Immigration Law and the Excluded Alien: Potential for Human Rights Violations

Immigration law requires the United States Immigration and Naturalization Service to deport an inadmissible alien to the country from which he came. If that country refuses to readmit the alien, authorities can detain him until deportation becomes possible. This comment examines how such unlimited detention can result in human rights violations, and suggests reforms which will prevent future arbitrary detention or imprisonment of aliens.

INTRODUCTION

On June 2, 1980, Pedro Rodriguez-Fernandez arrived in the United States on a boat in the "Freedom Flotilla" from Cuba.[1] Based on his admission of criminal convictions in Cuba, the Immigration and Naturalization Service (INS) excluded Rodriguez-Fernandez from the United States.[2] Authorities ordered his detention in a federal prison pending deportation.[3] Cuba, however,

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[1] Fernandez v. Wilkinson, 505 F. Supp. 787, 788 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). The "Freedom Flotilla" was the convoy of private boats that brought more than 125,000 Cuban refugees to the United States between May and October, 1980. *See Carter and the Cuban Influx*, NEWSWEEK, May 26, 1980, at 22; *The Flotilla Grows*, TIME, May 12, 1980, at 36; *The Cuban Refugees Move On*, TIME, Oct. 13, 1980, at 45.

[2] Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). 8 U.S.C. § 1182(a)(9) (1976) provides for exclusion of aliens who have been convicted of or admit to having committed a non-political crime involving moral turpitude. Rodriguez-Fernandez disclosed to Immigration and Naturalization Service (INS) officers that before he left Cuba he was serving a sentence in a Cuban prison for attempted burglary and escape. He also admitted to two prior theft convictions. He testified that he was scheduled for release from prison in Cuba on June 27, 1981. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384 (10th Cir. 1981).

[3] Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 645 F.2d 1382 (10th Cir. 1981). The

refused to readmit any members of the Freedom Flotilla. Because present immigration law does not provide due process rights or alternative deportation sites for excluded aliens, many excluded Cubans, like Rodriguez-Fernandez, face indefinite incarceration in United States prisons.[4]

The *Rodriguez-Fernandez* case illustrates the inadequacy of United States immigration statutes in providing for excluded aliens physically present in this country. Laws that allow indefinite imprisonment of aliens who have been neither convicted of committing a crime in this country nor determined to constitute a security risk potentially violate these aliens' fundamental human rights. The recent influx of thousands of potentially excludable aliens intensifies the need for immediate legal reform.[5]

This comment examines the present immigration law governing excludable aliens and its potential for allowing human rights violations. Part I delineates the different legal rights granted to excludable aliens and to deportable aliens. Part II traces the evolution of immigration law into these two separate branches, examining the reasons for this inequity. Part III discusses the potential for human rights violations that the present statutory structure contains. Finally, Part IV advocates reform of the immigration statutes to grant excluded aliens certain rights presently available only to deportable aliens. Part IV also

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Immigration and Naturalization Service (INS) uses the following procedure for admitting aliens as they arrive in the United States. INS officers acting under the Attorney General inspect all persons seeking admission. 8 U.S.C. § 1225 (1976). Immigration officers may order a temporary "removal" of the aliens into the country for examination purposes. *Id.* § 1223(a). If the examining officer finds that an alien is not clearly entitled to enter the United States, the officer may detain the alien for an exclusion hearing. *Id.* § 1225(b). An alien who is found to be excludable at the hearing is immediately deported to the country from which he came unless the Attorney General determines that immediate deportation is not practicable or proper. *Id.* § 1227(a).

[4] Guyer, *Cuban Exclusion Hearings at Atlanta Federal Penitentiary*, 9 IMMIGRATION NEWSLETTER 16 (Sept.-Oct. 1980). Of the original 125,000 refugees, at least 2000 were imprisoned for some period of time. *Id.* The Tenth Circuit Court of Appeals ordered Rodriguez-Fernandez' release about one year after his arrival in the United States. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386 (10th Cir. 1981). At the time of this comment's publication, 1300 refugees were still imprisoned after two years of detention. *See What Became of the Cubans?*, NEWSWEEK, Feb. 1, 1982, at 28.

[5] In addition to the Cubans, approximately 15,000 unscreened Haitian "boat people" arrived on American shores in 1980. *See The New Immigrants*, NEWSWEEK, July 7, 1980, at 29; 80 DEP'T ST. BULL. 81 (Aug. 1980).

proposes that the United States ratify human rights treaties to insure human rights protection for all people in the United States.

I. Comparison of Excludable and Deportable Aliens' Rights

A. Legal Status

Immigration law has long distinguished between "deportable" and "excludable" aliens.[6] Although the INS deports[7] undesirable aliens from both classes, the different points in time at which their undesirability is determined greatly affects their rights in this country.

