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COMMENTS

Criminal Aliens Facing Indefinite Detention Under INS: An Analysis of the Review Process

I. INTRODUCTION

In the fiscal year ending September 30, 1999, the Immigration and Naturalization Service (hereinafter "INS") removed 62,359 criminal aliens from the United States.¹ However, about 3,500 other non-citizen criminals from Cuba, Laos, Vietnam, Cambodia, Croatia, Bosnia, and Somalia are still waiting to be deported; more than 2,400 of these criminal aliens are Cubans.² Their deportation will not occur in the near future because their respective governments do not have deportation agreements with the U.S. government.³ This Comment will focus on those aliens who had a legal immigration status, particularly legal permanent residency, before they were convicted of a criminal offense that rendered them removable from the United States. They are being detained indefinitely under the custody of the INS in federal, state, and county jails in the United States after serving their criminal sentences. Many of them have been in the United States for most of their lives and have most, if not all, of their immediate relatives in the United States. Some can barely remember the land where they were born. However, if their countries of origin had stable relations with the U.S. government, and a repatriation agreement, these aliens would have been deported already. Unfortunately, they must wait indefinitely, confined in a prison or detention center in the United States. Foreign policy constraints dictate the destinies of these criminal aliens.

Part II of this Comment will briefly describe the 1996 amendments to the Immigration and Nationality Act⁴ (hereinafter "INA") and their repercussions on criminal aliens. Part II will also address how the lack of action on the part of the INS led to a hunger strike that pressured the agency to implement procedures for a fair review of the cases of aliens who are being held indefinitely. Part III of this Comment describes fed-

1. *INS Expels 176,000 Immigrants*, AP, Nov. 12, 1999, WL, APWirePlus Database.

2. *U.S. May Free Hundreds of Detained Immigrants*, MIAMI HERALD, Apr. 12, 2000, at 2A.

3. *Id.*

4. Immigration and Nationality Act of 1990, Pub. L. No. 101-649 104 Stat. 4978 (1990) [hereinafter INA].

eral court decisions which required the INS to take action. Part IV specifies the interim procedures the INS implemented through a series of memoranda. Part V evaluates the effectiveness of the guidelines, as understood from recent court decisions and practitioners' experiences. Lastly, Part VI illustrates the impact of indefinite detention on the lives of individual aliens.

II. BACKGROUND

A. *IIRIRA and its Repercussions on Criminals Aliens*

The Antiterrorism and Effective Death Penalty Act⁵ (hereinafter "AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act⁶ (hereinafter "IIRIRA") of 1996 had as a primary objective the removal of criminal aliens. Criminal aliens are those non-citizens of the United States who have been convicted of a criminal offense in the United States. Some of these aliens could in fact be legal permanent residents (hereinafter "LPRs") of the United States. These new laws, passed as part of the anti-crime policy of the 1990s, not only expanded the grounds for deportation of criminal aliens,⁷ but also required the Attorney General of the United States to take most criminal aliens into custody after serving their sentences.⁸ Since the IIRIRA expanded the class of aggravated felonies, it removed much of the discretionary relief available to long-term LPRs with criminal convictions, such as cancellation of removal, formerly known as "212(c) relief."⁹ Under the new law, an alien who has committed certain criminal offenses after the date of admission is a criminal alien,¹⁰ regardless of whether the alien com-

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, title IV, 110 Stat. 1214 (codified as amended in scattered sections of U.S. Code) (1996) [hereinafter AEDPA].

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, title III, subtitle B, 110 Stat. 3009-546 (codified as amended in scattered sections of U.S. Code) [hereinafter IIRIRA].

7. See 8 U.S.C. § 1227 (Supp. IV 1998). The list of aggravated felonies was also greatly expanded. See 8 U.S.C. § 1101(a)(43) (1994 & Supp. IV 1998). For example, before IIRIRA, an offense that involved fraud or deceit for over \$200,000 was an aggravated felony. Compare 8 U.S.C. § 1101(c)(43)(M) (1994) with 8 U.S.C. (a)(43)(M) (Supp. IV 1998). After the enactment of the IIRIRA, the same offense for over \$10,000 is an aggravated felony.

8. 8 U.S.C. § 1226(c)(1) (Supp. IV 1998).

9. See 8 U.S.C. § 1182(c) (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, title III, § 304(b), 110 Stat. 3009-597. Under INA § 240A(a), a legal permanent resident who has been lawfully admitted for permanent residence for at least five years, has resided continuously in the United States for seven years after having been admitted in any status, and has not been convicted of any aggravated felony, is eligible for cancellation of removal, which is a discretionary relief given by the Attorney General that reinstates the LPR status. See 8 U.S.C. § 1229b(a) (Supp. IV 1998).

10. One exception would be when an alien committed a crime of moral turpitude, wherein the alien would have to commit the crime within five years (ten years for an LPR) and be sentenced to a year or more in jail. 8 U.S.C. 1227(a)(2) (Supp. IV 1998).

mitted the crime and served the sentence before the law was enacted.¹¹ The INS will take into mandatory custody any alien convicted of an aggravated felony, multiple crimes of moral turpitude, a controlled substance violation, certain firearms offenses, or one crime of moral turpitude for which the alien was sentenced to at least one year of imprisonment.¹² While the Attorney General has the option to detain or not detain removable non-criminal aliens during the ninety-day removal period, during which the alien must be removed from the United States,¹³ criminal aliens shall be detained unless that person is a witness, potential witness or person cooperating with a criminal investigation, or an immediate family member or associate of such a person, if he is not a danger to others.¹⁴

