . to be resolved against the detainee as he has the burden to convince review participants that he qualifies for release . . . ." Plan 5. Actual parole, moreover, required approval by the Commissioner of the INS or his representative, and sponsorship to a halfway house. Plan 7-8. The risk of absconding was not a factor considered under the Plan.

In December of 1984, Cuba finally agreed to the return of 2,746 named Mariel Cubans in exchange for a resumption of normal United States immigrant visa and refugee processing in Cuba. See exhibits attached to Government's Motion For A Stay of the Court's October 15, 1984 Order Pending Appeal, filed Dec. 27, 1984. At

that time, 147 of the detainees had been approved for release under the Plan. Cuba, however, had agreed to take all 147, including 34 with ready sponsors. See exhibits to Defendants' Response To The Court's Order To Show Cause Dated January 7, 1985, filed Jan. 10, 1985.

In a January 9, 1985 directive, the Attorney General blocked the release of all these aliens. The directive noted that the Plan was adopted to protect the American public from dangerous Mariel Cubans and was developed when Cuba still refused to accept their return. Release under the Plan had focused on an alien's dangerousness, and the Attorney General wanted his Plan reassessed. The Attorney General continued the Plan's review mechanism, but invoked his authority under 8 U.S.C. 1182(d)(5) to "direct that no releases . . . shall be effected," because "the existence of the agreement may significantly increase the likelihood of an alien absconding . . . ." Id. [6]

On February 12, 1985, the Attorney General terminated the Status Review Plan, finding that "there is no necessity to continue the special criteria and procedures of the plan in lieu of normal parole criteria and procedures contemplated by 8 U.S.C. § 1182(d)(5) and 8 C.F.R. § 212.5."[7] See appendix A-2, Brief of

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[6] In Garcia-Mir v. Smith, 766 F.2d at 1484-86, this Court upheld the Attorney General's temporary suspension of the Plan.

[7] This Court acknowledged the fact of the abolition of the Plan in Perez-Perez v. Hanberry, ___ F.2d ___, No. 85-8552, n.5 (11th Cir. Jan. 27, 1986), which overturned the district court's appointment of counsel at taxpayer expense under the Criminal Justice Act for Mariel Cubans bringing individual habeas corpus challenges to immigration parole denials.

Amici Curiae, filed March 12, 1985. The government succeeded in deporting 201 detainees to Cuba prior to Cuba's decision to suspend implementation of the repatriation agreement in response to the commencement of a new "Radio Marti" program on Voice of America broadcasts to Cuba. Currently, the INS District Director in Atlanta considers whether to release detained class members on parole, and as of December 19, 1985, 63 detainees had been paroled to halfway houses by the District Director, 15 detainees had been approved for release and were awaiting sponsors, and 66 had been relocated to St. Elizabeth's Hospital in Washington, D.C. Supplement to Government's Motion For A Stay, filed December 20, 1985.

The District Court's Decision

On July 1, 1985, the district court held an evidentiary hearing on the "international law" issues. On September 6, 1985, it heard oral argument on the "liberty interest" issues, at which time the question of decertification of the class arose, this Court's Garcia-Mir decision having been issued several weeks earlier. Transcript of Sept. 6, 1985 proceedings, 28-33. The government's formal motion for decertification of the class was filed on September 23, 1985. On Novermber 25, 1985, the district court issued its decision denying relief on the "international law" theory, but ordering criminal trial-like detention hearings on the basis of one of the aliens' "liberty interest" theories.

The district court divided the class into two groups for purposes of its analysis. The first group consisted of those aliens who were mentally incompetent or who had committed serious crimes in Cuba prior to their arrival, while the second group

consisted of all other arriving Cubans. While the aliens' arguments respecting these groups were framed in terms of the first group never having been released on parole and the second having had parole revoked, the court's analysis focused not on their prior parole status, but on whether they in fact were mentally incompetent or had committed serious crimes. Order at 9 & 15, n. 6 & 13. As to both groups, the court found that the extinguished Status Review Plan did not limit the broad parole authority of the Attorney General so as to be a source of a liberty interest, even if improperly terminated under the Administrative Procedure Act as the aliens claimed.

The court rejected the separate claims of the first group that the U.N. Protocol Relating To The Status Of Refugees and President Carter's June 7, 1980 statement respecting the making of "fair decisions" on prosecution or exclusion for rioters at a government processing facility gave them a liberty interest in obtaining parole. Order at 11-13. As to the second group, the court ruled that the general INS parole regulations, 8 C.F.R. § 212.5(d), conferred no liberty interest on the aliens because they contained even fewer limitations on official discretion than did the Status Review Plan. Id. at 16. However, combining its analysis of the aliens' arguments respecting the effect of parole under the "Cuban/Haitian Entrant (Status Pending)" terminology with its assessment of their Presidential "invitation" theory, the court concluded that a federally-created liberty interest exits for those Mariel Cuban class members who were not mentally incompetent and who had not committed a serious crime in Cuba. Id. at 16-31.

Standard Of Review

There is little or no dispute between the parties respecting the activities of the government or the statements of President Carter and the pronouncements of the affected agencies in response to the 1980 Mariel boatlift. The dispute, and the correctness of the district court's order, depend instead on the legal effect of those actions and pronouncements. Accordingly, the questions of the existence of a federally-created liberty interest and any attendant hearing procedures are questions of law which may be considered de novo on appeal.

Similarly, the district court's failure to decertify the class, as the government believes was mandated by this Court in Garcia-Mir v. Smith, 766 F.2d at 1487-88, n.11, also presents a question of law for de novo consideration here.