Deportable aliens are already living in the United States when the INS determines their undesirability. Even if they were excludable at the time of entry or had entered the country illegally, the law considers them to be within the United States.[8] This initial determination of physical presence guarantees due process and other statutory rights to deportable aliens.[9]

Excludable aliens, however, enjoy a less priviliged status because the INS determines their undesirability before they establish residence in the United States.[10] Although they may be physically present within the United States, the law does not

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[6] *See* Sannon v. United States, 427 F. Supp. 1270, 1276 n.15 (S.D. Fla. 1977); notes 35-39 and accompanying text *infra*.

[7] The term "deportation," as applied to both excludable and deportable aliens, signifies expulsion from the United States to another country. When used in referring to excludable aliens, deportation does not contain the technical gloss that it does in referring to deportable aliens. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

[8] 8 U.S.C. § 1251(a)(1) & (2) (1976) provides:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who —
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> (1) at the time of entry was within one or more classes of aliens excludable by the law existing at the time of such entry; (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States . . . .

Id.

[9] *See* notes 14-15 and accompanying text *infra*.

[10] *See, e.g.*, 8 U.S.C. § 1223(a) (1976). Most aliens are denied entry into the United States when they go through pre-processing before they leave their own countries. *See* note 39 and accompanying text *infra*.

consider them to have entered the country.[11] A legal fiction developed in the 1800s, treats excludable aliens who enter through parole[12] as aliens outside the United States.[13] Aliens outside the United States are not entitled to due process or other rights.

Thus, the initial determination of an alien's legal status fixes his legal rights. The scope of these substantive rights can greatly affect the treatment an alien receives in this country.

B. Substantive Rights

The government may expel aliens who have "entered" the country only after proceedings that conform to the constitutional guarantees of due process of law.[14] In keeping with procedural due process protection, immigration statutes grant various substantive rights to deportable aliens who are involved in expulsion proceedings.[15] However, an alien who is "stopped at the

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[11] 8 U.S.C. § 1223(a) (1976). "Entry" is a term of art encompassing more than the physical act of coming into the geographical territory of the United States. United States *ex rel.* Brancato v. Lehmann, 239 F.2d 663, 665 (6th Cir. 1956) (naturalized alien who left and reentered United States, then committed a crime involving moral turpitude, not subject to deportation as an alien). Freedom from official restraint must accompany physical presence before entry is accomplished. United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954) (alien seaman did not accomplish "entry" into the United States merely by crossing the national border or arriving at port).

[12] *See* note 29 *infra.*

[13] Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892) (Japanese alien ordered excluded as a person likely to become a public charge, unsuccessfully challenged the constitutionality of the law denying permission to land). The case's holding has been codified in 8 U.S.C. § 1223(a) (1976), which states that "upon the arrival at a port of the United States of any vessel or aircraft bringing aliens . . ., the immigration officer may order a temporary removal of such aliens for examination and inspection at a designated time and place, but such temporary removal shall not be considered a landing." *Id.*

[14] The Japanese Immigrant Case, 189 U.S. 86, 101 (1903) (deportable alien residing in the United States was entitled to due process rights of notice and an opportunity to be heard in deportation hearing).

[15] 8 U.S.C. §§ 1105a(a), 1252(b), 1253(h), 1254(e) (1976). The rights that are limited to deportable aliens can be broken down into four categories:
(1) *Procedural rights during deportation hearings*: These include the right to legal counsel; reasonable notice of charges; reasonable opportunity to be present at the proceeding; reasonable opportunity to examine and give evidence; and a right to cross-examine witnesses. *Id.* § 1252(b).
(2) *Judicial review of hearing decision*: Deportable aliens may have the deportation order reviewed by a Court of Appeals. Service of the petition for review results in an immediate stay of deportation pending the court's determination.

border"[16] is not entitled to procedural due process. Courts consider the congressionally authorized procedure[17] to be sufficient due process for an excludable alien.[18] As a result, excludable aliens do not enjoy many of the substantive rights that deportable aliens do, including two important rights that govern deportation.

First, a deportable alien may designate the country to which he prefers to be deported.[19] If that country and the country of

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Id. § 1105a(a).

(3) *Voluntary departure*: In lieu of deportation, an alien who can show that he has been a person of good moral character for the last five years may depart voluntarily. *Id.* § 1254(e). The alien may thus avoid the stigma of deportation and select his own destination. Voluntary departure may also facilitate the possibility of return to the United States. *See* Tzantarmas v. United States, 402 F.2d 163, 165 n.1 (9th Cir. 1968) (alien who applied for voluntary departure found ineligible because not of good moral character).

