

November 2001

RESPONSE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REPORT 85/00 OF
OCTOBER 23, 2000 CONCERNING MARIEL CUBANS (Case 9903)

The United States rejects Commission Report 85/00 of October 23, 2000, in its entirety. The United States respectfully requests that the Commission publish the following Response of the United States in the next Annual Report of the Commission, if Report 85/00 is published.

INTRODUCTION

In response to the petition of April 10, 1987 in the above-referenced case, the United States has submitted four lengthy and detailed written filings to the Commission dated:

October 9, 1987

January 19, 1988

July 29, 1988

March 22, 1999

In addition, the United States has participated vigorously in hearings before the Commission, notwithstanding the Commission's disregard for the consistently stated objections of the United States to the convening of those hearings and to the Commission's overall manner of proceeding in this case.

More than thirteen years after the petition against the United States Government was filed in this case, the Commission issued Report 85/00 on October 23, 2000 setting forth the following conclusions:

1. The Status Review and Cuban Review Plans do not constitute effective domestic remedies within the meaning of Article 37 of the Commission's Regulations, and, therefore, their continuing availability to Petitioners does not bar consideration by the Commission of their claims.
2. The United States has violated Articles I, II, XVII, XVIII, and XXV of the American Declaration of the Rights and Duties of Man.

In accordance with these conclusions, the Commission proceeded to make the following recommendations to the United States in Report 85/00:

1. For all Petitioners remaining in custody, status reviews should be conducted "as soon as is practicable" to ascertain the "legality" of their detentions under "the applicable norms of the American Declaration."

2. Laws, procedures, and practices should be reviewed to ensure that all aliens who are detained, including aliens who are considered "excludable" under immigration laws, are afforded full protection "of all of the rights established in the American Declaration, in particular Articles I, II, XVII, XVIII, and XXV."

For the United States, the objectionable nature of the Commission's handling of this case was most recently demonstrated by the Commission's April 4 decision (communicated to the United States in a letter of April 9, 2001)

to publish its report without the courtesy of further consultations and coordination with the United States. This action was taken by the Commission notwithstanding its knowledge that the United States had for several months been carrying out in good faith the very difficult task of attempting to compile complete and accurate factual information on the most relevant individual cases identified either by the Commission in its report or in recent submissions to the Commission.¹

Moreover, in its January 29, 2001 extension request letter, the United States alerted the Commission to the fact that its consideration of this case might be barred by its own Rules of Procedure, specifically the article on

¹ The updated record information about the petitioners that was secured is attached (Addendum). This record survey both refutes any claim that Mariel Cubans with minor infractions or insignificant criminal records are being detained, and demonstrates that the existing procedures in the Cuban Review Plan provide the petitioners with an effective vehicle for release. All of the petitioners, and all other Mariel Cubans presently in custody, have been paroled one or more times since their arrival. Of the original 367 petitioners, less than 20 appear to be in custody at this time and, of those paroled, most were released under the current procedures between 1987-89, and have not returned to custody.

Duplication of Procedures (Article 33 in the Rules effective on May 1, 2001).

Since the United States has now determined that Article 33 does indeed bar Commission consideration of this case, the Commission could have avoided embarrassment and damage to its credibility by delaying publication of Report 85/00 until after consideration of the forthcoming United States response, or at least by inquiring of the United States as to the substance of the claimed duplication.

For the record, the United States did request an extension of time to reply, but was granted only a short extension by the Commission.

In the view of the United States, the Commission's arbitrary and heavy-handed procedural conduct throughout this case raises very serious questions concerning the Commission's impartiality.

From the outset of this case, more than a decade ago, to the present, it is the position of the United States Government that the written submissions of the United States and its

presentations at hearings of the Commission have established overwhelmingly that the Commission should immediately have declared the petition inadmissible or, in the alternative, should have promptly dismissed it if the petition were somehow found admissible.

SUMMARY OF RESPONSE

- Article I.** 1. The United States disagrees with the conclusions of the Commission in this case, rejects the Commission's conclusions, and requests that the Commission withdraw, and refrain from publishing, Report 85/00.
2. With regard to each implication or direct assertion in the Commission's report that the American Declaration of the Rights and Duties of Man itself accords rights or imposes duties, some of which the United States has supposedly violated, the United States reminds the Commission that the Declaration is no more than a recommendation to the American States. Accordingly, the Declaration does **not** create legally binding obligations and therefore **cannot**

be "violated."

3. With regard to the substantive legal and policy aspects of this case, the United States maintains all of the points made repeatedly to the Commission in the four major written submissions cited above, and during hearings before the Commission in this case. The United States will not reiterate all of those points in full here, but asserts the continuing validity of all points previously made, and refers the Commission to the record in this case.

The United States will emphasize in this submission, as concisely as possible, certain fundamental and irrefutable arguments by the United States that should have been decisive in persuading the Commission to find the petition inadmissible, or to dismiss it, long ago. Regrettably, the Commission failed to give adequate weight to these points, which, to say the least, are not reflected or adequately acknowledged in the Commission's report.

4. With regard to the facts of as many as possible of the individual cases mentioned either in the Commission's Report or the March 22, 1999 submission of the United States, updated reports are set forth in the Addendum to this Response.

5. From a review of the Commission's Report, it is the impression of the United States that virtually the entire decision rests on, or flows from, the Commission's unsupported and insupportable assertion that there exists in international human rights law a rebuttable presumption that everyone has a right to freedom, in whatever country he is located and no matter what his legal or immigration status in that country. The Commission cites no legally binding international instrument to which the United States is a Party or any other source of widely accepted or respectable authority for this proposition. In fact, the Commission has fashioned this so-called international human right out of whole cloth. No such right exists.

6. In addition to the arguments previously made for a finding of inadmissibility or dismissal of the petition, the United States wishes to inform the Commission that the petition duplicates the work of the United Nations Commission on Human Rights, and therefore must be dismissed in accordance with Article 33 of the Commission's regulations.

In particular, Article 33 provides that the Commission shall not consider a petition if its subject matter "essentially duplicates" a petition "already examined and settled by another international governmental organization of which the State concerned is a member." The issues raised by the petition in this case and the petitions (or "communications") submitted to the UN Commission on Human Rights in a so-called 1503 process case resolved on April 7, 1997 are essentially identical in all significant respects. This is particularly true with respect to the issues of detention of Mariel Cubans and their claim to have a right to be admitted into

the United States.

If this Duplication of Procedures prohibition against Commission action has any meaning whatsoever, the exceptions stated in Article 33 cannot be interpreted (or in any way "stretched") to apply in this case. In short, Article 33 applies to this case, and the Commission is barred from further consideration of the petition.

The United States has not raised the duplication issue previously because, like this Commission's process, the 1503 process of the United Nations is confidential. Consequently, the United States did not wish to mention the 1503 proceedings of 1997 in this case at all.

In addition, however, the United States also did not do so because the United States considered it unnecessary. The United States could not have imagined that the Commission would not only disregard the case for inadmissibility and dismissal, but would purport to create international human rights that do not exist, and never have.

At this stage, therefore, the United States has no choice but to invoke Article 33 and to inform the Commission that a superior body, the United Nations Commission on Human Rights, voted on April 7, 1997 to discontinue consideration of a Mariel Cuban case that "essentially duplicates" (using the key term in Article 33) the petition in this case. The margin of decision by the UN Commission on Human Rights was 45 to 2, with 4 abstentions.