SUMMARY OF THE ARGUMENT

Governmentally created liberty interests do not arise merely from generous grants of discretionary benefits. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981). Instead, they arise when "particularized standards or criteria" result in "substantive limitations" on discretion, such that the benefits must be granted under specified conditions. Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

In this case, neither the informal remarks of President Carter to the League of Women Voters (the "open heart and open arms" statement) nor any other Executive Branch action respecting the 1980 Mariel Flotilla established substantive limitations on official discretion so as to require the Attorney General to revoke parole and to detain Mariel Cubans only in accordance with the

substantive and procedural requirements imposed by the district court. The district court purported to interpret an alleged "invitation," and to define the procedural due process elements attaching to the substantive rights which the district court found were conferred upon Mariel Cubans by the Government. In fact, however, the district court manufactured its own substantive limitations on the broad parole discretion of the Attorney General and then determined that criminal-like procedures are necessary to protect the important substantive interests which the district court alone has conferred on the Cubans. The district court has thus reached the unprecedented and truly incredible conclusion that an off-hand Presidential remark, coupled with a prosecutorial policy dictated by circumstances and sheer numbers, negated the discretion conferred on the Attorney General by Congress and changed the role of the judiciary from one of reviewing parole decisions under a "facially legitimate and bona fide" test, see Garcia-Mir, to that of creating both the substantive and procedural requirements surrounding the exercise of that discretion.

The criminal-like procedures ordered by the court reflect its failure to appreciate the interests of the government in the enforcement of the immigration laws, and the civil nature of all immigration proceedings. The sweeping class-wide relief it ordered, moreover, is contrary to this Court's directive in Garcia-Mir to decertify the class, and has been given to all detainees despite no showing that even a single alien has wrongly been denied release on parole.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT A FEDERALLY-CREATED LIBERTY INTEREST EXISTS, REQUIRING CRIMINAL TRIAL-LIKE PROCEDURES

A. Particularized Standards Limiting Discretion Are Required

The government has exercised its immigration powers to detain excludable Mariel Cubans for extended and indefinite periods of time because Cuba, with the exception of a recent six-month period, has refused to take them back, and because those charged with enforcing our immigration laws have considered the detainees unsuitable for release on parole. Their continued detention, brought on by Cuba's unwarranted refusal to accept their return, results in an obvious loss of freedom and is a matter of considerable weight to the individual detainees.

However, in Meachum v. Fano, 427 U.S. 215 (1976), a liberty interest case involving a transfer of a convicted state prisoner, the Supreme Court "reject[ed] at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause," stating instead "that the determining factor is the nature of the interest involved rather than its weight." 427 U.S. at 224 (emphasis in original). Subsequently, in another prison liberty interest case, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), the Supreme Court stated that "to obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of

it. He must, instead, have a legitimate claim of entitlement to it.'" 442 U.S. at 7 (quoting from Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

Excludable aliens, such as the Cuban detainees here, "'have no constitutional rights with regard to their [immigration] applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress.'" Garcia-Mir v. Smith, 766 F.2d at 1484 (11th Cir. 1985), quoting Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), aff'd on other grounds, ___ U.S. ___, 105 S. Ct. 2992 (1985). Indeed, the district court's 1983 ruling requiring the same hearings it has now mandated was reversed by this Court precisely because "the Cubans lack a constitutional liberty interest" in obtaining their release on immigration parole. Fernandez-Roque v. Smith, 734 F.2d at 582 (11th Cir. 1984).

Moreover, the authority of the political branches over immigration matters is exceptionally broad, and the Supreme Court has declared that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." Mathews v. Diaz, 426 U.S. 67, 81 (1976). The district court here applied a liberty interest analysis developed in the context of governmental actions relating to United States citizens, and concluded, in effect, that the United States had relinquished aspects of its sovereignty and had extended an irrevocable and virtually unbridled offer to the whole population of Cuba to come to the United States.

The government's paramount authority in immigration matters

forecloses any simple extension of domestic liberty interest law to this field. See Kleindienst v. Mandel, 408 U.S. 753, 765-70 (1972) (inherent sovereign power to exclude aliens dictates exceptionally narrow review even as against First Amendment interests of U. S. citizens); Olegario v. United States, 629 F.2d 204 (2d Cir. 1980), cert. denied, 430 U.S. 980 (1981) (domestic law equal protection analysis inappropriate in immigration context). Compare Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), with Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979) (President's action presumed legitimate in extinguishing "core" liberty interest in federal employment for permanent resident aliens). However, it is not necessary to determine precisely the contours of liberty interest analysis in the unique immigration law context, as the district court's decision is in error, even under traditional domestic liberty interest law.

A liberty interest, for domestic law purposes, can arise from sources other than the Constitution, and can lead to constitutionally required procedures to protect that interest. Wolff v. McDonnell, 418 U.S. 539 (1974). In such cases, the nature and extent of the interest are not founded in the Constitution, but are contained in, for example, the "statutes or other rules defining the obligations of the authority charged with exercising" the power. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Greenholtz v. Nebraska Penal Inmates, supra. Most importantly, the Supreme Court has stated that its "cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official

discretion. An inmate must show 'that particularized standards or criteria guide the State's decisionmakers.'" Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis added).