(4) *Withholding of deportation*: The Attorney General may withhold deportation of any alien in the United States to any country in which the alien would be subject to persecution on account of race, religion, or political opinion. 8 U.S.C. § 1253(h) (1976). Although the exclusion statutes do not afford this type of relief to excluded aliens, it is available to *any* person under the United Nations Convention and Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967). The Senate ratified the Protocol on October 4, 1968. 90 CONG. REC. 29608 (1968). The Protocol entered into force with respect to the United States on November 1, 1968. 19 U.S.T. 6223 (1968). Currently, any alien who unsuccessfully claims refugee status may avoid the persecution mentioned in § 1253(h). *See* Sannon v. United States, 427 F. Supp. 1270, 1274-75 (S.D. Fla. 1977) (excluded Haitian aliens sought refugee status).

[16] Kaplan v. Tod, 267 U.S. 228, 230 (1925) (Holmes, J.) (a paroled alien was not "within" the United States for purposes of the naturalization statute).

[17] *See* note 3 *supra*.

[18] Nishimura Ekiu v. United States, 142 U.S. 651 (1892). "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660. Because excludable aliens cannot invoke constitutional protections, *see* note 44 *infra*, an equal protection argument also would not apply. For a general discussion of due process and equal protection as applied to aliens, *see* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 589-601 (1978).

Statutes accord few rights to excludable aliens. The alien is entitled to have one friend or relative present at the exclusion hearing, 8 U.S.C. § 1226(a) (1976), is entitled to the services of counsel, *id* § 1362, and can obtain judicial review of the exclusion order only by writ of habeas corpus. *Id.* § 1105a(b). *See* note 47 and accompanying text *infra*.

[19] 8 U.S.C. § 1253(a) (1976) provides that the deportation of an alien shall be directed by the Attorney General, to a country promptly designated by the alien if that country is willing to accept the alien.

his citizenship refuse to accept him, the Attorney General has the discretion to deport him to any one of seven alternative countries.[20] In contrast, the Attorney General must immediately deport the excluded alien to the "country whence he came."[21] The lack of alternatives or exceptions to this provision creates problems when the designated country refuses to permit the return of the alien.[22]

Second, the Attorney General has only six months to deport a deportable alien.[23] After this period, detention automatically terminates, although the alien remains subject to the supervision of the Attorney General.[24] The law governing deportation of excluded aliens, however, sets no time limit. This creates the potential for unlimited detention if the government cannot "immediately" effectuate deportation.[25]

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[20] *Id.* § 1253(a) provides that the Attorney General has the authority to deport the alien —

> (1) to the country from which such alien last entered the United States;
> (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
> (3) to the country in which he was born;
> (4) to the country in which the place of his birth is situated at the time he is ordered deported;
> (5) to any country in which he resided prior to entering the country from which he entered the United States;
> (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
> (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable or impossible, then to any country which is willing to accept such alien into its territory.

[21] *Id.* § 1227(a).

[22] *See* notes 1-4 and accompanying text *supra*.

[23] 8 U.S.C. § 1252(c) (1976). The six-month period begins when the deportation order is final. *Id.*

[24] *Id. See also* United States *ex rel.* Blankenstein v. Shaughnessy, 117 F. Supp. 699, 704 (S.D.N.Y. 1953) (alien ordered deported to Russia successfully obtained a writ of habeas corpus on the grounds of impossibility of deportation within the foreseeable future); United States *ex rel.* Kusman v. District Director, 117 F. Supp. 541, 545 (S.D.N.Y. 1953) (alien held on Ellis Island for five months with no possibility of deportation within statutory period entitled to issuance of writ of habeas corpus); United States *ex rel.* Lee Ah Youw v. Shaughnessy, 102 F. Supp. 799, 801 (S.D.N.Y. 1952) (alien whose six month deportation period had expired was subject only to supervision).

[25] 8 U.S.C. § 1227(a) (1976).

The present statutory system creates a paradox under which two aliens who are both physically present in the United States may be accorded totally different rights. An excludable alien who has attempted to enter the United States through legal channels will not receive the procedural due process and substantive rights that are enjoyed by a deportable alien who entered illegally. An alien must thus gain deportable status to enjoy the maximum available rights.[26] To understand the origin of this paradox, it is necessary to trace the evolution of immigration law into its two separate branches.

II. Evolution of the Excludable/Deportable Distinction

A. Early Law

Before 1875, Congress did not attempt to regulate United States immigration procedures. After that time, it added legislation as new immigration needs arose.

The Immigration Act of 1875 required for the first time that arriving aliens remain on board ship until an inspecting officer found them to be admissible to the United States.[27] An alien literally could not land until he was deemed admissible.