7. The most relevant provision of international (treaty) law binding upon the United States is Article 12, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR), which declares:

"Everyone **lawfully** within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." (emphasis added)

However, this right and the right to leave any country, including one's own, are subject to the potential restrictions set forth in paragraph 3, even for those lawfully in a State's

territory. Those restrictions must be provided by law and be consistent with the other rights recognized in the ICCPR, but nevertheless give the State broad authority and discretion, since restrictions may be based on national security, public order, public health or morals, or the rights and freedoms of others. Only paragraph 4 of Article 12 articulates a right that is absolute and can fairly be considered customary international law:

"No one shall be arbitrarily deprived of the right to enter his own country."

It is exclusively Cuba's failure to respect this international norm that has placed the petitioners in the situation about which they complain, not any act or omission by the United States. The fact that Cuba has not submitted to the jurisdiction of this Commission does not justify the Commission focusing its attention on the only other available target in this case, the United States.

8. With regard to Article 12(1) of the ICCPR cited

above, it is unchallenged that petitioners have never been lawfully in the territory of the United States. Their presence has been unlawful from the outset. Put differently, they have never had a lawful basis for being in the United States. It is absurd to claim that people who have no legal right to be in a country, whose presence there is not lawful, and who have unquestionably shown that they pose a danger to the community, nevertheless somehow have a right to be at liberty in that country, or at the very least enjoy a rebuttable presumption in favor of being at liberty.

GENERAL DISCUSSION

The petitioners are approximately 367 Cuban nationals who arrived in the United States in 1980. Many of them were taken from Cuban jails and sent here during the mass exodus of more than 125,000 undocumented aliens who illegally came to this country when Fidel Castro opened the Port of Mariel to Cubans who wanted to leave that country ("Mariel Cubans").

The petitioners claim that they are entitled to be admitted into the United States, despite their serious and repeated violations of this country's criminal laws, and despite the sovereign right of the United States, shared by all other nations, to regulate its borders. They also aver that they are being unlawfully detained, although few of the petitioners are even in custody at this time. All of the petitioners have been paroled into the United States one or more times, and the vast majority presently enjoy that status, many having been released after committing new crimes even while their petition was pending before this Commission.

As noted above, the United States has previously responded in detail to the Petition, and reiterates its consistent position, restated in recent correspondence, and in the four major submissions previously cited that: (1) the Petition is inadmissible because Petitioners failed to exhaust their domestic remedies and the Petition fails to raise any significant issue

under the American Declaration of the Rights and Duties of Man ("American Declaration"), or any other rule of international law; and (2) it fails to articulate any ground for action by this Commission because the detention of criminal aliens lawfully denied admission to the United States is not inconsistent with, and does not "violate," any provision of the American Declaration, which as a non-binding instrument **cannot** be "violated" in any event.

The Commission's Report (at ¶ 249) acknowledges the serious problems forced upon the United States by the unprecedented influx of the undocumented aliens who illegally traveled to this country in the 1980 Mariel boatlift, compounded by the continuing, unreasonable and unlawful failure of the Government of Cuba to accept the return of all of its nationals. The Report also acknowledges the extraordinarily generous treatment by the United States afforded to the Mariel Cubans, the vast majority of whom have been extended the opportunity for lawful status in this country and, for many, citizenship

through a variety of legislative acts.

Likewise, the United States' treatment of the petitioners---inadmissible aliens who committed violent and other serious new crimes in the United States **after** their arrival in the Mariel boatlift--can also only be characterized as generous. The Report's conclusions that the petitioners have been subjected to arbitrary detention or unfairly burdened by inadequate custody review procedures cannot be reconciled with the facts of petitioners' own cases. Most have been released within the United States, despite their clear ineligibility to enter or reside lawfully in this country, and despite the dangerous criminal conduct with which they have repaid this extraordinary hospitality. The Report's conclusion that the fundamental authority of the United States to exclude dangerous aliens is somehow diminished, or that it is compelled by Cuba's irresponsible and unlawful actions to assume the risk of hosting dangerous aliens in its communities, is not supported by any article of the American

Declaration. Indeed, the suggestion that such aliens are presumptively entitled to liberty because of the unlawful failure or refusal of their own government to honor its obligations to its nationals, and irrespective of such aliens' individual failure or refusal to comply with the host country's civil and criminal laws, squarely conflicts with several provisions of the same instrument, including Articles VIII, XIX, XXVII, XXIX, XXXIII.

At best, as mentioned above, the Report suggests a heretofore unknown rule of international law, to which no nation subscribes.

In addition to the discussion that follows in response to some of the Report's findings, the United States incorporates by reference here, and respectfully refers the Commission to, its previous responses in opposition to this petition. This exhaustive and informed analysis clearly demonstrates that the actions of the United States in relation to the uninvited and inadmissible aliens who arrived here during the

Mariel boatlift have been, and continue to be, entirely consistent with domestic and international law. These actions fully respect the human rights of the petitioners and other Mariel Cubans, all of whom have access to a variety of administrative procedures and independent judicial review to ensure that they are treated justly and humanely.

Moreover, in that the United States continues in its efforts to persuade the Government of Cuba to repatriate Mariel Cubans who cannot or will not live lawfully in the United States, the United States finds the Report (and the decision to publish it) particularly objectionable because of its potential to affect adversely and impermissibly ongoing diplomatic initiatives by the United States to resolve the current impasse with Cuba about repatriation of individuals such as petitioners, as well as efforts by officials of both governments to deter future illegal migration.

The Report's irresponsible assertion that, once here, even illegal migrants are entitled to

liberty in the United States, can only encourage further unlawful, inherently dangerous attempts to migrate to the United States, with more loss of life in the process. Without justification, the Commission's Report also represents an inappropriate and significant intrusion into United States domestic matters, in that it has the potential to hamper, if not actually undermine, efforts by the United States to promote orderly immigration and contain serious concerns related to the illegal presence and removal of dangerous criminal aliens.

Subsequent events, including recent decisions of the United States Supreme Court, among them Zadvydas v. Davis, 533 U.S. ___, 121 S. Ct. 2491 (2001), and the September 11 terrorist attacks in New York and Washington, D.C., underscore the validity of the objections of the United States to the Commission's Report.

These events clearly demonstrate that foreign nationals, including criminal aliens, are afforded meaningful avenues of judicial review in the United States, and provide additional grounds

that should compel the Commission to withdraw its novel suggestion, to which no nation subscribes, that one country can force another to admit undesirable or dangerous aliens.

SPECIFIC REPLY POINTS

I. THE CONTINUED DETENTION OF MARIEL CUBANS WHO HAVE NO RIGHT TO ENTER THE UNITED STATES DOES NOT VIOLATE INTERNATIONAL LAW.

- A. A State Has No Obligation Under International Law To Admit Aliens Into Its Territory Whose Presence It Deems To Be Harmful

The detention of dangerous aliens who have committed serious crimes or who otherwise pose a danger to themselves or the community is a lawful exercise of the sovereign authority of the United States to regulate the entry and presence of aliens within its borders. It is well settled in international law that a State has no obligation to admit aliens into its territory whose presence is not in its national interests or is potentially harmful to its public safety. Rather, every nation enjoys the fundamental sovereign power, essential to self-preservation,

to forbid the entrance of foreigners, and to admit them only under such conditions as it may see fit.