The import of the requirement that there be particularized standards limiting discretion was made graphically clear in Connecticut Board of Pardons v. Dumschat, supra. There, the Board of Pardons had a "consistent practice of granting [sentence] commutations" to inmates serving life terms, which it was contended gave rise to a protected liberty interest. 452 U.S. at 465. In response, the Supreme Court stated:

> A constitutional entitlement cannot "be created--as if by estoppel--merely because a wholly and expressly discretionary state privilege has been granted generously in the past." . . . . No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency.
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> The statute imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board.
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> . . . the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or "entitlement." A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.

452 U.S. 465-67 (emphasis in original).

Thus, generous dispensations of discretionary benefits create

no constitutionally protected entitlement for those receiving the benefits, unless there are particularized standards which, by placing substantive limits on the exercise of that discretion, require the granting of benefits under certain specified conditions. As we demonstrate next, nothing in the government's response to the flotilla placed any substantive restrictions on the Attorney General's exercise of his parole powers, or otherwise required a grant of immigration benefits to a sane and law-abiding Mariel Cuban.

B. No Liberty Interest Was Created For All Sane And Law-Abiding Cubans

The liberty interest found by the district court does not exist in any statute, regulation, or written set of instructions governing the immigration processing of Mariel Cubans. Instead, it was found in the overall response of the government to the flotilla and in President Carter's "open heart and open arms" statement. The court thus declared that detainees "who were not mental incompetents and who had not committed serious crimes in Cuba have a federally-created liberty interest in continued parole because they came to this country in response to an invitation from the President of the United States." Order at 37.

The district court, however, was unable to point to any "substantive limitations on official discretion" that were put in place as a result of this alleged invitation, nor did it find that the President established "particularized standards or criteria" to guide administrative decisionmakers. Instead, the district court could only infer that the alleged "invitation concerned the substantive right to be 'assimilated into American society'" (Order

at 27), because, as even the court was forced to acknowledge, "the language of the executive policy statements comprising the invitation did not spell out all its parameters and legal ramifications" (Order at 25).

The district court's analysis is fundamentally flawed in several respects, but perhaps most importantly in the conclusions it draws from the actions undertaken in response to the flotilla. The history of the 1980 boatlift clearly shows that it commenced with no encouragement from the Federal government. Castro opened Mariel harbor on April 20, 1980, the Cuban American community reacted, and the first aliens arrived in Key West on April 21. Sixteen thousand had arrived as of May 5, the day of the "open heart and open arms" statement.

In retrospect, there is little question that the government's initial response, consisting of urgings to the Cuban American community, radio warnings, INS civil fine notices and the like, was ineffective in stemming the transit of vessels to and from Cuba. Nor is there any doubt that the President's "open heart and open arms" comment contributed to the problem. But neither that statement nor the general response of the government reflects any "invitation" to the entire sane and law-abiding population of Cuba to come to the United States.

The flotilla was well underway before the government could do anything about it. It is simply absurd to infer that an "invitation" arose from the decision not to use force in an attempt to turn around the numerous overloaded and unseaworthy boats returning to Florida. Such action would have jeopardized the lives

of the aliens and the American crews, both of whom were only pawns in Castro's game, and would likely have caused many vessels to make surreptitious landings throughout Florida's Keys and coast. That the government chose against incurring both a loss of life and a loss of control, which a blockade of returning vessels would have caused, does not transform the flotilla into an open-ended government invitation. Indeed, maintaining control became of great importance once it was discovered that Castro was using the boatlift to expel a good deal of his criminal population.

Similarly, the resettlement and release on parole of the vast number of law-abiding Cubans who arrived here does not give rise to any liberty interest. The humanitarian prosecutorial policy respecting parole reflected the practical realities of dealing with tens of thousands of people who could not be returned to Cuba, who individually were no threat to the nation, and for whom there was insufficient detention space in any event.

The media coverage of the "open heart" statement, which ignored the President's "processed in accordance with law" qualification, may have sent the wrong message. But that could not change the fact that there was consistent government opposition to the flotilla, and progressively increased enforcement measures designed to bring it to a halt. More importantly, neither the "open heart" statement nor any other government pronouncement or policy required the admission or parole of <u>any</u> Mariel Cuban. The President at various times clearly directed that strong enforcement measures be taken against "individuals with records of criminal activity who represent a threat to the country or whose presence would not be in

the best interests of the United States" (WEEKLY COMP. 819-20, May 2), against "hardened criminals" and unidentified "others who represent any danger to our country" (id. at 915, May 14), and against those "having committed serious crimes in Cuba" and "who have violated American law while waiting to be reprocessed" (id. at 1053, June 7).

These generalized directives, which were most likely intended to reassure the public that protective enforcement measures were being taken in appropriate cases, did not place any "substantive limitations" on the parole discretion of the INS, nor did they establish "particularized standards or criteria" to guide the decisionmakers. The parole statute, 8 U.S.C. § 1182(d)(5), provides that the Attorney General "may, . . . in his discretion parole into the United States . . . for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission . . . ." The President told the Attorney General not to extend parole to Mariel Cubans "whose presence would not be in the best interest of the United States" and who "represent any danger to our country." The President's directives no more created a liberty interest than does the parole statute itself. Compare Jean v. Nelson, 727 F.2d at 981-82, with Garcia-Mir v. Smith, 766 F.2d at 1484-86. Moreover, those enforcement directives clearly extended to individuals beyond the district court's categories of persons who were mentally incompetent or had committed serious crimes in Cuba.