The Immigration Act of 1891 amended the 1875 act to allow an alien's entrance examination to be made on United States shores.[28] For this purpose, immigration officers could temporarily "remove" aliens from the boat to shore, but this removal was not considered to be a landing or admission.[29]

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[26] Aliens enjoy greater rights in deportation proceedings than in exclusion proceedings. *See* notes 15-20 and accompanying text *supra*. *See, e.g.*, Maldonado-Sandoval v. United States Immigration and Naturalization Service, 518 F.2d 278, 281 (9th Cir. 1975) (status as a permanent resident alien entitled alien to deportation rather than exclusion proceedings).

[27] Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (1873-1875).

[28] Act of March 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085 (1889-1891).

[29] *Id.* Since the term "land" seemed to connote "admission," the language used to describe the temporary entry was "removal" or "parole."

Current immigration statutes use the same terminology found in the early statutes. *E.g.*, 8 U.S.C. § 1223(a) (1976) provides: "[T]he immigration officers may order a temporary removal of such aliens for examination and inspection at a designated time and place, but such temporary removal shall not be considered a landing. . . ." *Id.* § 1882(d)(5) provides: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of

Early law required the immediate return of both excluded and deportable aliens to the country "whence they came."[30] The Immigration Act of 1917[31] first distinguished between the rights of excludable and deportable aliens. It listed several alternative countries to which the government could send deportable aliens if the designated country refused to permit their return.[32]

B. The Internal Security Act of 1950

Congress drafted the Internal Security Act of 1950[33] to protect the nation's security from a perceived Communist threat.[34] It amended the Immigration Act of 1917 to allow easier expulsion of undesirable aliens and to permit greater control over aliens

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the alien . . . ."

Apparently, the temporary removal, which Congress provided for the alien's convenience, was never intended to affect his legal status. *See* Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (excluded alien who was to be deported was not "within" the United States nor eligible for rights of deportable aliens).

[30] Act of 1882, ch. 376, § 4, 22 Stat. 214 (1881-1883) first applied this provision to excludable aliens. 8 U.S.C. § 1227(a) (1976) now contains this language. The Act of 1907, Pub. L. No. 96, ch. 1134, § 20, 34 Stat. 898, 904 (1905-1907) first specified the same treatment for deportable aliens.

There were two purposes behind this provision. First, the statute was directed at the steamship lines to insure that they would not profit from the practice of booking passage to the United States for aliens whom they knew to be excludable, and then collecting a return fare when the aliens were denied admission. Menon v. Esperdy, 413 F.2d 644, 653 (2d Cir. 1969) (in determining to which country an alien should be deported, the court examined the purpose behind 8 U.S.C. § 1227(a) (1964)). Second, the statute sought to ensure that transportation lines would return inadmissible aliens to the original territory from which they came, rather than debarking them at a nearby territory from which they might attempt to enter the United States unlawfully. United States *ex rel.* Shung v. Murff, 176 F. Supp. 253, 259 (S.D.N.Y. 1959) (court examined statute to determine if "country whence he came" referred to geographical area only).

[31] Act of 1917, Pub. L. No. 301, ch. 29, 39 Stat. 857, 874 (1915-1917).

[32] *Id.* at 890, § 20. A deportable alien could be sent to the country of the foreign port at which the alien embarked for foreign contiguous territory, the country of which he was a subject or citizen, or the country where he resided before entering the United States.

[33] Internal Security Act of 1950, Pub. L. No. 831, ch. 1024, 64 Stat. 987 (1950-1951). Section 23 of this Act was later incorporated into the Immigration Act of 1952, Pub. L. No. 414, § 243, 66 Stat. 212 (1952), which currently controls United States immigration.

[34] H.R. REP. No. 2980, 81st Cong., 2d Sess. 3886 (1950).

who could not be deported.[35] To this end, the amended law provided a list of seven alternative countries to which an alien could be deported.[36] Additionally, Congress was concerned with over 3000 deportation orders that had been rendered unenforceable by refusals of iron curtain countries to receive deported aliens.[37] In response to this situation, the amended Act required that the Attorney General effectuate deportation within six months.[38]

The Security Act significantly changed the law governing deportable aliens, yet left the law governing excludable aliens virtually untouched. This probably occurred because, although deportation needs changed dramatically, requiring new provisions, no new needs arose concerning excludable aliens. Most aliens are disallowed entry to the United States when they go through preprocessing before they leave their home country.[39] Those aliens who arrive in this country only to be excluded usually do not encounter problems with readmission into their designated country. Thus, detention of an alien who is both unable to

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[35] *Id.* at 3911.

[36] *See* note 20 *supra*. The amended list increases the likelihood that some country will accept the deportable alien, particularly as the seventh alternative, 8 U.S.C. § 1253(a)(7) (1976), allows deportation to any country willing to accept the alien. *Id.*

[37] Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981).