Criminal aliens from Laos, Vietnam, Cambodia, Croatia, Bosnia, Somalia, and Cuba face the dilemma that they will not be deported to their native countries during or after the removal period; instead, they could remain detained indefinitely.¹⁵ The INA also provides for this continued, and in many cases indefinite, detention, after the ninety-day removal period.¹⁶ The Attorney General may detain an alien beyond the removal period if the alien is removable for criminal offenses (including crimes of moral turpitude, aggravated felonies, controlled substance convictions, certain firearms offenses, crimes of domestic violence) or if the Attorney General determines that the alien is a risk to the community or is unlikely to comply with a removal order.¹⁷ The INS has applied this indefinite detention provision to criminal aliens, because, in most cases, these aliens were presumed to be a danger to the community, a flight risk, or both. However, they were never given individualized hearings or meaningful opportunities to present evidence to rebut this presumption. Cuban aliens were affected the most, as they constitute the majority of these indefinite detainees.¹⁸

In 1999, former Attorney General Janet Reno and the Department of Justice were pressured to resolve the crisis of thousands of Cuban indefinite detainees in INS custody. Although INS District Directors¹⁹

11. See 8 U.S.C. § 1227(a)(2) (Supp. IV 1998). One exception is if an alien commits a crime involving moral turpitude, wherein the alien would have to commit it within five years of admission (ten years if the alien is an LPR). *Id.*

12. § 1226(c)(1).

13. § 1231(a)(2).

14. § 1226(c)(2).

15. § 1231(a)(3).

16. § 1231(a)(6).

17. § 1231(a)(6).

18. See Yves Colon, *Detainee Procedures Overhauled, Criminals at Krome to Get Cases Reviewed*, MIAMI HERALD, Aug. 7, 1999, at 1B [hereinafter Colon, *Detainee Procedures*].

19. See *infra* Part IV.

had the discretion to release criminal aliens detained beyond the removal period (after ninety days), there was no established procedure for the review of these cases.²⁰ Under federal regulations, if aliens demonstrate by a clear and convincing standard that they do not pose a threat to the community or a significant flight risk, the District Director can release them pursuant to an order of supervision.²¹ Furthermore, a memorandum from the INS, dated February 3, 1999, "clarifie[d] the authority of District Directors to make release decisions and emphasize[d] the need to provide a review of administratively final order detention cases"²² of aliens whose immediate repatriation was not possible or practicable. This memorandum also stated that District Directors must review the status of aliens detained beyond the removal period every six months to determine whether there has been a change in circumstances that would support their release.²³

The problem was that District Directors appeared to not be seriously considering these releases.²⁴ Although an experimental review panel was formed, and the panel interviewed a small number of detainees, only a few detainees were actually released. There was no consistency in the results, however.²⁵ For example, a Cuban convicted of kidnapping, arson, and aggravated battery with a deadly weapon, was released after being in INS detention for seven months.²⁶ However, another Cuban convicted of minor assault and a gun charge for which he had only received probation and community service, without being imprisoned, had been denied release after being in INS custody for a year.²⁷ Such apparent unfairness in cases like these made immigration advocates "call the process inconsistent at best and arbitrary at worst."²⁸ As a result, detainees with one or two minor convictions who had sufficient evidence to demonstrate they were not a threat to society or a flight

20. See 8 C.F.R. § 241.4 (1999) (although this regulation does list several factors for the District Directors to consider).

21. 8 C.F.R. § 241.5 (1999). A clear and convincing standard means that the defendant must demonstrate that he is not a danger to the community and/or a flight risk by offering proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it is a *highly probable* standard. BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

22. Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to INS Regional Directors (Feb. 3, 1999) (regarding detention procedures for aliens whose immediate repatriation is not possible or practicable) (on file with the author) [hereinafter Pearson Memorandum, Feb., 1999].

23. *Id.*

24. See Andres Viglucci, *INS Tackling Disparity in Detentions, Releases*, MIAMI HERALD, Apr. 19, 1999, at 1B [hereinafter INS Tackling].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

risk were detained for years after they served their criminal sentences.²⁹

B. *Hunger Strikers Ask for Fairness*

From March 18 until May 3, 1999, four³⁰ parents of Cuban detainees held a forty-seven days hunger strike in front of Krome Service Processing Center in Miami, Florida.³¹ The sons of these strikers were young adults (the oldest was thirty-three years old) detained by the INS after their releases from prison, or while they were serving probation or after having been released to a halfway house.³² Two of them were first time offenders.³³ Four of them had come from Cuba when they were children.³⁴ The striking parents were asking the INS, and the Florida District Director specifically, for a fair process of review of their sons' cases and those of two thousand other Cuban indefinite detainees.³⁵ The persistence of the strikers provoked the visit of INS Commissioner Doris Meissner to Miami. An April 30, 1999, INS Commissioner's Statement notified the public that all INS District Offices had been instructed to perform reviews of individuals who had final orders of removal but whose immediate repatriation was not possible, pursuant to the previous memorandum issued in February.³⁶ The Commissioner's Statement further guaranteed that the INS would put into place "uniform, standardized and transparent procedures for the reviews."³⁷ Meissner assured that the "INS is committed to ensuring a fair and consistent review process that is conducted in a timely, methodical manner."³⁸ While emphasizing that the INS's priority was not to release any individual who will pose a threat to the community, she made clear that "by establishing regularly scheduled reviews, individuals in long-term detention and their families will know when their cases will be reviewed, as well as the procedures for those reviews."³⁹ This nationwide process should have affected

29. *Id.*

30. Originally there were six parents, but two of them had to end the hunger strike because of severe health conditions. Andres Viglucci, *Concessions by INS Halt Hunger Strike*, MIAMI HERALD, May 4, 1999, at 1A, [hereinafter Viglucci, *Concessions*].

31. Andres Viglucci, *Detainees' Moms Go on Hunger Strike*, MIAMI HERALD, Mar. 19, 1999, at 2B; Viglucci, *Concessions*, *supra* note 30, at 1A.