There certainly is no known principle of international law, let alone any binding obligation, that compels one nation to accept the dangerous criminals of another, even when they have been expelled and effectively exiled by their own government. A sovereign State has the right to protect its society, and to do so through the exclusion of aliens from its territory, for economic, political, social and other reasons it deems critical to the well-being of its citizens and lawful residents.²

In fact, the only internationally recognized right that is being violated (under customary international law for non-Parties to the International Covenant on Civil and Political Rights such as Cuba) in the petitioners' cases is the right of everyone to return to his country of nationality. As noted above and repeatedly in

^{2/} See, e.g., Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

previous submissions, this right is being violated by the Government of Cuba, not the United States.³ The United States reiterates that the petitioners' complaint and the Commission's concerns should be addressed to Cuban officials, not the United States.

No reasonable reading of the American Declaration in general or the particular articles cited in the Report contradicts these principles, or supports the conclusion that an alien has a presumptive right to liberty in any country other than his own, or the contention that a foreign government may effectively dictate the admission of its undesirable and dangerous citizens by unlawfully expelling and exiling them to another State.

As exhaustively demonstrated in the previous submissions by the United States in this matter, detention of dangerous, illegal migrants does not violate international human rights law or any other universally accepted principle of

^{3/} See, e.g., Universal Declaration of Human Rights, Article 13.

international law. Instead, detention is a recognized, legitimate means, under both domestic and international law, of enforcing a State's inherent sovereign right and power to regulate immigration into its territory.

Nonetheless, detention is neither the goal of United States immigration law, nor the only means of enforcement when an alien cannot be promptly returned to his own or a third country.

Less restrictive alternatives are permitted under the immigration statute, including discretionary parole or other supervised release into the community to await repatriation. Such alternatives, however, are reasonably conditioned upon the lawful conduct of the alien when released. Where less restrictive measures have proved unworkable, or inadequate to prevent the resumption of violent or recidivist criminal conduct, detention is an appropriate means of enforcement in order to prevent the very harm to which the regulation of immigration is addressed.

Court rulings that have sustained the

authority of the Attorney General under the immigration laws to detain Mariel Cubans who are lawfully excluded, but who are stranded here by the human rights violations and otherwise unlawful actions of their own government, and who cannot be safely released into the community, are not inconsistent with the American Declaration. The articles cited in the Report do not define liberty in abstract or absolute terms, but must be understood in light of the competing right of a State to restrain individual liberties. They do not purport to guarantee admission or release of aliens lawfully excluded under that State's existing laws. (See U.S. submission Jan. 19, 1988).

The Supreme Court of the United States has found detention to be lawful when there is a reasonable apprehension of harm to the community by aliens who have been denied admission and are awaiting their removal to another country.⁴ The Court also held that the Government's objective

^{4/} See Shaughnessy v. Mezei, 345 U.S. 206, 210, 215-216 (1953).

of protecting the community from the threat of harm posed by aliens lawfully denied admission to the United States is a legitimate objective that outweighs the aliens' interest in securing release from detention.⁵

The United States accordingly disagrees with the Report's finding (at ¶ 216) that the detention of the petitioners "violates" the American Declaration, particularly in view of the fact that the Declaration **cannot** be violated, as explained above. The United States reiterates that the Declaration does not establish binding legal obligations that can be violated by anyone.

Even if the Declaration were a legally binding instrument, the United States would not be in violation of it. None of the articles cited, including Articles I and XXV of the Declaration, can be construed to suggest that criminal or other undesirable aliens must be admitted to any country they choose, or to dilute the authority of the country to which their own

^{5/} See Zadvydas, 121 S. Ct. at 2495, 2500-01, 2502.

government has unlawfully expelled them to enforce its own laws or promote those interests protected through the regulation of immigration.

The petitioners - -aliens who have never been eligible for admission to the United States, and have been ordered excluded based on their convictions of serious crimes - -cannot force the United States to admit or release them into its territory. Neither the intransigence of their own government, nor the petitioners' illegal presence in this country, changes this analysis or confers on them the entitlement they claim to be at liberty in American society.

Just as the Declaration does not create legal duties, it cannot create rights. The United States nonetheless has provided generous alternatives to detention through the immigration parole statute. Insofar as the government of Cuba has refused, in violation of international law and basic principles of human rights, to accept the return of its citizens, however, it has left the United States with no reasonable

alternative except to detain those who pose an unacceptable risk to the communities into which they would be released.

Nor can even an expansive reading of Articles I and XXV displace competing State interests or existing procedures of law in the circumstances presented here. The Supreme Court of the United States has held that, because the alien's presence in this country is illegal, an alien denied admission likewise lacks an enforceable right to be released into the United States, where such release would pose an unacceptable risk of harm to society.⁶ The petitioners remain in this country only because their orders of exclusion have not yet been effectuated. At most, they are entitled to a proportionate, constitutionally adequate procedure for determining whether they should be detained or released pending efforts to secure their repatriation, or further consideration for

^{6/} Mezei, 345 U.S. at 215-216; see also Zadvydas, 121 S. Ct. at 2500, 2502; Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc), cert. denied, 516 U.S. 976 (1995) (alien denied admission lacks constitutional right to parole

release. The current custody review procedures meet or exceed this standard.⁷

The petitioners have not established that they have been denied adequate administrative or judicial process. Rather, all of the petitioners have been released or paroled into the United States one or more times under the very procedures they label inadequate. That parole afforded each of them an opportunity to reside in society, and was forfeited because of the aliens' own unlawful conduct, including violations of the conditions under which they were released to the community by their commission of additional, serious and violent crimes in this country.

Nonetheless, if detained, they are afforded automatic, periodic and meaningful opportunities, at least annually, under the comprehensive immigration parole review procedures for Mariel Cubans established at 8 Code of Federal Regulations § 212.12 (2000), to seek further

into the United States).

^{7/} See, e.g., Ngo v. INS, 192 F.3d 390 (3d Cir. 1999); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984).

release within the United States.

These procedures are separate from and in addition to administrative hearings and appeals afforded every alien to determine whether he is eligible to enter or remain in the United States.

The allocation of proof under the regulations, moreover, is consistent with the statutory and constitutional allocation of proof applicable to any alien who seeks to be admitted even temporarily into the United States.⁸ As evidenced by the petitioners' own cases, and those of the thousands of other Mariel Cubans who have been paroled under 8 C.F.R. § 212.12 (none of whom has a lawful right to resume their illegal presence in this country, but many of whom have been approved for parole into the United States multiple times), these procedures are clearly sufficient.

Mariel Cubans also have access to judicial oversight of their administrative proceedings, including habeas corpus proceedings to test the legality of their detention and to insure that

they are not detained in violation of the Constitution, laws, or treaties of the United States.⁹ Importantly, they are also guaranteed the same rights under law, including the Fifth and Sixth Amendments of the Constitution, as a citizen or any other criminal defendant, before they can be convicted of or punished for a crime.

In providing these procedures, the United States has complied with its obligations under international law to protect the liberty interest of every foreign national on its soil.¹⁰ It is

^{8/} See, e.g., 8 U.S.C. 1225(b)(2)(A), 1361 (Supp. IV 1998).

^{9/} See Zadvydas, 121 S. Ct. at 2497 ("[T]he primary federal habeas corpus statute, 28 U.S.C. 2241, confers jurisdiction upon the federal courts to hear these cases," citing 8 U.S.C. 2241(c)(3), which "authoriz[es] any person to claim in federal court that he or she is being held 'in custody in violation of the Constitution or laws [or treaties] of the United States.'").