[38] The Internal Security Act of 1950, Pub. L. No. 831, ch. 1024, § 23, 64 Stat. 987, 1011 (1950-1951). Congress derived this provision from prior cases that held that an alien must be deported within a reasonable time. Congress based this provision on the rationale that the Attorney General's right to deport an alien does not include the right to imprison the alien under the guise of awaiting an opportunity to deport him. *See, e.g.*, Dymytryshyn v. Esperdy, 285 F. Supp. 511 (S.D.N.Y. 1968) (where authorities could not effectuate deportation, requiring the alien to report to authorities once a year was reasonable); United States v. Witkovich, 140 F. Supp. 815 (N.D. Ill. 1956) (an alien must be released from detention in less than six months if it appears that there is no reasonable possibility of deportation in the foreseeable future); United States *ex rel.* Consola v. Karnuth, 63 F. Supp. 727 (W.D.N.Y. 1945) (two-year delay in deportation not unreasonable when alien requested delay to apply for writ of *certiorari* to Supreme Court).

The Act also proscribed deportation of an alien to a country where he would be subject to persecution. Although this proscription originally encompassed only physical persecution, today it includes a denial of one's rights on racial, religious, or political-ideological grounds. 8 U.S.C. § 1253(h) (1976).

[39] INS Director George Geil cited this very reason at the evidentiary hearing in one of the Cuban habeas corpus cases. Fernandez v. Wilkinson, 505 F. Supp. 787, 792 (D. Kan 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). *See* note 9 *supra*.

"enter" the United States and unable to return to his country is the exception, not the rule.[40] Nonetheless, as *Rodriguez-Fernandez* illustrates, the exception has proved that the rule is seriously inadequate in light of current immigration trends.[41] These inadequacies contain the potential for violations of aliens' human rights.

III. Result of the Excludable/Deportable Distinction: Potential Human Rights Violations

The present statutory system permits human rights violations such as those in *Rodriguez-Fernandez*[42] to occur. Even if courts circumvent the problem, defective statutes still contain the potential for future violations. Only a change in the law can preclude these violations.

Human rights violations can occur through acts or omissions. Thus, a statutory scheme that fails to safeguard otherwise unprotected human rights potentially violates these rights. One of the most important human rights is freedom from arbitrary detention or imprisonment.

The due process clause of the fifth amendment guarantees the right to freedom from arbitrary imprisonment to United States citizens and residents.[43] Although excludable aliens are not constitutionally entitled to due process,[44] the right to freedom from arbitrary imprisonment or detention should not be denied to

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[40] *See, e.g.*, Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (court found that physical detention of paroled alien was only for security reasons and was never intended to place an alien legally "within" the country).

[41] In addition to the Cuban refugee situation, since the late 1970s many unscreened aliens have arrived on United States shores. *See* note 5 *supra*. Although excluded Haitian aliens will be readmitted into their country, they may face persecution upon their return. *See* Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977) (excluded Haitian aliens sought refugee status).

[42] Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

[43] U.S. Const. amend. V. The fifth amendment provides that "nor shall any person . . . be deprived of life, liberty or property, without due process of law." *Id.*

[44] The Supreme Court has long refused to apply fifth amendment protections to excludable aliens. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (excluded alien does not have the right to a hearing on due process grounds); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (excluded alien not entitled to due process rights granted to United States citizens and residents).

them because of legal status. Instead, it should be respected as a fundamental human right, consistent with basic principles of international human rights law.[45]

The excluded alien is particularly vulnerable to arbitrary detention. If the INS excludes an alien and the country from which he came refuses to readmit him,[46] immigration law neither provides alternative deportation sites nor limits his detention. The excluded alien's only remedy is a writ of habeas corpus.[47] If a court does not grant the writ, authorities may detain or imprison the alien indefinitely.

In *Shaughnessy v. Mezei*,[48] the government excluded an alien and detained him on Ellis Island pending deportation. Because Hungary refused to permit his return, he applied for admission to several other countries. His attempts to leave the United States were unsuccessful, and authorities held him on Ellis Island for twenty-one months before the Supreme Court reviewed his petition for a writ of habeas corpus.[49] The Court held that his detention was valid, finding no deprivation of any statutory or constitutional right.[50]

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[45] Sections 3 and 9 of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. 810, at 56 (1948), provide that everyone has the right to life, liberty and the security of person, and no one shall be subjected to arbitrary arrest, detention, or exile. Article 7 of the American Convention of Human Rights, O.A.S. Doc. OEA/SER.K/XIV 1.1, Doc. 65 (1970), *reprinted in* [1969] Y.B. ON HUMAN RIGHTS 390, U.N. Sales No. E.72.XIV.1 (1969), 77 DEP'T ST. BULL. 28 (1977), provides that every person has the right to personal liberty and security, and no one shall be subject to arbitrary arrest or imprisonment. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1953), Section 4, provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be speedily decided by a court and his release ordered if the detention is not lawful.