32. Andres Viglucci, *Parents Hunger for Sons' Freedom*, MIAMI HERALD, Apr. 10, 1999, at 1B.

33. *Id.*

34. *Id.*

35. *Id.*

36. See Statement from Doris Meissner, INS Commissioner, (regarding new mandatory review policy for INS long-term detainees) (Apr. 30, 1999) (on file with the author).

37. *Id.*

38. *Id.*

39. *Id.*

about four thousand indefinite detainees from various countries.⁴⁰ The mandatory review procedures were officially implemented by an INS memorandum from Michael A. Pearson, Executive Associate Commissioner, on August 6, 1999, which was supplemented by an October 22, 1999, implementing memorandum issued to Regional and District Directors.⁴¹ Part IV will discuss these memoranda in detail.

The hunger strike also led to the release of the sons of five of the original strikers.⁴² However, Dagoberto Monrabal, the son of Marta Berros, one of the strikers and the leader of the organization that orchestrated the strike, "Mothers for Freedom," was denied release.⁴³ The INS contended that Monrabal presented a danger to the community because he was a habitual offender.⁴⁴ His convictions included burglary, auto theft, forgery, and robbery with a firearm.⁴⁵ Monrabal and his mother blamed a drug addiction for his criminal record.⁴⁶ He had already been in INS custody for almost two years after his release from prison.⁴⁷ Ms. Berros claimed that the INS denied her son's release as vengeance for the negative national publicity the agency received as a result of the hunger strike.⁴⁸ Mr. Monrabal was finally released the day before Thanksgiving under a supervised order of release, which required his attendance at a sixty-day residential drug rehabilitation program.⁴⁹

Manuel Angel Chiong, the son of another of the strikers, was released after the hunger strike to a supervised facility, but was arrested two months after finishing the program at a halfway house and charged with strong-arm robbery and resisting arrest.⁵⁰ Mr. Chiong, who had the most serious criminal record of the strikers' sons, had been convicted

40. See Andres Viglucci, *INS Orders Fair Reviews of Cases of Ex-Convicts*, MIAMI HERALD, May 1, 1999, at 1B.

41. Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of field operations, (regarding interim changes and instructions for conduct of post-order Custody Reviews) (Aug. 6, 1999) (on file with the author) [hereinafter Pearson Memorandum, Aug., 1999]. United States Department of Justice, Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations to Regional and District Directors, (Oct. 22, 1999) (regarding Review of Long-Term Detainees) (on file with the author) [hereinafter Pearson Memorandum, Oct. 1999].

42. Andres Viglucci, *Sons of Hunger Strikers Set Free 5 of 6 Win Release from INS*, MIAMI HERALD, May 13, 1999, at 1A [hereinafter Viglucci, *Sons of Hunger Strikers*].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See id.*

49. See Andres Viglucci, *Cuban-Born Detainee Thankful for Freedom*, MIAMI HERALD, Nov. 25, 1999, at 1C [hereinafter Viglucci, *Cuban-Born Detainee*].

50. See Andres Viglucci, *Freed Cuban Ex-Convict is Arrested*, MIAMI HERALD, Sept. 9, 1999, at 1B [hereinafter Viglucci, *Freed Cuban*].

previously of aggravated battery with a deadly weapon, robbery with a firearm, and cocaine possession.⁵¹ He had been detained by the INS for five years prior to the hunger strike.⁵² His subsequent arrest caused frustration among detainees and their relatives who feared the INS might stall the release procedures.⁵³ The INS responded that the review process would continue as announced in the Pearson Memorandum dated August 6, 1999.⁵⁴

III. RECENT FEDERAL COURT'S RULINGS ON INDEFINITE DETENTION

Federal courts have agreed with these challenges to INS reviews of the cases of indefinite detainees. In *Phan v. Reno*,⁵⁵ a federal district court in Washington state held that the "absence of any individualized assessment" of the cases of aliens indefinitely detained pending deportation to countries that refused their admission violated the aliens' due process rights.⁵⁶ The petitioners in this case were five legal permanent residents from Vietnam and Cambodia, who had committed removable criminal offenses.⁵⁷ Vietnam and Cambodia, like Cuba and Laos, do not have repatriation agreements with the United States.⁵⁸ These aliens had been detained at different state and federal facilities by INS authorities for varying periods of time, ranging from eight months to three years, after serving their criminal sentences.⁵⁹ The court cited federal regulation, 8 C.F.R. §241.4, which delegates to District Directors the Attorney General's release power for aliens detained after the removal period who have demonstrated that they are neither a threat to the public nor a flight risk.⁶⁰ The court referred to the February 3, 1999 INS memorandum, mentioned above, which confirmed this delegation.⁶¹ Although petitioners had been ordered deported, the court asserted that they were entitled to Fifth Amendment Due Process protections because they had been legal permanent residents, and thus had developed some stakes and ties in this country.⁶² The court found that the issue at stake was the aliens' fundamental right to liberty, which was certainly protected under the

51. See Viglucci, *Sons of Hunger Strikers*, *supra* note 42.

52. *Id.*

53. See Viglucci, *Freed Cuban*, *supra* note 50.

54. *Id.*

55. *Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

56. *Id.* at 1157.

57. *Id.*

58. *Ngo v. INS*, 192 F.3d 390, 392, 395 (3rd Cir. 1999).

59. *Phan*, 56 F. Supp. 2d at 1151.

60. *Id.* at 1152.

61. *Id.*

62. *Id.* at 1154.