The President created no entitlement to parole for any Mariel Cuban, as he never directed that anyone be admitted. Circumstances

dictated that the majority of arriving Cubans would be released, and the generalized expressions of a humanitarian prosecutorial policy reflected that fact. However, no invitation was extended to the entire population of Cuba, as is shown by the continuous and escalating efforts to stop the boatlift. In any event, the President's generalized statements could not give rise to a liberty interest, as no "particularlized standards or criteria" were issued to differentiate between those who would be detained and those who would be paroled. No statements of the President or binding policy of the government in response to the flotilla restricted the unfettered discretion of the Attorney General to deny parole to any Mariel Cuban whose release was deemed imprudent or unwise, for whatever reason.

Arriving Mariel Cubans had only the opportunity to seek release on parole. They were given no vested rights which might support "a constitutionally protected 'legitimate claim of entitlement'" to parole. Olegario v. United States, 629 F.2d at 223 (statutory naturalization provisions for Filipino war veterans created only an opportunity to become citizens and governmental frustration of that opportunity did not deprive former U.S. nationals of a protected liberty interest). There was no mandatory language requiring a grant of relief to any Mariel Cuban. See Velasco-Gutierrez v. Crossland, 732 F.2d 792 (10th Cir. 1984) (INS operating instruction confers no liberty interest in absence of mandatory language restricting discretion).

The absence of "substantive limitations" and of "particularized standards or criteria" in this purported invitation is further

reflected in the exceptions found by the court below. The district court concluded that persons who were mentally incompetent or who had committed serious crimes in Cuba were not included in President Carter's invitation. The "open heart and open arms" statement of May 5, 1980, however, contains no such exclusions. Indeed, it appears that the district court inferred the existence of these exceptions to the alleged "invitation" because the class representatives suggested them. As support, it alluded to subsequent White House pronouncements (e.g. Order at pp. 11-12), and to a statement in United States v. Frade, 709 F.2d 1387, 1396 (11th Cir. 1983), that a May 14, 1980 Presidential statement was interpreted to mean that legitimate Cuban refugees would continue to be welcomed while efforts would be taken to prevent unsafe sea passage "and entry into the United States of Cuban undesirables forced onto the boats by the Castro regime." Neither Frade's concept of "undesirables," nor other White House statements which showed concern over hardened criminals, those committing offenses in the United States, and those representing "any danger to our country," however, are so precise in scope as to confer a liberty interest on everyone except mental incompetents and those committing serious crimes in Cuba.

Never before has a court found a liberty interest, or in other words "substantive limitations on official discretion," to arise from an off-hand response by the President during a public question and answer session coupled with inferences stemming from other policy pronouncements and actions by the Executive Branch. Indeed, if this is the law, then no president dare describe the actions he is taking or plans to take with respect to any problem facing the

country lest he tie the hands of government forevermore.

The district court's conclusion here simply flies in the face of Supreme Court case law. In Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the Supreme Court rejected the notion that a liberty interest could stem from a state criminal sentence commutation practice which resulted in a dramatically high grant of clemency to prisoners serving life terms. In doing so, the Court stated that a "constitutional entitlement cannot 'be created -- as if by estoppel -- merely because a wholly and expressly discretionary state privilege has been granted generously in the past.'" 452 U.S. at 465 (emphasis in original). That the Executive Branch has exercised its discretionary powers pertaining to parole and to the prosecution of immigration cases favorably for the vast majority of the law-abiding Mariel Cubans does not beget a liberty interest which restricts the exercise of those discretionary powers as to Mariel Cubans who are perceived to pose threats to the American public. See also Jago v. Van Curen, 454 U.S. 14 (1981) (finding no liberty interest based on any legitimate expectations arising from "mutually explicit understandings" in connection with a formal grant of criminal parole that was subsequently rescinded).

By blending impermissible inferences with isolated and inapplicable elements of equitable estoppel, the district court has "judicially divined" a federally-created "entitlement," despite the absence of any genuine "substantive limitations" which the Executive Branch has itself placed on its discretion to parole or to prosecute Mariel Cubans. See Connecticut Board of Pardons v. Dumschat, 452 U.S. at 463. In the absence of any genuine

federally-created right of parole for Mariel Cubans who were not mentally incompetent or had not committed serious crimes in Cuba, the district court was forced to invent its own detention criteria. Its "likely to abscond," "risk to the national security," and "serious and significant threat to persons or property" tests for detention are not derived from any statute, rule, policy or practice pertaining to Mariel Cubans, nor does the district court claim them to be. These are court-made substantive limitations which would govern parole and detention decisions for Mariel Cubans if the district court is not reversed.

If the Executive Branch had truly created a substantive limitation which required parole for all Mariel Cubans except mental incompetents and persons committing serious crimes in Cuba, then two important ramifications would flow from that creation. First, no Mariel Cuban, regardless of the extent of his United States criminal activity, could be detained for immigration reasons unless he could be shown to have committed a serious crime in Cuba or to have been mentally incompetent upon arrival. Balking at this inconceivable conclusion, the district court was forced to manufacture its own detention policy, one which largely ignored the very "substantive limitations" which the court found the government had placed on itself. Second, if the liberty interest were truly an Executive Branch creation, then, not being founded on constitutional right, the Executive would be free to loosen or even abolish any "substantive limitations" which it had imposed on

itself.[8] The district court's order does not envision or permit such a policy change because it was not really applying a liberty interest analysis; instead, it wrongly locked the government into a policy that had never been adopted, apparently because it wrongly perceived some sort of equitable estoppel to be appropriate. See Connecticut Board of Pardons v. Dumschat, supra.