The United States has not ratified any of these human rights documents. U.S. Dep't of State, Treaties in Force, Jan. 1, 1982.

[46] In Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), Cuba either responded negatively or did not respond to six diplomatic notes sent by the United States concerning the return of Rodriguez-Fernandez and other excluded aliens. 505 F. Supp. at 789.

[47] 8 U.S.C. § 1105a(b) (1976). *See* note 18 *supra*.

[48] 345 U.S. 206 (1953).

[49] *Id.* at 209.

[50] *Id.* at 215. In reaching its result, the court relied on due process grounds. The issue before the Court was whether the Attorney General could exclude an

The concept of detention in the immigration statutes presupposes that the detention is temporary pending some further action.[51] However, in *Mezei*, the detention was not temporary; instead, incarceration was substituted for departure.

Similar situations arose in early deportation cases when no provision existed for either a time limit for detention or alternative deportation sites.[52] Case law that developed at that time determined that the right to deport an alien does not include a right to indefinitely imprison him under the guise of awaiting an opportunity for deportation.[53] From this determination emerged the standard that deportation of deportable aliens must be effectuated within a reasonable time.[54] In 1951, Congress statutorily defined "a reasonable time" as six months and added the list of alternative countries for deportation.[55]

Although exclusion statutes do not yet include similar provisions, two recent cases have circumvented the problem.[56] Both held that when detention does not appear to be pending deportation, an excluded alien is entitled to release unless he is a security risk or is likely to abscond.[57] The trial and appellate courts in *Rodriguez-Fernandez* both held that detention of an excluded alien in prison pending effectuation of exclusion may

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alien without a hearing when the exclusion was based on information that would be harmful to United States security interests if disclosed. The Court stated that the alien plaintiff had no due process right to a hearing. *Id.* at 212.

[51] The statutes authorize detention only as a temporary, necessary measure until the next step in the deportation process occurs. *E.g.*, detention or custody pending admission hearing, 8 U.S.C. § 1182(d)(5) (1976); detention pending decision of eligibility or deportation, *id.* § 1223(b); detention pending further admission inquiry, *id.* § 1225(b); detention pending deportation, *id.* § 1227(a).

[52] *See, e.g.*, United States *ex rel.* Ross v. Wallis, 279 F. 401 (2d Cir. 1922) (detention exceeding four months after alien has exhausted his legal remedies is tantamount to unlawful imprisonment); *In re* Brooks, 5 F.2d 238 (D. Mass. 1925) (United States cannot imprison alien indefinitely, even though country to which he is ordered deported refuses to accept him).

[53] *See* note 52 *supra.*

[54] *See* note 38 *supra.*

[55] Internal Security Act of 1950, Pub. L. No. 831, ch. 1024, § 23, 64 Stat. 987, 1010 (1950-1951). *See* notes 33-38 *supra.*

[56] Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049 (N.D. Ga. 1981); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

[57] Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 (N.D. Ga. 1981); Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981).

occur only for a determinate period of time.[58] Both courts went beyond the examination of constitutional or statutory rights used in *Mezei*[59] to find that customary international human rights principles required release.[60]

A similar case, *Soroa-Gonzales v. Civiletti*,[61] also required the release of an excluded Cuban alien held in prison. The court found that the government must release an alien who cannot be deported within a reasonable time unless the public interest requires his continued custody.[62] The court did not decide whether the detention amounted to "arbitrary detention" and a violation of human rights.[63] The court did indicate in dictum, however, that if it were to rule on the issue, it would find a human rights violation.[64]

These two recent examples of a judicial willingness to consider an alien's human rights may signal a growing trend to recognize fundamental human rights in immigration cases. While earlier courts that faced the *Mezei*[65] problem recognized the law's basic unfairness, they unwillingly applied it.[66] Nonetheless, assuming

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[58] Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981).

[59] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *See* notes 48-50 and accompanying text *supra*.

[60] The trial court based its holding on customary international law, Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), while the appellate court relied on domestic law but cited international law principles to support its holding. 654 F.2d at 1388.

[61] 515 F. Supp. 1049 (N.D. Ga. 1981).

[62] *Id.* at 1061.

[63] *Id.* at 1061 n.18. The court based its holding on the District Director's abuse of discretion in refusing to reinstate parole. *Id.*

[64] *Id.*

[65] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *See* notes 48-50 and accompanying text *supra*.