^{10/} Indeed, the United States has struck an exemplary balance between its own rights and obligations to its own citizens and the desire of the Mariel Cubans to live in the United States. Of the 125,000 Mariel Cubans who came to this country in 1980 without any legal right to enter, approximately 123,000 were promptly released into the community, including aliens who admitted to having criminal records in Cuba, and all but a very few were eventually paroled. The vast majority have become productive, law abiding members of their communities and have become eligible for U.S. citizenship. See October 9, 1987 Submission, at 4.

not, as the Report acknowledges, required to treat citizens and aliens identically in every context. In particular, nothing in the American Declaration or any other rule of international law confers on aliens an absolute right to reside in a country to which they have not been lawfully admitted, or even a qualified right to be released from immigration custody when their release poses an unacceptable danger or risk of harm to the interests of that country. Again, the Commission therefore erred in finding such a right to exist, and the continued detention of the petitioners to be arbitrary or otherwise objectionable under the American Declaration.

B. The Detention of Excludable Mariel Cuban Aliens Pending Their Removal Does Not Violate Principles of Equal Protection.

The detention of the Mariel Cubans is consistent with Article II of the American Declaration and its principle of equal protection under the law. Immigration detention, particularly in light of the comprehensive custody review procedures for Mariel Cubans in 8

C.F.R. § 212.12, is reasonable and proportional to the governmental objectives of promoting orderly immigration, protecting the community, and insuring enforcement of immigration laws. These objectives require the exclusion of criminal aliens who have no legal claim or other right to live in American society.

Detention for the purpose of enforcing the immigration laws that require the exclusion of inadmissible criminal aliens is not arbitrary, punitive, or in violation of due process.¹¹ Before they are ordered excluded from the United States, aliens in the petitioners' circumstances are afforded full hearings before an immigration judge, in which they may be represented by counsel, confront the immigration charges against them, proffer evidence in rebuttal, apply for such relief or protection from removal for which they may be eligible, and submit any other relevant information in support of their applications for admission. They also may appeal

^{11/} See, e.g., Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991), cert. denied, 506 U.S. 842 (1992).

adverse orders of the immigration court to the Board of Immigration Appeals, and have the same opportunity for judicial review of their immigration orders as do other similarly situated aliens.¹²

In addition, if detained, the Mariel Cubans are afforded, in separate administrative proceedings, automatic, periodic reconsideration for parole from custody under the comprehensive procedures at 8 C.F.R. § 212.12. These reviews, during which they may be assisted by counsel or other representatives, provide Mariel Cubans with individualized determinations based on the relevant facts of their particular cases, including any information submitted or developed during annual, face-to-face personal interviews with the review panels.

At the end of each review, the aliens are

^{12/} See Section 106(b) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(b) (1994), amended by Section 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and replaced by the procedures in amended Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 (Supp. IV 1998). Criminal aliens disqualified for judicial review under these statutory provisions may nonetheless challenge their removal by petition for writ of habeas corpus. See, e.g., INS v. St. Cyr, 121 S. Ct. 2271 (2001).

given a written decision, translated into Spanish, explaining the decisions in their individual cases, and providing reasons for the decisions. Importantly, while an alien's criminal record may have immigration consequences, immigration proceedings are not criminal proceedings, but are civil proceedings.

An alien in the United States who is accused of a crime is afforded the same statutory and constitutional safeguards as any other defendant arrested or tried for a crime. Immigration officials do not retry or otherwise go behind the findings or conviction records of the criminal courts. Mariel Cubans nonetheless may test the legality of their immigration detention in federal court by petitioning for writs of habeas corpus.

As demonstrated, here and in previous submissions in response to the petitioners' complaint, detention is recognized by nations as a permissible means of enforcing a state's inherent power to regulate immigration. U.S. immigration law, however, does not mandate

detention in every instance of unlawful migration, but authorizes the Attorney General to release aliens in lieu of detention when appropriate pending removal proceedings and repatriation.¹³ The Attorney General, relying on his statutory immigration parole authority, has unquestionably and generously exercised his discretion with respect to Mariel Cuban criminals who cannot be promptly repatriated. Parole under 8 U.S.C. § 1182(d)(5) is not a lawful admission to this country, and therefore does not change the alien's legal status from that of an applicant for admission.¹⁴ It nonetheless permits an alien not lawfully present in the United States to reside in the community, and to enjoy many of the same benefits (and obligations) of residence in this country, pending proceedings to determine if he is admissible, and pending arrangements to enforce his departure if he is

^{13/} See, e.g., Leng May Ma v. Barber, 357 U.S. 185 (1958); Kaplan v. Tod, 267 U.S. 228 (1925) (discussed in Zadvydas, 121 S. Ct. at 2500).

^{14/} Id.

not.¹⁵

The statute provides for the temporary, conditional parole of inadmissible aliens "only on a case-by-case basis for urgent humanitarian reasons or for significant public benefit."¹⁶ These concerns generally include public safety and risk of flight to avoid removal.¹⁷ The special regulations for Mariel Cubans are fully cognizant of the aliens' unique circumstances, and as such allow release of aliens who would normally be removed rather than paroled into the United States. For the same reasons, the regulations at 8 C.F.R. § 212.12 speak to related concerns, including an alien's own welfare once he is released into the community, and the likelihood that he may resort to new criminal conduct if he is released without such basic resources as

^{15/} See, e.g., Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985).

^{16/} Prior to amendment in 1996, the statute permitted parole for "emergent reasons" or where release is "strictly in the public interest." See 8 U.S.C. 1182(d)(5)(A) (1994, Supp. IV 1998).

housing and income.

The regulations thus reasonably condition release on the availability of a sponsor, and on the alien's willingness to agree to other reasonable limits, such as complying with civil and criminal laws, or the rules of any transitional halfway house program to which he may initially be released, and subsequent periodic reporting to immigration authorities to ascertain his whereabouts and renew his employment authorization. The Report's implicit criticism of the sponsorship requirement is shortsighted from both the perspective of the petitioners and the United States.

The Report also erred as a matter of law in concluding that Mariel Cubans are subject to detention solely because of their status as inadmissible or excludable aliens. See Report at ¶ 241. This finding is based on the Commission's belief that the United States relies on a legal "fiction" to justify detention of excludable aliens at the border, while deportable aliens are

^{17/} 8 C.F.R. §§ 212.5, 241.4 (2000).

allowed to go free within the United States.¹⁸
See Report at ¶ 233. The petitioners, and Cubans in general, are in no way discriminated against by the United States in the enforcement of the immigration laws. The relevant U.S. immigration law applies to all similarly situated aliens, and all dangerous, illegal aliens are liable to detention for purposes of enforcing the immigration laws, irrespective of their nationality, or their prior immigration status.

Contrary to the Report's finding, the so-called "entry doctrine " is consistent with basic due process principles, and international law. The doctrine recognizes that aliens who have been admitted and have lawfully resided in the United States are entitled to additional procedural protections before they may be deprived of that status, and the expectancies that go with it, and expelled from the United States.¹⁹ Neither prior admission nor illicit entry, however, entitles

^{18/} The definition of "entry" was replaced in 1996 by Congress with a definition of "admission" when it amended 8 U.S.C. 1101(a)(43).