A proper equitable estoppel analysis, however, would have foreclosed the result reached by the district court. The Supreme Court has consistently and repeatedly held that the government may not be equitably estopped from enforcing the laws. See, e.g. INS v. Miranda, 459 U.S. 14, 17-19 (1982); INS v. Hibi, 414 U.S. 5, 8 (1973). While the Supreme Court has left open the possibility that estoppel could lie against the government upon a showing of "affirmative misconduct," nothing in the government's response to the 1980 Cuban Flotilla remotely implies affirmative misconduct. See INS v. Hibi, supra. Equally importantly, a "private party surely cannot prevail [against the government] without at least demonstrating that the traditional elements of an estoppel are present." Heckler v. Community Health Services, __ U.S. __,

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[8] Aliens have no vested rights with respect to their immigration status. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); see e.g. Marcello v. Bonds, 349 U.S. 302 (1955) (permanent resident can be deported for actions which were not a basis for deportation when committed); U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (war bride excluded without a hearing had no vested right of entry precluding even retroactive operation of regulations affecting her status); Mahler v. Eby, 264 U.S. 32 (1924). Congress has not acted to confer any specialized immigration status on Mariel Cubans, and the only "rights" they have are those contained in the statutory provisions generally pertaining to all applicants for admission. See Fiallo v. Bell, 430 U.S. 787, 792-96 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972).

104 S. Ct. 2218, 2224 (1984). There has been no showing in this case on a class-wide basis, let alone on the required individual basis, of a definite misrepresentation of fact by the government or of reasonable detrimental reliance by the aliens. Indeed, the aliens have not pursued a formal equitable estoppel theory, presumably because of the insurmountable legal and factual hurdles to such relief. For example, it would be virtually impossible to show, in a class action, that each detainee knew of and acted reasonably in response to the purported "invitation."

The errors in the district court's liberty interest analysis are further disclosed by its truly implausible results and implications. Thus, the "invitation" found by the court extends to Cubans who arrived before the government ever had a chance to react to the flotilla, to those 16,000 who came before or arrived on the day of the "open heart" statement, to those who came even after the most vigorous governmental efforts to halt the flotilla were undertaken, and necessarily to the entire sane and law-abiding population of Cuba, without numerical limitation. Unless the "invitation" is still open, it appears to have been withdrawn not by our government, but by Castro when he closed Mariel harbor. Under the district court's reasoning we are indeed fortunate that Castro finally acted to stop the boatlift, as the United States government was evidently powerless to withdraw the "invitation."

According to the district court, "the invitation also appears broad enough to impose limitations on the exclusion of plaintiffs from this country." Order at 31, n.23. In other words, the district court is suggesting that the government cannot exclude Mariel Cubans in accordance with our laws, but will be limited to

barring admission only under the terms of the "invitation," or under some other concepts to be "judicially divined" later.

The utter absurdity of all this should make it clear that the district court improperly applied settled liberty interest concepts, most likely to achieve a policy result that it preferred over the policy being pursued by the government. It is not for the district court, however, to set immigration policy, or, for example, to foreclose enforcement actions against Mariel Cubans who have committed crimes in the United States after their arrival unless the government can demonstrate by "clear and convincing evidence" that those criminals continue to represent a "serious and significant threat" to members of our society. This Court's prior observation applies with equal force here: "In overriding the government's decisions about how best to handle the sudden influx of Mariel Cubans, the district court has failed to take account of those significant countervailing national concerns that have led our immigration law to place primary decisionmaking authority about such a problem squarely into the hands of the political branches." Garcia-Mir v. Smith, 766 F.2d at 1484. See also Perez-Perez v. Hanberry, ___ F.2d ___(11th Cir. Jan. 27, 1986).

The detainee class has made no showing that its members came to the United States in reliance on an "invitation" from the President or from anyone else in our government. While the class representatives have repeatedly implied that aliens took action on the basis of a perceived "invitation," the district court made no finding that any meaningful proportion of the class, or that even one single class member, truly decided to come here on the basis of such an understanding. Nevertheless, the argument advanced by

these aliens is founded on their claim that they arrived with a legitimate expectation of release and that this gives them a liberty interest in parole.

As we have shown, no "invitation" was in fact extended to the Cubans. However, they would not have a protected liberty interest even if the government's overall response to the flotilla could somehow be interpreted as an approval of what transpired. Unlike property interests, liberty interests do not spring into being simply from "mutually explicit understandings." Compare Perry v. Sindermann, 408 U.S. 593 (1972)(mutually explicit understandings, but not mere subjective "expectancy," may create property interest in tenure for college professor), with Jago v. Van Curen, 454 U.S. 14 (1981)("mutually explicit understandings" concept not particularly useful in liberty interest analysis).

Indeed, in Jago v. Van Curen, a state prison inmate received written notice that he was to be released on parole, and thereafter completed prerelease classes and was measured for civilian clothes. The decision to release him was later rescinded without a hearing after it was learned he had lied about his situation. The Supreme Court acknowledged that the inmate "suffered 'grevious loss' [by the] rescission of his parole." 454 U.S. at 17. However, it rejected any analysis that focused on the "understandings" of the parties, insisting that for liberty interest purposes the frequency of past grants of clemency does not generate constitutional protections, and that it is only the "'statutes or other rules defining the obligations of the authority charged with exercising clemency'" which can give rise to a liberty interest. 454 U.S. 20 (quoting from Connecticut Board of Pardons

v. Dumschat, 452 U.S. at 465).