[66] *See, e.g.*, Menon v. Esperdy, 413 F.2d 644 (2d Cir. 1967) (alien who had been ordered excluded was refused entry by Switzerland). "Despite its evident shortcomings, we must apply § 1227(a) as written until Congress sees fit to change the statute . . . . However unwise the restricted standard of § 1227(a) may be we must apply its terms as long as they stand." 413 F.2d at 654. In United States *ex rel.* Milanovic v. Murff, 253 F.2d 941 (2d Cir. 1958), the court had to decide from which country an alien came, to determine where he should be sent upon exclusion. Concerning the fact that deportable aliens may be sent to different countries, the court said, "That there may be such a statutory anomaly does not seem to be sufficient reason to ignore the plain distinction in the statute." *Id.* at 944. In United States *ex rel.* Shung v. Murff, 176 F. Supp.

that courts today are willing to circumvent the law in order to grant human rights to excluded aliens, the present statutory scheme does not guarantee similar treatment in the future.

Case law concerning excluded aliens appears to be changing to meet new needs, as did the statutory law governing deportable aliens over thirty years ago.[67] As new problems arise that statutory law cannot resolve, the statutes must be changed to insure the future protection of aliens' human rights in the United States.

IV. Proposal For Reform

The United States, as one of the leading proponents of international human rights, should make every effort to protect human rights within its boundaries. The present law governing excludable aliens, however, permits arbitrary detention.[68] Aliens such as Rodriguez-Fernandez suffer from a violation of the basic human right to freedom from detention because of outdated statutes. Statutory reform or ratification of human rights treaties may prevent future violations of this right.

A. Statutory Reform

To eliminate the possibility of arbitrary detention, Congress should change existing immigration statutes in two ways. First, Congress should amend the exclusion statute so that it includes a maximum statutory period of detention pending effective exclusion. This detention period, like that in the deportation statute,[69] could be limited to a maximum of several months. Alternatively, the statute could forbid detention beyond a reasonable period, leaving it to the courts to define "reasonable" on a case-by-case basis.[70] In addition, the amended statute should provide

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253 (S.D.N.Y. 1959), an alien was ordered deported back to China where he might suffer physical persecution. The court said, "[C]ongress has made relief [from persecution] available to expellees. It has not done so in the instance of excludees. The courts are not at liberty to supply that which Congress appears deliberately to have omitted from the exclusion statute." *Id.* at 260.

[67] *See* notes 32-38 and accompanying text *supra*.

[68] *See* notes 42-47 and accompanying text *supra*.

[69] 8 U.S.C. § 1252(c) (1976), discussed in notes 23-24 and accompanying text *supra*.

[70] The latter approach seems more sensible because what is "reasonable" varies from case to case. Two arguments, however, may be made against this

that after expiration of the maximum detention period, the government must grant parole subject to supervision,[71] unless a court determines that the alien presents a security risk justifying continued detention.[72]

Second, Congress should amend the statute so that it provides a list of alternative countries to which authorities may deport an excluded alien. The statute in its current form ineffectively expels undesirable aliens and violates human rights. Amending the exclusion statute to include the list of countries that currently appears in the deportation statute[73] would produce a two-fold result. First, it would greatly reduce the alien's chances of arbitrary detention. If the first designated country refused to accept the alien, the United States could send him elsewhere. Second, the United States would achieve its goal of "immediately"[74] expelling undesirable aliens. Because the United States could send the alien to any country willing to accept him,[75] the financial burdens of detention would be reduced or eliminated.

Adding these two provisions to the law governing excludable aliens would not produce a drastic impact on immigration law. Both provisions have been successfully implemented in deportation law.[76] Their addition to exclusion law would merely further the evolution of that branch of immigration law. As a result, both exclusion and deportation statutes would protect aliens in the United States from arbitrary detention.

B. Ratification of Human Rights Treaties

As an alternative to statutory protection, international law that is set forth in treaties and covenants could be used as legal authority for protecting the human rights of aliens.[77] Under the supremacy clause of the Constitution, a ratified treaty becomes

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provision. First, an alien may suffer further detention while the issue of "reasonableness" is litigated. Second, a court can conceivably find an unduly long period of detention to be reasonable.

[71] *See* note 24 *supra.*

[72] *See* Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 (N.D. Ga. 1981); Fernandez v. Wilkinson, 505 F. Supp. 787, 792 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389 (10th Cir. 1981).

[73] *See* note 20 *supra.*

[74] 8 U.S.C. § 1227(a) (1976).

[75] *Id.* § 1253(a)(7).

[76] *Id.* §§ 1252(c) & 1253(a).