^{19/} See Landon v. Plasencia, 459 U.S. 21, 32 (1982).

aliens to be free of detention contrary to the interests of the United States pending their removal.²⁰

The Supreme Court has construed the immigration statute to implicitly limit under certain circumstances the duration of post-order detention of aliens who have been admitted to the United States.²¹ The Court, however, has not found any statutory, constitutional, or other rule of law under which other nations could in effect force this country to accept or even temporarily host dangerous aliens by sending such individuals here and refusing to take them back.²²

Even then, as demonstrated by the petitioners' own cases, the parole statute and regulations permit the release of inadmissible aliens within the United States, despite their unlawful arrival or presence. The United States' treatment of the petitioners thus conforms with

^{20/} See Reno v. Flores, 507 U.S. 292, 305-6 (1993); Carlson, 342 U.S. 524.

²¹ Zadvydas, 121 S. Ct. at 2502-05.

²² Id. at 2500, 2502; Mezei, 345 U.S. at 215-16.

and indeed exceeds this country's obligations under international law,²³ and is fully consistent with the Declaration.

There also is no evidence that the United States has used its detention authority under civil immigration law to punish or mistreat the petitioners or other Mariel Cubans. All classes of aliens are protected under the Fifth and Fourteenth Amendments of the United States Constitution against inhumane and punitive treatment that violates recognized human rights, and the courts are open to any who protest the legality or conditions of their confinement.²⁴ Furthermore, the procedures governing the detention of Mariel Cubans, which are discussed further below, are similar to the procedures governing the detention of other groups of aliens.²⁵

²³ See ICCPR, art. 12, ¶ 1 ("Everyone **lawfully** within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.") (emphasis added).

²⁴ See, e.g., Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987).

²⁵ Compare 8 C.F.R. § 212.12 (2000) (Cuban Review Plan) with 8 C.F.R. 241.4 (2000) (post-order custody review procedures

In a related point, the United States also objects to the Report's reference (at ¶ 251) to its "on site visits in this matter," and challenges the Commission's resulting conclusion that detained Mariel Cubans are not provided the same "programs of reform and rehabilitation" that are available to sentenced criminal offenders. This comment again fails to distinguish between the State's interests in criminal and immigration law, including its greater obligations to its own citizens and lawful residents, both those who are leaving prison, and those who live in the communities to which sentenced offenders will necessarily return upon their release from prison.²⁶

Further, the noted concern is an inaccurate description of the resources that are available to Mariel Cuban detainees, particularly those who are housed in Federal Bureau of Prisons ("Bureau") facilities. In such facilities,

for other aliens).

^{26/} See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986).

detainees are permitted (but, unlike sentenced inmates, cannot be required) to work, and likewise are encouraged to participate in available educational programs. The vast majority of detainees are housed in the general population, are involved in work and educational programs with other inmates and detainees, and are allowed to move about the institution independently.²⁷

In addition, the Bureau funds and/or staffs a number of programs solely directed to Mariel Cubans, including a comprehensive residential substance abuse treatment program at Englewood, Colorado, for detainees who are approved for immigration parole, and it oversees the placement of detainees in halfway house programs established for Mariel Cuban parolees and other

^{27/} Highly secure placements are ordinarily reserved for detainees who have physically attacked and injured prison staff, other inmates, or other detainees. All detainees are housed in the least restrictive setting possible, taking into account their criminal and institutional behavioral histories, and all detainees housed in the secure units are evaluated on a regular basis for placement in less restrictive housing. Mariel Cubans in local and state contract facilities who are denied immigration parole are referred to the Bureau for placement.

similar programs willing to accept or sponsor parolees upon their initial release from custody.²⁸

The Bureau also expends significant resources to address such special needs presented by this population, providing bilingual staff and educational services, including English as a Second Language, high school equivalency degree programs, general educational development, drug education and behavior therapy, as well as thorough medical care, and counseling and occupational therapies to Mariel Cubans diagnosed with significant mental health problems.

In this respect, again, the Report's observations cannot be reconciled with its apparent criticism of 8 C.F.R. § 212.12(f), regarding the halfway house and sponsorship requirements when an alien is paroled. The halfway house programs provide paroled Mariel Cubans with housing, health, counseling,

^{28/} Many of these functions were performed by the United States Public Health Service and the Department of Justice's Community Relations Service before they were consolidated under the Bureau.

employment and other vital services critical to their successful transition from institutional to community living. Aliens released directly to their own custody or even to that of their families rarely access comparable resources.

In short, the American Declaration neither contemplates that a government will release dangerous criminal aliens into its communities, nor does it question the authority of the United States in this case to determine how best to allocate its resources and where to spend them in its efforts to address the complex and difficult problems related to the release of criminal aliens who should but cannot be removed from its territory.

Accordingly, there is no basis for the Commission's finding (at ¶ 241) that the treatment of excludable Mariel Cubans is discriminatory and denies them equal protection of the law.

The treatment of the Mariel Cubans subject to detention has been both responsible and humanitarian, as well as reasonable and

proportionate in relation to the Government's interests.

The detention is not an end in itself, but rather it is to ensure that the Attorney General is able to fulfill his statutory authority to exclude or decline admission to dangerous aliens whose illegal presence is not in the public interest. The United States does not accept the proposition that it has an obligation or a duty under its own laws or the American Declaration to admit individuals whom no other country, including the petitioners' country of origin, is willing to accept, simply because such persons have managed illegally to arrive or remain in the United States. Nevertheless, it affords the petitioners procedures that are clearly fair, adequate and effective, and substantially identical to the process afforded other similarly situated aliens, through which they may obtain (and have obtained) their release.

For these reasons, the detention of the petitioners does not deny them equal protection under domestic or international law. While a

different, perhaps even more generous policy might be possible, the Commission should refrain from attempting to impose a different policy choice in the form of recommendations that not only discount the sound policy and procedures already in place, but would impair the inherent authority of the United States to protect its borders, and enable foreign governments to compel this country to admit undesirable aliens by the simple expedient of sending them here and refusing to take them back.²⁹ The Report's cursory treatment of the latter, sensitive issue in particular is unpersuasive and irresponsible, and suggests a view not shared by the United States or other nations.

^{29/} See Jean, 727 F.2d at 975.

II. THE PETITIONERS' DESIRE FOR LIBERTY IN THE UNITED STATES IS SUFFICIENTLY PROTECTED BY PAROLE REVIEW PROCEDURES THAT PROVIDE A REGULAR AND MEANINGFUL OPPORTUNITY TO SEEK RELEASE FROM DETENTION.

A. The United States Already Provides Significant Custody Redeterminations for Mariel Cuban Detainees.

The Cuban Review Plan at 8 C.F.R. § 212.12 is described in detail in the previous submissions of the United States (see, e.g., July 28, 1988 Submission, at 8-11). Through the comprehensive procedures and extensive, individualized review available under Section 212.12, the Cuban Review Plan serves its purpose of providing an effective, and humanitarian, resolution to a longstanding, complex problem that implicates sensitive foreign relations as well compelling domestic concerns. The review procedures allow the Attorney General to identify Mariel Cubans who can be paroled without posing an unacceptable risk to the community. The effectiveness of this effort is absolutely demonstrated by the release of literally

thousands of detained Mariel Cubans since the current review procedures were implemented beginning in 1987, and by the significant overall reduction of the number of Mariel Cubans held in detention today.³⁰

Even when parole has been determined to be against the public interest in an individual case, detention of excludable Mariel Cubans has never been properly characterized as unlawful or even "indefinite." The United States has constantly sought the agreement of Cuba, consistent with that government's obligations under international law, to accept the return of those detainees who have serious criminal records or severe mental problems. Like every other criminal alien who is lawfully removed from the United States, where possible and appropriate, this country promptly removes Mariel Cuban detainees who can be repatriated to Cuba.³¹ In

^{30/} To date, approximately 7,300 Mariel Cubans have been paroled by the Plan.