If the Cubans had any real understanding or knowledge of the response of the United States to the boatlift, it could amount to no more than a "mere subjective 'expectancy'" of being released here, which would not even be sufficient for property interest purposes, let alone be enough to confer a liberty interest on them. Perry v. Sindermann, 408 U.S. at 603. But even a generalized decision by the United States generously to grant parole which was understood by the aliens would be insufficient to forge the liberty interest they now seek. Such a decision, even when coupled with any understandable expectations of the arriving Cubans would not alter the rules governing the exercise of that parole power.

While Mariel Cubans could certainly request release on parole, none of them could claim a legitimate entitlement to it. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. at 11 (the possibility or the hope for parole is not a protected interest). An expectancy may give rise to a liberty interest if it has its basis in a limitation on discretion that has the force of law behind it, such as a statute or regulation. See id. at 12. Any expectations of release harbored by the Cubans, however, could not be based on the parole statute, the implementing regulations, or any binding guidelines restricting the exercise of that discretionary power, because no provisions of that sort required the release of any Mariel Cubans, let alone dictated such release absent a showing that the alien was mentally incompetent or had committed serious crimes before arrival.

In short, there can be no federally-created liberty interest

for these Mariel Cubans, even if they can rightly claim to have been "invited" here under some expansive construction of that word.

C. The District Court Misconstrued The Case Law

As we have demonstrated, the district court wrongly applied the well-established tests for determining the existence of a liberty interest arising from sources other than the Constitution. In this context it becomes clear that the district court's reliance on United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958), for its liberty interest analysis also was misplaced.

Paktorovics dealt with a Hungarian refugee who had been paroled into the United States in 1956 after having executed a written application for parole and having been interviewed by American immigration officers in Austria. In 1957, the INS revoked his parole because of information indicating that Paktorovics had failed to disclose the extent of his voluntary association with the Communist Party in Hungary. After being found excludable for lack of an immigrant visa, Paktorovics sought habeas corpus relief. Over a strong dissent, a panel of the Second Circuit ruled that an invitation extended to Hungarians by the President was sufficient to elevate Paktorovics' status above that of simply an excludable alien and "to entitle him to the protection of our Constitution." 260 F.2d at 614. The majority declared that: "Under the special circumstances of the case of these Hungarian refugees, we think their parole may not be revoked without a hearing at which the basis for the discretionary ruling of revocation may be contested on the merits." 260 F.2d 612.

The essential holding of the majority in Paktorovics is that refugees who are pre-screened and selected for admission to the

United States by American officials may not have their parole revoked without a hearing at which they can contest the factual basis for the parole revocation decision. This questionable Second Circuit ruling does not support the result reached below, even aside from the obvious distinction that Paktorovics did not deal with a situation, such as the Cuban Flotilla, where a foreign dictatorial power made the selection of who was to come to the United States. Paktorovics did not establish a substantive standard for parole revocation, nor did it mandate any onerous procedures for the hearing. It merely required the government to have a factual basis for its parole revocation determination, irrespective of what that basis might be.

Unlike the district court's ruling here, the decision in Paktorovics did not restrict the substantive grounds upon which the INS could bring an enforcement action against the alien. No substantive right of entry or assimilation into our society was found or created. The Second Circuit merely required that the alien be given a chance to show that the INS was acting on mistaken information. In other words, the alien was given the opportunity to convince the agency, at a hearing, not to proceed against him.

The Mariel Cubans were often forced onto the boats by the Castro regime, and were not interviewed or pre-selected by American officials before their departure. See Def. 1985 Add. 129-134 (showing procedures used as to Hungarians). While they are not given parole revocation hearings, they most certainly are able to challenge the basis for any such revocation. See Moret v. Karn, 746 F.2d 989 (3rd Cir. 1984) (INS erred in revoking parole for Mariel Cuban). Even assuming it was correctly decided, which

the government disputes, nothing in Paktorovics permits the district court here to establish its own substantive standards for detention or to impose criminal trial-like procedures in ascertaining whether those standards have been met. The observation of the dissent in Paktorovics applies with even greater force here. "The effect of the [district court's] decision is to remove such aliens from the parole of the Attorney General and without Congressional sanction to place it in the courts." 260 F.2d at 619.

In addition, United States v. Frade, supra, does not support the district court's liberty interest analysis. Frade is a criminal case concerned with whether two Episcopal priests, who had transported Mariel Cubans, had "specific knowledge of the criminal provisions" of a Trading With the Enemy Act regulation which outlawed certain Flotilla-related financial transactions. 709 F.2d at 1397. It does not deal with whether a liberty interest for Mariel Cubans was created, and actually refutes the notion that governmental policies imposed substantive limitations on official discretion. While stating that the "open heart and open arms" comment "was broadly interpreted as governmental approval of the boatlift," 709 F.2d at 1395, Frade pointedly notes that a May 14, 1980 Presidential statement "gave sufficient warning that administrative response to the boatlift was changing daily." Id. at 1397. It is axiomatic that a constantly changing policy cannot amount to an "established practice" sufficient to confer a liberty interest. See Dudley v. Stewart, 724 F.2d 1493, 1497 (11th Cir. 1984). If indeed the policy was in such flux, it simply could not have been "meant to create [the] binding requirements"

necessary for the creation of a liberty interest. Hewitt v. Helms, 459 U.S. 460, 472 (1983).