Fifth Amendment and subject to strict scrutiny.⁶³ INS detention deprived petitioners of their fundamental right to freedom and did not serve a compelling government interest.⁶⁴ Thus, individualized hearings are required to check the balance of the strength of the deprived liberty interest and likelihood the government will be able to effectuate deportation against the aliens' actual dangerousness and likelihood they would abscond.⁶⁵

Although the court agreed with the INS's argument that the legislative and executive branches possess plenary power⁶⁶ over immigration matters, this plenary power doctrine did not extend to detention beyond the removal period because "indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a *means* by which the government implements Congress's directives."⁶⁷ This detention serves only domestic interests, not foreign relations concerns.⁶⁸ The key fact to the court's finding of a substantive due process violation was that detention would not serve the INS interest in deportation because deportation will simply not occur due to the political circumstances.⁶⁹ Only if there is a realistic chance of deportation may the INS continue detention; otherwise, detention will exceed any government interest.⁷⁰

One of the most striking aspects of this decision was the court's criticism of the quality of the reviews that the INS conducts of these cases. The court stated that "the record confirms that the INS does not meaningfully and impartially review the petitioners' custody status."⁷¹ The court even took a step further when it proposed that, in order to comport with constitutional procedural due process standards, these detainees should be entitled to a fair and impartial hearing before an immigration judge, not merely the usual administrative reviews established by the regulations.⁷²

63. *Id.*

64. *See id.* at 1154-55.

65. *Phan v. Reno*, 56 F. Supp. 2d 1149, 1156-57 (W.D. Wash. 1999); *see Phan v. Smith*, 56 F. Supp. 2d 1158, 1159 (W.D. Wash. 1999); *Lynch v. Reno*, 56 F. Supp. 2d 1160, 1160-61 (W.D. Wash. 1999).

66. The plenary power doctrine was created in *Chae Chang Ping v. United States*, 130 U.S. 581 (1889), also called the "Chinese Exclusion Case," in which the Court held that the Executive and Legislative branches of government enjoyed "plenary" or absolute power over immigration matters; therefore, the Judiciary should not intervene in foreign relations issues.

67. *Phan*, 56 F. Supp. 2d at 1155 (emphasis added).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1157.

72. *Id.* In *Fernandes v. INS*, 79 F. Supp. 2d 44 (D. R.I. 1999), a Rhode Island district court, following the *Phan* court's reasoning, held that indefinite detention of an alien from Angola, who had been a legal permanent resident since 1971 and was convicted of drug charges, was a violation of substantive due process rights. The governments of Angola, Portugal and Cape Verde

That court was not the only one to criticize INS procedures in dealing with indefinite detainees. In *Vo v. Greene*,⁷³ a district court in Colorado maintained that the INS internal guidelines and procedures did not accord petitioners a meaningful and impartial review.⁷⁴ The two petitioners in this case were legal permanent residents from Vietnam and Laos.⁷⁵ The procedures established in the federal regulations were insufficient to guarantee procedural due process because indefinite detainees were not entitled to "representation, a hearing, the right to testify, a neutral decision maker," or the right to appeal a negative decision because INS officers performed these summary reviews by merely filling out forms; therefore, "perfunctory review by INS staff is not adequate process."⁷⁶

An appellate court has confirmed INS violation of due process in its review of such cases. In *Ngo v. INS*,⁷⁷ the Third Circuit Court of Appeals held that, although INS had the authority to detain aliens with criminal records for lengthy periods beyond the removal period, appropriate provisions for release should be in place to guarantee that confinement does not continue when the justifications for detention are no longer tenable.⁷⁸ Furthermore, a mere reading of an alien's file followed by "rubber-stamp denials based on temporally distant offenses" translates into inadequate due process.⁷⁹ This court agreed with the *Phan* court in that aliens should be entitled to a hearing before an immigration judge because District Directors were conducting superficial reviews that, relied only on past criminal record.⁸⁰ Such review did not afford

refused to issue travel documents; thus the "I.N.S. conceded that [the alien's] deportation could not be accomplished in the near or foreseeable future." *Id.* at 45. Therefore, "it becomes clear that as the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe." *Id.* at 48 (quoting *Phan*, 56 F. Supp. 2d at 1156). Likewise, in *Sok v. INS*, 67 F. Supp. 2d 1166 (E.D. Cal. 1999), a district court in California, citing the *Phan* decision, held that continued detention of an alien pending deportation to Cambodia violated INA § 241(a)(6) (8 U.S.C. § 1231(a)(6)), which authorizes the Attorney General to detain certain aliens beyond the removal period, because there was no reasonable possibility of removing the alien in the foreseeable future. The court maintained that INA § 241(a)(6) should be restricted to detention of aliens beyond the removal period only if there is a reasonable possibility that removal will occur in the foreseeable future. *See id.* at 1169.

73. *Vo v. Greene*, 63 F. Supp. 2d 1278 (D. Colo. 1999).

74. *Id.*

75. *Id.* at 1279-80.

76. *Id.* at 1287.

77. *Ngo v. INS*, 192 F.3d 390, 398 (W.D. Wash. 1999).

78. *Id.*

79. *Id.* at 398 (citing *Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999)).