^{31/} See, e.g., Joint Communique Between the United States of

addition, the United States has always been willing to permit any detained Mariel Cuban who could obtain admission to a third country to depart.³² The evident unwillingness of third countries to accept these detainees further illustrates the reasonableness of the United States' position and its unwillingness to release all of them into the community.

For those who cannot be repatriated, the Attorney General's custody review procedures provide automatic, periodic reconsideration for release, and clear guidelines for the exercise of his discretion under the regulations. When properly viewed in this light, such detention is neither indefinite nor unlawful, but subject to periodic reconsideration, affording at minimum an annual opportunity to demonstrate that release on

America and Cuba, T.I.A.S. No. 11057, available at 1984 WL 161941 (signed at New York, December 14, 1984, with Minute on Implementation), under which agreement the United States has repatriated 1530 Mariel Cubans.

^{32/} See, e.g., Alvarez-Mendez v. Stock, 746 F. Supp. 1006, 1010 (C.D. Cal. 1990), aff'd, 941 F.2d 956 (9th Cir. 1991), cert. denied, 506 U.S. 842 (1992).

immigration parole would not be contrary to the public safety or interest.

Indeed, although an alien's parole may be revoked under these regulations because he has violated the conditions of his release, the Attorney General may (and often does) decline to resume custody, if he determines, upon review of the alien's particular case, including the nature and severity of the violation, that on balance revocation is not warranted.³³

B. The Cuban Review Plan Meets Prevailing Standards of Fairness and Impartiality.

The United States disagrees with the Commission's finding (at ¶¶ 220-230) that the Cuban Review Plan at 8 C.F.R. § 212.12 is

^{33/} As noted in our March 22, 1999 Submission, at 7, between June 1994-December 1998, detainees were reviewed for 3,948 Mariel Cubans whose immigration parole was subject to revocation because of criminal activity in this country. Parole was not revoked in approximately half (1,972) of those cases given the nature of the crimes and other relevant factors in each case. In nearly 38% of such cases so considered for parole revocation between January-October 1998,

procedurally deficient. The United States also, of course, rejects any assertion that it "violates" Article XXV of the American Declaration, which cannot be violated as discussed above. Article XXV merely requires that a deprivation of liberty be in accordance with "procedures established by pre-existing law," and that detainees be given a right of judicial review of the legality of detention in a court of law. Id. at 17. It does not disturb or address the grounds of exclusion, burden of proof, delegation of authority, or frequency of custody reviews under the immigration statute. The Report's assessment of these factors are not supported by the articles it cites, and reflect a flawed analysis of U.S. law and the extant custody review procedures applicable to Mariel Cubans.³⁴

the aliens had been paroled since 1988.

^{34/} The Commission found, in particular, that the Plan (1) fails to identify with particularity the grounds for detention; (2) places the burden on the detainee to justify release; (3) gives too much discretion in the Attorney

The review procedures at Section 212.12 allow the Attorney General to identify and release Mariel Cubans who can be paroled without posing an unacceptable risk to the community. As a remedy from the petitioners' perspective, and that of other Mariel Cubans, the Cuban Review Plan speaks for itself. As noted, it cannot be disputed that thousands of detained Mariel Cubans have been released since the current review procedures were implemented beginning in 1987, and that there has been a significant overall reduction of the number of Mariel Cubans held in detention today.³⁵

General; and (4) fails to provide for detention reviews at reasonable intervals.

^{35/} The majority (123,000) of the Mariel Cubans were paroled under 8 U.S.C. § 1182(d)(5)(A) shortly after their arrival in 1980. Another 2,040 were released under the Attorney General's Status Review Plan, which was adopted in 1981, when Cuba's refusal to allow repatriation created the undesirable possibility of prolonged detention for the small number (1,800) who were not initially paroled because their criminal backgrounds or serious medical and psychiatric problems posed an unacceptable risk to the community. The Attorney General's Status Review Plan was terminated in February 1985, in the expectation that the Cubans then in detention would be repatriated to Cuba under the terms of the agreement reached between the two governments in December 1984. In May 1985,

1. The American Declaration does not require the United States to implement additional, trial-like procedures.

The Cuban Review Plan is entirely consistent with basic principles of due process and with the balance of interests to be accommodated. In one of its most significant decisions on procedural due process, Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the United States Supreme Court provided a balancing test for determining the sufficiency of a particular procedure for purposes of due process. While Mathews may be drawn from non-immigration jurisprudence, its approach would not require additional procedures even if applicable here:

Due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

however, Cuba unilaterally suspended the 1984 agreement for unrelated reasons after only 201 Mariel Cubans had been repatriated to Cuba. Between 1985 and promulgation of the current review procedures in 1987, approximately 1,300 Mariel Cubans were paroled under normal immigration procedures that are applicable to all aliens. Approximately 7300 excludable Mariel Cubans have been paroled under the current procedures. See March 22, 1999 Submission, at 15-16.

of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Here, the balance clearly tips in favor of assuring fairness without exhaustive, adversarial proceedings.³⁶ The private interest at stake is the desire of criminal aliens who have been ordered excluded and who have no right to be released within the United States while they await repatriation. That interest must be balanced against the Government's countervailing obligation to protect the public welfare and its absolute sovereign right to control the presence of aliens within its territory. When both of these interests are properly weighed, it becomes clear that the risk of wrongful detention is minimal, for under neither domestic nor international law do aliens illegally present in the United States enjoy an unhampered right to be members of American society despite their lawful

^{36/} Cf. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

exclusion.

On the other hand, the Government's interests in detention are weighty. The United States is already providing automatic, periodic, time-consuming and individualized consideration to Mariel Cubans who seek parole. Furthermore, the Cuban Review Plan focuses on the difficult task of predicting future conduct if released, not on retribution for past conduct.

The Plan nonetheless meets if not exceeds the provisions of the American Declaration, in that it features many of the protections required by civil proceedings in general, and immigration proceedings in particular, such as the right to legal representation by counsel at no expense to the government, the right to present evidence in support of the aliens' suitability for parole, the opportunity to review and rebut any adverse evidence against them, and the right to judicial review of the legality of their detention by habeas corpus proceedings. No additional procedures are contemplated by Article XXV of the

American Declaration, under Mathews, or any other domestic or international standard of due process.

2. The existing custody review procedures for Mariel Cubans state the grounds for detention and release with sufficient clarity.

The United States also disagrees with the Report's finding that the immigration statute and present parole review procedures do not identify the particular grounds for detention. Ample notice of the factors for decision making in this realm is provided to the Mariel Cubans and all other aliens by the statute and implementing regulations, including the events that will require an alien's exclusion or expulsion from the United States, and the scope of the Attorney General's detention and release authority. The principles stated in the American Declaration do not suggest more; they do not suggest that the United States should admit dangerous criminal aliens, or adopt a precise formula essentially eliminating discretion or prescribing an

entitlement to release of such aliens within its borders.