[77] *See, e.g.,* treaties and covenants set forth in note 45 *supra.*

the "law of the land."[78] Courts must enforce a treaty that has thus become law if it is either self-executing[79] or accompanied by enabling legislation.[80]

Two recent human rights treaties specifically forbid the deprivation of freedom by arbitrary detention or imprisonment. The American Convention of Human Rights[81] provides that every person has the right to personal liberty and security, and that no one shall be subject to arbitrary detention or imprisonment.[82] The International Covenant on Civil and Political Rights[83] states that no one shall be subject to arbitrary arrest or detention, nor shall anyone be deprived of liberty except in accordance with lawful procedure.[84]

Either of these documents could fill the gaps in United States immigration statutes that allow arbitrary detention. However, since the United States has not ratified either of these documents,[85] they have no binding legal effect. They serve only as guidelines that courts may either ignore or invoke.[86]

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[78] U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." *Id.*

[79] Self-executing treaties are immediately effective without the necessity of ancillary legislation. BLACK'S LAW DICTIONARY 1220 (5th ed. 1979).

[80] Foster v. Neilson, 27 U.S. 253, 314 (1829) (the Supreme Court established for the first time that a treaty may not become binding on United States courts until Congress enacts enabling legislation).

[81] American Convention of Human Rights, July 18, 1978, O.A.S. Doc. OEA/Ser.K/XVI 1.1 Doc. 65 (1970), *reprinted in* [1969] Y.B. ON HUMAN RIGHTS 390, U.N. Sales No. E.72.XN.1 (1969), 77 DEP'T ST. BULL. 28 (1977).

[82] *Id.*

[83] International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/16316 (1966).

[84] *Id.*

[85] President Carter signed both documents on October 5, 1977, and sent them to the United States Senate for ratification. He also sent a list of reservations, including a recommendation that the treaties not be self-executing. *See* Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978-79). As of January 1, 1982, the Senate had taken no further action toward ratification. U.S. Dep't of State, Treaties in Force, Jan. 1, 1982. Even if such treaties were ratified, Congress would have to enact enabling legislation if the treaties were not self-executing. *See* note 74 *supra.*

[86] Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). The trial court used these and other unratified human rights treaties, *see* note 45

Although commentators have given various reasons for the United States' failure to sign many human rights agreements,[87] none sufficiently justifies its continuing refusal to be bound by these agreements. The existence of international human rights depends on the willingness of governments to accept and honor them.

By ratifying and implementing human rights treaties such as the American Convention and the International Covenant, the United States would ensure domestic enforcement of human rights. International law would serve to protect rights that domestic law may overlook. Most importantly, a United States commitment to domestic human rights enforcement would strengthen the fight against human rights violations throughout the world.[88]

CONCLUSION

As *Rodriguez-Fernandez v. Wilkinson*[89] illustrates, the law governing excludable aliens inadequately deals with the problem of aliens who cannot be returned to the country from which they came. Since current statutory law specifies neither alternative countries to which these aliens may be sent nor any maximum detention period for these aliens, arbitrary detention can result.

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supra, in concluding that arbitrary detention was unlawful. Because it could not invoke the treaties as binding law, it analyzed them as customary international law. *See* note 60 and accompanying text *supra*.

[87] Of 19 human rights treaties deposited with the United Nations in recent years, the United States has been a party to only five. Szasz, *The International Legal Aspects of the Human Rights Program of the United States*, 12 CORNELL INT'L L.J. 161, 168 (1979). Although the United States participated in the initial formation of these human rights agreements, Congress has opposed ratification of these agreements from the start. *See* Weissbrodt, *supra* note 85, at 38 n.45. Some of the reasons given for Congress' present refusal to ratify these agreements are that the treaties would grant rights greater than those guaranteed by federal or state legislation or constitutions, that they are signed by other countries with offensive human rights records, and that some treaties contain provisions that violate certain American principles, *id.* at 169-74. *See also* Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 406, 422 (1979); Weissbrodt, *supra* note 85, at 45-47.

[88] The United States cannot credibly appeal to other nations to cease human rights violations until it willingly subjects its own human rights record to international scrutiny. *See* Weissbrodt, *supra* note 85, at 42.

[89] 505 F. Supp. 787 (D. Kan 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

Yet, the right to freedom from arbitrary detention should be a basic human right of every person, regardless of the person's legal status.

Although the law governing deportable aliens has evolved to meet changing needs, the law governing excludable aliens has remained virtually unchanged since the 1800s. In its present form, it contributes to human rights violations.

This comment suggests that current immigration needs require further evolution of exclusion law. One possible solution is statutory reform. This comment proposes the addition to exclusion law of a maximum detention period and a list of alternative countries to which excluded aliens may be deported. This reform would prevent future cases of arbitrary detention. Another possible solution involves United States ratification of international human rights treaties. The international law invoked by these treaties would protect any human rights that domestic law leaves unprotected. These two proposals are necessary if the United States is to cope humanely with current immigration trends and to lead the world in the fight against human rights violations.

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