80. *See id.* The *Ngo* holding, that the INS had statutory authority to detain aliens indefinitely, applied specifically to excludable aliens, which are those aliens that are not legal permanent residents. *See Kay v. Reno*, 94 F. Supp. 2d 546 (M.D. Pa. Apr. 18, 2000) (citing *Ngo v. INS*, 192 F.3d 390 (W.D. Wash. 1999)). The court in *Kay v. Reno* made a clear distinction between the

due process of law to any alien, not even to an excludable alien.⁸¹

All of these cases made it clear that aliens who were lawful permanent residents were entitled to a different constitutional treatment than excludable aliens, such as Mariel Cubans.⁸² Nevertheless, in *Zadvydas v. Underdown*,⁸³ the Fifth Circuit Court of Appeals disregarded this distinction. The court determined that the governmental interest in removing an excludable alien was undistinguishable from the governmental interest removing a resident alien. As a result, the court held that the petitioner's detention was within the government's plenary power and did not constitute a violation of substantive due process.⁸⁴ However, the court made it clear that periodic administrative reviews would provide an opportunity for parole if the alien was not a danger to the community or a flight risk.⁸⁵ The procedures in place guaranteed that detention would not be indefinite. It is important to mention that although the court analogized the case to that of the Mariel Cubans, the petitioner in this case was a stateless alien born in a displaced persons camp in Germany, to whom German officials had refused to issue travel documents.⁸⁶ The fact that the court acknowledged the possibility of deportation to Germany, Lithuania, or Russia may distinguish this decision.⁸⁷ Nevertheless, nowhere in this case does the court criticize INS

rights of excludable and deportable aliens. See *id.* at 548, 553. That court held that deportable aliens are "persons" under the Fifth Amendment of the Constitution and as such are entitled to constitutional due process. See *id.* at 549. This holding was in accordance with the *Ngo* court, which held that even excludable aliens are entitled to a fair consideration of an application for parole if their removal is not likely to occur. See *id.* at 556-57. However, the *Kay* case was argued after the implementation of the INS review guidelines for indefinite detainees.

81. In the spring of 1980, 125,000 Cuban immigrants arrived to the U.S. coasts from the port of El Mariel in Cuba. Most of them were political prisoners or had relatives in the United States, but a fraction of them were criminal prisoners and mental patients who had been released by Castro's government and placed on the boats with the rest of the immigrants. The undesirable criminals were not admitted into the United States, which meant that although they were physically present in the United States, they were considered to be detained at the border. They remained in prisons in the United States pending deportation to Cuba. Many of them brought their cases to American tribunals, arguing violations of due process rights. Courts rejected their cases holding that Congress is allowed to detain excludable aliens pending deportation. See Birgitta I. Sandberg, Note, *Is the United States Government Justified in Indefinitely Detaining Cuban Exiles in Federal Prisons?*, 10 DICK. J. INT'L L. 383 (1992).

82. *Zadvydas v. Underdown*, 185 F.3d 279, 287, 294 (5th Cir. 1999).

83. *Id.* IIRIRA subjects deportable and excludable aliens to the same removal proceedings under INA § 240. See 8 U.S.C. § 1229(a) (Supp. 1997).

84. *Zadvydas*, 185 F.3d at 287.

85. *Id.* at 283.

86. *Id.* at 291-93.

87. In *Dominguez-Estrella v. INS*, 71 F. Supp. 2d 578 (W.D. La. 1999) and *Villafuerte v. INS*, 71 F. Supp. 2d 573 (W.D. La. 1999), the Western District Court of Louisiana followed the Fifth Circuit's *Zadvydas* precedent and held that the indefinite detention pending deportation of Cuban aliens due to the country's unwillingness to repatriate did not violate the defendants' due process rights. *Villafuerte*, 71 F. Supp. 2d at 577, 581.

reviews. The court simply adheres to the position that detention is an acceptable alternative to the removal of a criminal resident alien or excludable alien; the plenary power and interest of the sovereign are the same.⁸⁸

The Tenth Circuit Court of Appeals concurred with the Fifth Circuit in holding that indefinite detention is not a violation of substantive or procedural due process. In *Ho v. Greene*,⁸⁹ this court consolidated the cases of one excludable alien (a refugee who had never become a LPR) and one deportable alien (a former LPR) from Vietnam.⁹⁰ First, the court determined that indefinite detention was statutorily authorized because the plain language of INA section 241(a)(6) allowed the Attorney General to detain certain removable aliens beyond the removal period without a time limit.⁹¹ Second, the court examined the constitutionality of indefinite detention and held that a final removal order stripped LPRs of any rights they had acquired by residing in the United States, thereby establishing stronger ties to the country.⁹² The order of removal places an LPR in the same position as an alien seeking readmission to the United States.⁹³ The relief an LPR requests, release from detention, is the equivalent of requesting readmission after physical removal from the United States.⁹⁴ Aliens physically present in the United States are "persons" within the Fifth Amendment, and, therefore, afforded certain constitutional rights. However, admission is not a constitutional right, but a privilege that is granted through the sovereign's plenary power.⁹⁵ The court decided that both Vietnamese aliens (the non-LPR and the LPR) had the same constitutional rights as an alien entering the country for the first time.⁹⁶ It cited *Zadvydas* for the proposition that the governmental interest was the same in the case of an excludable alien as in the case of a deportable alien.⁹⁷ Hence, the court did not apply strict scrutiny, since the aliens did not have a liberty interest in the relief they requested, which the court characterized as the privilege to be admitted.

Judge Brorby wrote a dissenting opinion that resembled the reasoning of the *Phan* court.⁹⁸ He agreed with the majority that INA section

88. *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000).

89. *Id.*

90. *Id.* at 1057.

91. *Id.* at 1058.

92. *Id.*

93. *Id.*

94. *See id.* at 1058-59 (citing *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

95. *See id.* at 1059.

96. *See id.* *See also Zadvydas*, 185 F.3d at 294-97.

97. *Phan*, 56 F. Supp. 2d at 1149.

98. *Ho*, 204 F.3d at 1060.