The district court relied on Dudley v. Stewart, 724 F.2d 1493 (11th Cir. 1984), and Parker v. Cook, 642 F.2d 865 (5th Cir. Unit B 1981), for the proposition that a "broad variety of governmental actions may give rise to a liberty interest." Opinion at 8. The court's reliance on these cases, however, was misplaced, as neither case supports the district court's result. In Parker v. Cook, the Fifth Circuit recognized an inmate's liberty interest in remaining in the general prison population because Florida had promulgated an elaborate procedure for the imposition of disciplinary or administrative segregation. It also held that Florida's labeling the confinement as administrative or disciplinary would have no effect on the prisoner's due process rights because in practice, the resulting segregation was the same. Parker v. Cook, supra at 875. Parker v. Cook clearly pertained to the interaction between written regulations and the implementing practices. Id. at 876. In dicta in Dudley v. Stewart, this Court cited Parker for the proposition that the practices of state or county officials may give rise to certain liberty interests even though the governing statutes or regulations do not explicitly do so. Dudley, supra at 1498; see also, Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985). In none of these cases, however, did the Court find the creation of a liberty interest based solely on administrative practices or procedures, let alone inferences drawn from state actions.

Other courts of appeals have recognized that a liberty interest may be created not only by statutes or administrative regulations

but also by official policy pronouncements. However, such policy pronouncements must still contain the same substantive limitations intended to restrict the exercise of discretion which are required of a statute or regulation. See, e.g., Parker v. Corrothers, 750 F.2d 653, 660-61 (8th Cir. 1984); (unpromulgated but implemented regulations which contain particularized substantive standards which significantly guide the exercise of discretion and which use mandatory language); Nash v. Black, __ F.2d ___ (8th Cir. January 17, 1986) (No. 85-1621) (same); Lucas v. Hodges, 730 F.2d 1493, 1501-04 (D.C. Cir. 1984) (official statements of prison policy contained in internal directives could be sufficient if they were authoritative statements of the criteria by which prisoner classification decisions are made). None of this case law supports the district court's determination that President Carter's general comments of May 5, 1980 and subsequent executive actions resulted in the creation of a liberty interest.

D. Due Process, In Any Event, Would Not Require Criminal Trial-Like Procedures

Even if the district court were correct in concluding that Executive Branch action had created a liberty interest in parole for certain Mariel Cubans, this finding alone would not support the imposition of extensive criminal trial-type procedures before parole could be denied or revoked. Procedural due process is not an end in itself. Rather, a person is entitled to only that process which will protect him from an unjustified infringement of the protected interest. As the Supreme Court stated in Superintendent, Massachusetts Correctional Institution v. Hill, 105 S. Ct. 2768, 2773 (1985), "[t]he requirements of due process

are flexible and depend on a balancing of the interests affected by the relevant government action." Under the test of Mathews v. Eldridge, 424 U.S. 319 (1976), this balancing is achieved by weighing (1) the plaintiffs' interest and (2) the increased accuracy from additional procedures against (3) the increased burden on the government and the public interest.

Thus, before it required new procedures, the court should have first identified the existing procedures for revocation or denial of parole to determine whether and to what extent they were insufficient. In its November 25, 1985, decision, however, the court failed to inquire into or to make any findings with regard to the nature or adequacy of current procedures, and instead simply resurrected the criminal trial-like procedures it imposed in 1983 in Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983).

Although the substantive and procedural tests manufactured by the district court in its 1983 decision and in its current order are identical, the the source of the alleged liberty interest is quite different in each instance; the 1983 interest purportedly stemmed directly from the Constitution, while the interest now in dispute derives allegedly from Federal action. Since this "federally-created" interest presumably arises from the government's own practices, it is difficult to justify the court's failure to assess those very practices or its implicit conclusion that the Attorney General's current parole decision process is in need of extensive revision. There is no evidence to suggest that the criminal trial-type procedures the court mandated will increase accuracy, while there is significant case law indicating that many of these additional procedures impose unprecedented and

unacceptable burdens on the efficient administration of the immigration laws, in which the government has a weighty interest. See Landon v. Plasencia, 459 U.S. 21, 34 (1982).

One example of the court's overreach is its holding that due process requires a presumption of releasability which can be overcome only by "clear and convincing evidence." In so ruling, the court is not ensuring more accuracy at all, but rather is simply transferring the risk of error onto innocent members of the public who may be subject to violent acts. Burdens of proof deal less with the accuracy of a determination than with which party should bear the risk of an erroneous determination. In re Winship, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring); Herman & MacLean v. Huddleston, 103 S. Ct. 683, 691-92 (1983). The presumption of releasability and the government's burden of proof by clear and convincing evidence in this context have no basis in statute, regulation, or case law, and are particularly difficult to meet with regard to the prior activities of the aliens in Cuba. Further, the district court's burden of proof is irreconcilable with this Court's recent admonishment that the Attorney General has broad discretion in parole decisions which, on review, need only be supported by a facially legitimate and bona fide reason. Perez-Perez v. Hanberry, supra, slip op. at 9. As the exercise of the parole authority is incident to the exclusion process, and since parole is in the discretion of the Attorney General, the burden of proof should always be on the detainee to show that he should be released.

The district court's procedures would also preclude drawing adverse inferences when a detainee refuses to testify on Fifth

Amendment grounds. Rather than enhancing the accuracy of decisionmaking, this prohibition could deprive the hearing officer of an important source of relevant and probative information. Moreover, this prohibition against adverse inferences is in direct conflict with Supreme Court rulings, in the immigration context and otherwise. In a prison disciplinary case, the Supreme Court reasoned:

> [T]he prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a civil cause." 8 J. Wigmore, Evidence, 439 (McNaughton rev. 1961) ....
>
> .... [T]he Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause.

Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976) (emphasis in original). More recently in INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), the Supreme Court stated that, consistent with the civil nature of deportation proceedings, various protections that apply in criminal trials do not apply in a deportation hearing. Quoting Justice Bandeis in United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-154 (1923), the Court in Lopez-Mendoza stated:

> "Silence is often evidence of the most persuasive character . . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called to speak . . . There is no provision which forbids drawing an adverse inference from the fact of standing mute."

104 S. Ct. at 3487. The district court's conclusion forbidding adverse inferences from a detainee's silence, therefore, is unnecessarily burdensome and inconsistent with the Supreme Court's holdings in Baxter and Lopez-Mendoza.

The district court also imposed the unreasonable requirement of appointment of counsel for the alien during his detention hearings. While the Immigration and Nationality Act grants the alien in exclusion proceedings the privilege of representation by "such counsel . . . as he may choose," it clearly provides that representation shall be at no expense to the government. 8 U.S.C. § 1362. If the alien cannot afford an attorney and is unable to secure pro bono services, he is not entitled to appointed counsel at government expense. See, e.g., United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975). Indeed, the Sixth Amendment guarantee of the right to counsel is not applicable in the immigration context. See Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); Paul v. INS, 521 F.2d 194, 197 (5th Cir. 1975).Most recently in Perez-Perez v. Hanberry, a case dealing with the issue of parole denial to Mariel Cubans, this Court held that the Criminal Justice Act, 18 U.S.C. § 3006A, does not provide the statutory authority necessary for appointment of counsel at government expense.

Having counsel in every case may well result in better presentations on behalf of the aliens. However, even permanent resident aliens facing deportation have no right to counsel at government expense. Since any court-ordered detention hearing would presumably still be part of a civil immigration proceeding, there is no authority for the district court to require appointment

of counsel, at taxpayer expense, as a part of the administrative determination whether to detain an excludable alien.

Thus, even assuming that Executive Branch action had somehow created substantive limitations on the Attorney General's broad discretion to make parole determinations, there is nothing in the district court's decision to justify the imposition of these and other criminal trial-type procedures. There has been no finding by the court that existing procedures and judicial review are inadequate to protect the alien's interest in parole, that additional procedures will lead to more accuracy in decisionmaking, or that the burden of such procedures does not outweigh their desirability. On the contrary, the district court's procedures would unnecessarily increase the adversarial nature of parole decisions, would shift to the general public the burden of erroneous determinations, and increase the burden on the government and on the taxpayers, all with very little, if any, statutory support or judicial precedent.

II. THE DISTRICT COURT ERRED IN FAILING TO DECERTIFY THE CLASS

The district court failed to follow the instructions of this Court in Garcia-Mir, 766 F.2d at 1487-88, n.11, respecting decertification of the class. The district court rendered what amounts to a faulty advisory opinion on the liberty interest issue, in part because it lacked a concrete fact situation in which to assess the need or propriety of the relief requested by the alien class members.

The attorneys for the class have advanced a common legal

issue. However, given the narrow scope of judicial review respecting immigration parole matters, see Garcia-Mir v. Smith, supra, and the widely varied factual circumstances of the individual detainees, there are fact issues which predominate and, in many respects, control the proper resolution of any otherwise common legal questions. The district court granted sweeping relief for all class members, regardless of the seriousness of their criminal activity in the United States and irrespective of whether or not they relied on or even knew about the purported "invitation" which the district court found had been extended to them by former President Carter. The court then imposed extensive procedural requirements ostensibly to protect this liberty interest, but without any particularized findings as to the inadequacy of existing procedures in any given case. There was no finding that any alien had been unjustifiably denied parole or that additional procedures would be likely to avoid any such results.

In Garcia-Mir, this Court noted that continued class-wide treatment of the issues in this litigation "will necessarily result in some individual class members, at least temporarily, receiving relief that they are not entitled to under any circumstances . . . ." 766 F.2d 1488, n.11. In reaching its decision, the district court did not have a complete factual picture of even one single alien's case before it. This absence of a concrete fact setting may have contributed to the district court's being led astray in its liberty interest analysis, and in its procedural due process holdings.

All legal issues raised by the class can be advanced by individual detainees as well. Should such a detainee ultimately

prevail on an issue of general applicability, principles of stare decisis will dictate similar treatment for similarly situated detainees. Continued class-wide treatment is unnecessary, is likely to again lead to over-broad relief, and is contrary to the directive of this Court in Garcia-Mir v. Smith, 766 F.2d 1487-88, n.11.

Lastly, the need for class decertification is further supported by what appears to be a conflict in the interests of various factions of the class. The class representatives have advanced a liberty interest theory that excludes from the alleged "invitation" those aliens who have been in continuous detention, on mental and criminal grounds, since their arrival. See Plaintiffs' Motion For Entry Of Writ Of Habeas Corpus, filed Nov. 30, 1984; Transcript of Sept. 6, 1985 proceedings, 16. While the district court adopted its own version of this theory, the interests of some class members appear to be at odds with the interests of others, at least in relation to the "invitation" question.

The district court should be directed to comply with this Court's mandate in Garcia-Mir to decertify the class.

CONCLUSION

This Court should reverse the November 25, 1985 order of the district court, and should direct decertification of the class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below two copies of the Brief for Appellants and one copy of the Record Excerpts by depositing the same in the United States Mail, postage prepaid to:

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