The regulations published at 8 C.F.R. § 212.12 provide in general that Mariel Cuban detainees may be granted immigration parole when it is not contrary to the public interest. Specifically, the regulations provide that parole may be granted if the alien is presently non-violent, is likely to remain non-violent, is not likely to pose a threat to the community following his release, and is not likely to violate the conditions of his parole.³⁷ The regulations also provide guidance by setting forth specific factors relevant to making this determination, including the detainee's: criminal history; psychiatric and psychological history; disciplinary infractions while in detention; participation in work, educational and vocational programs; ties to the United States including family ties; and any other information probative of a particular detainee's ability to adjust to

life in a community, and not abscond, engage in future acts of violence or criminal activity, or violate the conditions of parole.³⁸ Detainees are also regularly counseled regarding the program.

These procedures afford more than sufficient guidance to Mariel Cubans regarding the conditions they should meet in order to obtain parole, and the opportunity to show that they have done so, and accordingly merit parole. The result is not arbitrary, even insofar as it takes into account historical or other facts that may not be within the power of an individual to change.

Rather, it affords the detainees individualized consideration of the facts or combination of facts presented each time their specific cases are reviewed. An alien with a serious criminal history may be approved for release if, for example, his present review reflects a combination of such facts as favorable

^{37/} 8 C.F.R. § 212.12(d)(2).

institutional adjustment, participation in educational or work programs, or other evidence of rehabilitation, and community support.

No regulation, particularly one that is directed at assessing likely future conduct, can exhaustively list every possible factor that may be relevant in a particular case to the exclusion of all others, and the instant regulation necessarily preserves the Attorney General's authority to weigh external factors, domestic and foreign, in assessing an alien's need or suitability for release within the United States.³⁹

These procedures are applied uniformly to all detainees, to ensure fairness and consistency in the decision-making process. The review given to each detainee is an individualized determination of his suitability for release, including an assessment of his danger to the

^{38/} 8 C.F.R. § 212.12(d)(3).

^{39/} See Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986); Fernandez-Roque, 734 F.2d

community. Each determination is subject to several layers of review, in order to insure that the detainees receive full and fair consideration for parole. Further, by centralizing the final layer of review, the regulations promote consistency in parole determinations. These provisions, plus the expertise of the senior officers assigned to the Cuban Review Plan, the product of particularized training and years of experience administering the program, adequately safeguard against the generally unsupported and unfair charges of ambiguity, inconsistency, and speculation leveled by the Report (see, e.g., ¶¶ 222, 224).⁴⁰

Moreover, contrary to the Report's findings (at ¶¶ 219-222), the procedures do not create a presumption against release leading to the denial of parole in most cases. This conclusion is

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^{40/} Indeed, it is the job of the agencies to interpret and give meaning to the statutes enacted by Congress that it administers. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984).

unsupported by the record before the Commission, and contradicted by the facts of the petitioners' own releases on parole, and the sheer number of other Mariel Cubans who have been paroled into the United States, one or more times depending on their personal conduct, since their arrival in 1980.

While the immigration statute expresses Congress's clear preference for removal and detention pending removal of potentially dangerous aliens, it also includes the exception of discretionary parole or release for those cases in which removal cannot be promptly enforced. The parole regulations for Mariel Cubans provide a vehicle for release, require a case-by-case review of the custody status of each detainee, and a decision based on updated and accurate information provided by and about the detainee in the course of his case review.

3. The regulations lawfully place the burden of proof on an alien who seeks parole within the United States.

The custody review procedures are not

deficient because they place the burden on Mariel Cuban detainees to demonstrate that they merit release. See Report at ¶¶ 220, 228. This allocation of the burden of proof is consistent with the immigration statute specifically, with civil proceedings generally, and with the discretionary nature of the benefit sought. The Report's conclusion to the contrary is based on its incorrect conclusion that the petitioners are being deprived of a right to liberty, irrespective of the interests and laws to the contrary of the host nation in which they find themselves. See Report at ¶ 215; but see Section I A, supra. Importantly, while all of the petitioners are criminal aliens, and thus inadmissible to the United States, their complaint does not concern their criminal proceedings, or the statutory and constitutional safeguards afforded them during their criminal trials.

Rather, it concerns their desire to reside in a territory other than their own. The result

suggested here, by the Commission's Report, would require an extraordinary reversal of law.

Neither the American Declaration, nor any rule of international law, contemplates such a result.

The onus is clearly and reasonably upon the alien who seeks to reside abroad to prove to the satisfaction of the foreign state that he merits the privilege he desires, or at the very least that his liberty within that country will not be harmful to its society.

The United States has a fundamental obligation to protect its own citizens and lawful residents, an obligation that clearly outweighs the petitioners' narrow interest, or desire to be enlarged despite their lawful exclusion from the United States, and commission of serious crimes when previously accorded the same privilege.⁴¹

Nor are the petitioners or other Mariel

^{41/} See Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (holding that an alien's unlawful presence in the United States is only a "matter of permission and tolerance;" as such, matters relating to his expulsion are to be left to the discretion of the Attorney General).

Cubans materially prejudiced by the allocation of proof in their administrative custody reviews. They perhaps know better than anyone else the extent of their criminal conduct in this country and elsewhere, and they are afforded the opportunity during the review process -- in personal interviews, through written submissions, and with the assistance of their representatives -- to inform the panel of their accomplishments or any other facts which support their request for parole. Again, as clearly evidenced by the facts of the petitioners' own cases, the Report's findings also lack empirical support.

Clearly, the existing procedures are not so onerous as to prevent the petitioners from being able to satisfy their burden of proof, as evidenced by the release determinations in their favor.

4. The parole authority is properly vested in the Attorney General and his delegates.

Nor are the immigration parole review

procedures for Mariel Cubans deficient simply because they commit the ultimate decision-making authority to the Attorney General. See Report at ¶¶ 217-225. The return of dangerous aliens to American society despite their lawful exclusion from the United States, or their crimes in this country when previously released, is by nature an exercise of discretion on the part of the sovereign.

Congress has committed that discretion to the Attorney General, the executive official charged with administering the immigration laws.

This congressional delegation of authority is permissible under the U.S. Constitution and does not violate due process or international law. The simple combination of investigative and adjudicative functions under one agency does not, without more, violate any standard of due process. Further, the administrative decision-makers, the Attorney General and his delegates, are entitled to a presumption of honesty and integrity in carrying out their

statutory and regulatory duties.⁴² There has been no showing that this complex and difficult program has been operated under any lesser standard.

Although discretionary, the exercise of the Attorney General's detention and parole authority is guided by the statutory and regulatory criteria published at 8 C.F.R. § 212.12, which prescribe the procedures for conducting custody determinations, the relevant factors to be weighed in the case reviews, the conditions for release within the United States, and the circumstances under which the aliens may be returned to custody. These guidelines are applied uniformly to all Mariel Cubans liable to detention in the United States, and insure consistency in the decision-making process.

Contrary to the Commission's Report (at ¶¶

^{42/} See Withrow v. Larkins, 421 U.S. 35, 47, 56-58 (1975); see also Marcello v. Bonds, 349 U.S. 302, 311, 312-13 (1955) (holding that immigration officials' dual adjudicatory and prosecutorial functions did not strip immigration hearings of fairness and impartiality as to make the procedure violative

213, 218), a trial or a full-blown adversarial hearing is not required or even practicable to determine if discretionary immigration parole is warranted in a particular case. Again, the extant procedures have resulted in the parole of most of the petitioners, and greatly reduced the number of Mariel Cubans taken or retained in custody. There is no reason to believe that an administrative judge or the numerous federal courts would make better or more consistent judgments about the likelihood that a detainee could successfully integrate into the community, or that the additional burdens on the courts, and the attendant delays for the petitioners as well as other criminal and civil litigants, would result in additional releases or better safeguard public safety and order.