241(a)(6) (8 U.S.C. § 1231(a)(6)) authorizes indefinite detention, yet, he found a violation of the aliens' substantive due process rights under the Fifth Amendment that "shocks the conscience."⁹⁹ Judge Brorby criticized the majority for equating a removal order to the actual physical exit from the country. He reasoned that since indefinitely detained aliens do not physically leave the United States, they cannot be subject to the "entry fiction" the majority applied.¹⁰⁰ They are still physically present within U.S. borders; therefore, they are "persons" with guaranteed due process of law under the Fifth Amendment.¹⁰¹ Since they are "persons" under the Constitution, regardless of the removal orders, the court should strictly scrutinize any infringement of their liberty.¹⁰² Judge Brorby applied *Phan's* balancing test when examining whether an alien's detention is excessive in relation to the government's regulatory interest in ensuring the safe removal of aliens ordered deported, preventing flight before deportation and protecting the public from dangerous felons.¹⁰³ As the probability of actual deportation decreases, "the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe."¹⁰⁴ INS detention is only lawful if there is a realistic likelihood of deportation. The plenary power of the political branches in immigration matters should not obstruct the Fifth Amendment due process guarantee bestowed upon "persons."¹⁰⁵

The Ninth Circuit Court of Appeals has taken the most radical position in this issue (in the appeal from *Phan*) by holding that the immigration statute did not authorize the INS to detain an alien for more than a reasonable time after the removal period.¹⁰⁶ One of the five petitioners that the district court had consolidated in the *Phan* case brought the appeal, styled *Ma v. Reno*.¹⁰⁷ The petitioner, Kim Ho Ma, left Cambodia and came to the United States as a refugee when he was two years old.¹⁰⁸ He was a legal permanent resident who was convicted at the age of seventeen of manslaughter in a gang-related shooting.¹⁰⁹ This con-

99. *See id.* at 1061.

100. "[E]ven aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

101. *See id.* at 1062.

102. *See id.* at 1063; *see also Phan*, 56 F. Supp. 2d at 1156 (laying out the balancing test).

103. *Ho*, 204 F.3d 1045, 1062 (quoting *Phan*, 56 F. Supp. 2d at 1156).

104. *See id.* at 1063.

105. *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000), *aff'g sub. nom. Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

106. *Phan*, 56 F. Supp. 2d at 1151 n.1.

107. *Ma*, 208 F.3d at 818.

108. *See id.*

109. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. IV 1998).

viction made him removable under INA section 237(a)(2)(A)(iii) as an aggravated felon.¹¹⁰ Although the district court in *Phan* held that indefinite detention was statutorily authorized but that it violated constitutional due process guarantees, the *Ma* court avoided the constitutional issue. The court held that Congress did not intend to allow the indefinite detention of an alien pending removal;¹¹¹ thus INA section 241(a)(6) does not authorize indefinite detention.¹¹² In reaching this interpretation, the court read a “reasonable time” limitation into the statute, declaring the INS may detain an alien beyond the ninety days only “when circumstances render an additional period necessary in order to accomplish the statutory purpose — the removal of the alien.”¹¹³ According to the court, Congress could not have intended “to permit the agency [the INS] to hold people in detention for the remainder of their lives,” since such posture raises substantial constitutional questions and might violate international law.¹¹⁴

Additionally, the Ninth Circuit took the opportunity to criticize the Fifth and Tenth Circuits for holding that excludable and deportable aliens were not entitled to any constitutional protection under the Fifth Amendment because of the “entry fiction.” In dicta, the Ninth Circuit asserted that: “our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment.”¹¹⁵ While other courts made a distinction between LPRs and non-LPRs and gave the constitutional protections only to the former, this court bestowed upon all aliens the constitutional due process guarantees.¹¹⁶

The court ordered the INS to release the petitioner, affirming the finding in *Phan* that there was no reasonable likelihood the INS would remove *Ma*.¹¹⁷ However, *Ma* would still be subject to INS supervision

110. See *Ma*, 208 F.3d 815 (9th Cir. 2000); see also *Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

111. See 8 U.S.C. § 1231(a)(6).

112. *Ma*, 208 F.3d at 828.

113. *Id.* at 827.

114. *Id.* at 826 n.3.

115. See *id.* In *Pesic v. Perryman*, a district court in Illinois cited precedential authority from the United States Supreme Court that aliens who have come to the United States and have developed ties with the community are entitled to substantive and procedural due process under the Fifth Amendment of the Constitution, which is not restricted to citizens, but to “persons.” *Pesic v. Perryman*, No. 99C-3792, 1999 WL 639194, at *8 (N.D. Ill. Aug. 17, 1999) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)). Deportable aliens receive more substantive rights than excludable aliens. See *id.* at *7 (citing *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1440 (5th Cir. 1993)). The court held that the indefinite detention of an LPR from Yugoslavia without a proper procedure to weigh the evidence on both sides is a violation of due process. See *id.* at *8.

116. See *Ma*, 208 F.3d 815 (9th Cir. 2000).

117. See *id.* See 8 U.S.C. § 1231(a)(3).

requirements under INA section 241(a)(3).¹¹⁸ This remedy does not leave the INS emptyhanded, since it provides continued control over the alien over the safety of the community.

In response to the *Phan* court's ruling that indefinite detention violated due process, the INS implemented new procedures for long-term detention.¹¹⁹ The official announcement came in a memorandum dated August 6, 1999 from Michael A. Pearson, the INS's Executive Associate Commissioner for Field Operations. The memorandum reiterated Commissioner Meissner's previous commitment to a fair and consistent process, while remarking that the INS's priority continues to be the safety of the community.¹²⁰ The actual directives were issued to Regional and District Directors in another INS memorandum from Mr. Pearson dated October 22, 1999.¹²¹ These memoranda are discussed in Part IV.¹²²

IV. INTERIM PROCEDURES IMPLEMENTED BY INS

In order to understand the dynamics of the new procedures, a brief description of the INS structure is useful. The Attorney General, as head of the Department of Justice, is empowered to administer and enforce the Immigration and Naturalization Act.¹²³ The INS, headed by the Commissioner of Immigration and Naturalization, is a constituent part of the Department of Justice.¹²⁴ The Commissioner is assisted by a Deputy Commissioner, several Executive Associate Commissioners and other officers, all located at INS headquarters in Washington, D.C.¹²⁵ Enforcement and basic administration, however, occurs in INS district offices and in Regional Service Centers (hereinafter "RSC").¹²⁶ There are thirty-three districts, whose respective District Directors respond to three Regional Directors.¹²⁷ The October 22, 1999 memorandum is addressed to these Regional and District Directors, who are the basic

118. *INS Implements New Procedures on Long-Term Detention, Court Rules Indefinite Detention Invalid*, 76 Interpreter Releases, (Fed. Publications-West) 1285, 1285-86.

119. See News Release, Immigration and Naturalization Service, *INS Implements New Procedures for Long Term Detention: Interim Procedures will be Followed by Regulatory Process* (Aug. 6, 1999).

120. Pearson Memorandum, Oct. 1999, *supra* note 41.

121. It is important to remember that these procedures do not apply to the Cubans that arrived during the Mariel boatlift and were convicted of crimes in Cuba or were convicted in the United States after being paroled. The procedure for "Marielitos" is governed by 8 C.F.R. § 212.12.

122. See generally 8 C.F.R. § 212.12 (2000).

123. 8 U.S.C. § 1103(a)(1) (Supp. IV 1998).

124. See THOMAS ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 247-51 (4th ed. 1998).

125. See *id.*

126. See *id.*

127. See *id.*

operating units of the INS¹²⁸

Under the interim procedures (which would be followed by a regulatory process,) District Directors do not have exclusive discretion in release determinations.¹²⁹ Although the District Directors act as the primary judges of the evidence presented on behalf of the alien, their decisions are periodically reviewed by INS Headquarters.¹³⁰ This relieves District Directors of responsibility for denials, and guarantees uniformity at the national level. After all, immigration is an exclusive federal power.¹³¹ The interim procedures, however, may be a reaction to judicial opinions, such as *Phan v. Reno* and *Vo v. Greene*, that criticized the unfairness and inconsistency of the process as conducted by the District Offices.¹³²

While the interim procedures are in the right direction, they are not a cure. The interim procedures merely assure that an alien's case will be reviewed periodically and that the District Directors' decisions will be reviewed at the national level. Yet, they leave District Directors with the same criteria by which to judge the validity of an alien's case for release. The criteria, found in the federal regulation that delegates discretion to District Directors, are simply a non-exhaustive list of factors that District Directors may consider in exercising their discretion.¹³³ They are (1) the nature and seriousness of the alien's criminal convictions; (2) other criminal history; (3) sentences imposed and time actually served; (4) history of failures to appear for court; (5) probation history; (6) disciplinary problems while incarcerated; (7) evidence of rehabilitative effort or recidivism; (8) equities in the United States; and (9) prior immigration violations and history.¹³⁴ The regulation does not provide guidance as to the weight or priority accorded to the factors. Thus, a District Director is forced to act as an immigration judge does in balancing equities.

A. *First Custody Review ("File Custody Review")*

The interim procedures require District Directors to conduct the first review within the ninety-day removal period.¹³⁵ District Directors, however, may delegate the task to an Assistant District Director or a

128. Pearson Memorandum, Oct. 1999, *supra* note 41.

129. *Id.*

130. *Id.*

131. See *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

132. *Vo v. Greene*, 63 F. Supp. 2d 1978, (D. Colo. 1999); *Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

133. 8 C.F.R. § 241.4 (2000).

134. *Id.*

135. Pearson Memorandum, Oct. 1999, *supra* note 41.

Deputy Assistant District Director.¹³⁶ In this first review, District Directors have the option of conducting an interview with the alien or simply reviewing the case file.¹³⁷ The District Directors usually simply review files without conducting personal interviews. Regardless of a District Director's choice, an alien must receive advance notice of a review and of the factors that will be considered, pursuant to 8 C.F.R. § 241.4.¹³⁸ After the review the District Director's decision must be communicated to the alien in writing.¹³⁹ INS Headquarters does not review this decision at this stage.¹⁴⁰

B. *Second Custody Review*

If the District Director determines in the first review that the alien has not demonstrated by clear and convincing evidence that, if released, he or she would not pose a danger to the community or be a significant flight risk a second review is necessary. District Directors must conduct the second review, within nine months after the date of the final administrative removal order or six months after the first review, whichever is later.¹⁴¹ This time, a personal interview is mandatory.¹⁴² The alien is to be provided written notice at least thirty days prior to the scheduled review.¹⁴³ The notice, served personally or by certified mail, must advise the detained alien of his right to be represented by counsel at no expense to the government and to present evidence favoring his release.¹⁴⁴ It must also explain what the alien must establish to qualify for release.¹⁴⁵

Within thirty days after the interview, the District Director must serve the alien with a written decision, containing the terms of release, if granted,¹⁴⁶ or the reasons for denial.¹⁴⁷ If a District Director denies a release request, then the decision is forwarded to the Regional Director for the INS Headquarters review to be completed within thirty days.¹⁴⁸ If a Headquarters reviewer concurs with the District Director, the

136. *Id.*

137. *See id.*

138. Pearson Memorandum, Oct. 1999, *supra* note 41.

139. *Id.*

140. *Id.*

141. *See id.* at 5.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 6.

146. The alien would be released under an Order of Supervision 8 U.S.C. § 1231(a)(3) (Supp. IV 1998) and would be eligible for a work permit. 8 C.F.R. § 241.5 (2000).