Indeed, such measures as have been implemented, including extensive training to officers involved in the review process, and centralizing the final layer of decision-making,

of due process).

have demonstrably safeguarded prompt, uniform decision making, and promoting the development of necessary expertise.

Lastly, the American Declaration does not compel the United States to vest the parole authority in the judicial branch. As a non-binding instrument, the Declaration cannot oblige the United State to invest individuals with an overriding right to liberty or otherwise diminish the authority of the United States to exclude undesirable criminal aliens.

Further, the principles contained in Article XXV of the Declaration, specifically, do not suggest that detained Mariel Cubans should be given trials or adversarial hearings before law judges to determine whether or not they should be released into U.S. society. At most, they suggest that they be allowed to contest the legality of their detention before a judge, a procedure which they already have under this country's law. Any further decision whether to release or detain Mariel Cubans properly is a

matter of discretion for the United States.

5. The regulations provide for prompt, periodic reconsideration of detention status.

Custody reviews under 8 C.F.R. § 212.12 are not so infrequent as to make detention arbitrary.

See Report at ¶¶ 229, 230. The existing procedures provide Mariel Cubans with automatic, periodic reconsideration for immigration parole at least annually. In addition, the regulations permit the scheduling of reviews at shorter intervals where warranted by a detainee's particular case, or because of a material change in his circumstances in the interim.⁴³

Further, the review process itself is a complex undertaking that occurs over a period of weeks or even months from the time the interviews are first scheduled, requires numerous time-consuming steps, commits significant personnel and resources, and affects all of the responsible agencies.

The current procedures themselves are far from cursory; each case is reviewed by a panel of senior officers, who also conduct a personal interview with the alien, and prepare a written report with their findings and recommendation. That report is forwarded to the Director of the Cuban Review Plan, and again reviewed before a decision is rendered by the Associate Commissioner for Enforcement.⁴⁴ Before this process even occurs, time must be allowed for arrangements with the institutions where the detainees are located and the panel interviews conducted, for the selection and travel of the panel members, for notice to the detainees ahead of time, as well as for providing necessary records to the reviewing officers, and for inspection by the detainees and their representatives.

The Commission's Report does not appear to consider the extent of the process involved, nor

^{43/} 8 C.F.R. § 212.12(g)(3).

does it explain how the additional burdens of requiring more frequent custody reviews in every case would materially improve the decision making process.

6. The petitioners are afforded an effective right to judicial review of the legality of their detention.

The United States also disagrees with the Report insofar as it finds (at ¶¶ 232-235) that the judicial review procedures available to Mariel Cubans are too limited in nature and scope to be effective. As have other detained Mariel Cubans, the petitioners may test the legality of their detention by filing petitions for writs of habeas corpus in federal court under 28 U.S.C. § 2241.

There is no time limit for judicial review under the habeas corpus statute, and the scope of review is sufficiently broad to reach constitutional and statutory challenges to a petitioner's custody. A court may order the

^{44/} See 8 C.F.R. § 212.12(b), (d).

release by writ of habeas corpus to any individual detained in violation of the Constitution, laws or treaties of the United States.⁴⁵

Judicial review of immigration detention is therefore not limited to determining whether the detaining officials have complied with the procedures, as the Report found, but also extends to the legality of the detention itself. The scope of review may nonetheless vary with the nature of the right at issue.

Under our system of government, reviewing courts owe substantial deference to the Legislative and Executive Branches with respect to matters involving, in particular, foreign relations, including the formulation, administration and enforcement of immigration policy.⁴⁶ The Commission's apparent view (at ¶ 233) that judicial review cannot be effective

⁴⁵ Zadvydas, 121 S. Ct. at 2497.

^{46/} See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976); see also INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999); INS v.

unless the United States recognizes an obligation to admit all excludable Mariel Cubans into this country is simply wrong. Under neither domestic nor international law do aliens illegally present in the United States enjoy an unhampered right to liberty, irrespective of their crimes or potential for harm to others.⁴⁷

Notwithstanding the Commission's report, the courts of the United States have engaged not in limited review of the authority for the petitioners' custody, but in thorough, exhaustive examination of the custody challenges brought by detained criminal aliens, including Mariel Cubans, on statutory, constitutional, and international law grounds.

The majority of courts have held that under the existing Cuban Review Plan sufficient procedures are in place for excluded Mariel Cubans who seek release within the United States pending continued efforts to return them to Cuba.

Rios-Pineda, 471 U.S. 444, 451-52 (1985).

Any further doubt about the sufficiency of the procedures is contradicted by the fact that the vast majority of Mariel Cubans were paroled under the immigration parole statute at 8 U.S.C. § 1182(d)(5)(A), and thousands more have been released from immigration custody pursuant to the current custody review procedures since the instant Petition was filed in 1987, many of them more than once.

The only petitioners who are now detained have engaged in serious, violent, and/or repeated criminal conduct when paroled into the United States. They are nonetheless reconsidered every year to determine if they can again be paroled into the community under 8 C.F.R. § 212.12. In light of their criminal conduct when previously released, including such offenses as manslaughter, assault, drug offenses, and sexual crimes against children, the revocation or denial of immigration parole pending repatriation to Cuba, or further reconsideration for release into

^{47/} See Mathews, 426 U.S. 67; Mezei, 345 U.S. 206.

the United States in a year's time, is eminently reasonable.

7. The petitioners are not excused from continuing to exhaust available domestic remedies.

The United States further disagrees with the Commission's conclusion that exhaustion of domestic remedies would be futile. See Report at ¶ 212. The petitioners cannot demonstrate that they fall under any of the four exceptions to the exhaustion requirement set forth in the Regulations of the Commission because they have been given full access to the Mariel Cuban parole procedures.

If indeed still detained, the petitioners should not be excused from their continuing duty to exhaust those procedures that afford them a new opportunity to seek release every year.

At most, due process guarantees the petitioners fair and effective procedures by which they may seek to be released temporarily while awaiting their removal. The United States has established such procedures.

The regulations at 8 C.F.R. § 212.12 afford a comprehensive, effective and humane process under which Mariel Cubans who have failed to gain admission to this country are nonetheless able to obtain meaningful consideration for release, even after they have engaged in further dangerous criminal conduct that has injured this country and its lawful population.⁴⁸ Exhaustion here cannot be characterized as futile, when compared to cases of the petitioners and other Mariel Cubans who have been released after undergoing some form of custody review procedures.

In view of the generous procedural protections afforded to the Mariel Cubans that permit them an opportunity to seek release from detention every year, it cannot be said that their detention has become indefinite or arbitrary. On the contrary, the periodic review of their detentions, coupled with an opportunity for judicial review of any adverse decisions, provide the petitioners with a more than adequate

^{48/} See, e.g., Barrera, 44 F.3d at 1448-50.

process that they must exhaust before seeking relief from the Commission.

For these reasons, the United States also disagrees with the Commission's finding at ¶ 189 that the petitioners have fully pursued and exhausted their domestic remedies.