147. Pearson Memorandum, Oct. 1999, *supra* note 41.

148. *Id.* at 7, 8.

reviewer must write a supporting statement and seek the concurrence of a second Headquarters reviewer.¹⁴⁹ Should the two disagree, a panel of three will review the case.¹⁵⁰ This panel may ratify the District Director's decision, return the case to the District Director for reconsideration, or determine that additional information is required.¹⁵¹ The Headquarters' conclusions are then forwarded, via the Regional Director, to the District Director for execution pursuant to the Headquarters review.¹⁵² The District Director must notify the alien of the final decision within thirty days after INS Headquarters has completed the review.¹⁵³

C. *Third Custody Review*

If the second review results in a decision to continue custody then a third review shall be conducted six months later.¹⁵⁴ District Directors again have the option to either interview an alien or simply review a case file.¹⁵⁵ INS Headquarters will not review a District Director's decision following the third review.¹⁵⁶

D. *Fourth Custody Review*

Should a case require a fourth review, it must take place six months after the third review and the same notice requirements of the second review apply.¹⁵⁷ An interview, however, is not mandatory, but a detainee may request one within fourteen days of the notice of review.¹⁵⁸ Here, INS Headquarters will review a District Director's decision pursuant to the procedure of the second review.¹⁵⁹

E. *Alternating Review Procedure*

If further reviews are necessary, then the procedures for the third and fourth reviews will be alternated.¹⁶⁰ This guarantees reviews every six months by the District Director and annual reviews Headquarters.¹⁶¹

149. *Id.* at 7.

150. *Id.*

151. *Id.*

152. *Id.* at 8.

153. Pearson Memorandum, Oct. 1999, *supra* note 41, at 8.

154. *Id.* at 9.

155. *Id.*

156. *Id.*

157. *Id.* at 10.

158. *Id.*

159. *Id.*

160. *Id.* at 11.

161. *Id.*

V. EFFECTIVENESS OF THE REVIEW PROCEDURE

A. *Judicial Opinions*

After reading these interim guidelines, the Third Circuit Court of Appeals, in *Ngo* was satisfied that they will encourage good faith reviews.¹⁶² The court agreed that guaranteed periodic reviews will satisfy procedural due process because "the prospect of indefinite detention without hope for parole will be eliminated."¹⁶³

However, a district court memorandum opinion in California, issued to assist magistrate judges in the determination of writs of habeas corpus brought by aliens detained indefinitely because of the lack of diplomatic relations between the United States and their countries of origin, was not nearly as supportive of the INS guidelines.¹⁶⁴ The Central District of California described the INS memoranda, interim procedures, and implementation as inadequate.¹⁶⁵ Although the court acknowledged the plenary power of the political branches over immigration matters and the accustomed judicial deference, it remarked that since "detention threatens the deprivation of a fundamental liberty interest, it clearly triggers 'heightened, substantive due process scrutiny,' not judicial deference."¹⁶⁶ In asserting the need for judicial scrutiny to comport with due process, the court also examined the government interest in the removal of aliens ordered deported.¹⁶⁷ As with the standard of review, this court agreed with the *Phan* court that detention of aliens ordered deported is not a matter of immigration policy, but of domestic affairs.¹⁶⁸ While the primary interest is the actual removal of the aliens, domestic interests like community protection and the prevention of flight are also concerns.¹⁶⁹ Judges must determine whether detention is excessive in relation to these interest.¹⁷⁰

To determine whether detention is excessive, magistrate judges "must balance the likelihood that the INS actually will be able to deport a Petitioner against the Petitioner's danger to the community and the likelihood that a Petitioner will flee if not detained."¹⁷¹ If the government's ability to deport the alien decreases, the government's interest is

162. *Ngo v. INS*, 192 F.3d 390, 399 (W.D. Wash. 1999).

163. *Id.*

164. *In re: Indefinite Detention Cases*, 82 F. Supp. 2d 1098 (C.D. Cal. 2000).

165. *Id.* at 1100.

166. *Id.* at 1101.

167. *Id.*

168. *See id.*; *see also Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).

169. *Id.*

170. *See In re: Indefinite Detention Cases*, 82 F. Supp. 2d at 1101.

171. *Id.*

less compelling and the denial of alien's liberty is more severe.¹⁷² The court goes further to reiterate that even if the alien poses a threat to the community and a flight risk, detention may continue only "if there is a realistic chance that an alien will be deported."¹⁷³ Thus, indefinite detention of an alien whose deportation will never occur constitutes a violation of substantive due process.¹⁷⁴

The court suggests that these releases should not be unconditional, but could be pursuant to INA section 241(a)(3), which governs the supervised release of aliens not removed within the removal period.¹⁷⁵ However, conditions to be imposed must be minimal since the supervision will be a lifelong condition.¹⁷⁶ Thus, "the conditions must be reasonable and capable of being modified for the alien to satisfy them."¹⁷⁷ If an alien violates any of the conditions of the supervised release, the INS may ask the federal prosecutor to charge the alien with criminal contempt under 18 U.S.C. § 402, or with a criminal act under 8 U.S.C. § 1253(b) (both provide their own methods of punishment).¹⁷⁸

The decision in the *In re: Indefinite Detention Cases* interestingly shifts the burden of proof from the alien to the government.¹⁷⁹ Instead of the alien having the burden of demonstrating by clear and convincing evidence that the release will not pose a threat to the community or a flight risk, pursuant to 8 C.F.R. § 241.4, the burden of proof would be on the government to meet such a standard.¹⁸⁰ If the government does not meet its burden, then the alien is entitled to be released.¹⁸¹ Although the August 6, 1999, Pearson Memorandum does not allude to this burden of proof, it mentions that "the fact that the alien has a criminal history does not create a presumption in favor of continued detention."¹⁸² Thus, aliens do not have the burden of rebutting any legal presumption.

This court also suggests that aliens should be entitled to representation by counsel at all hearings before the magistrate judges. Furthermore, it suggests aliens are "entitled" to an opportunity to confront any evidence against them, cross-examine any witnesses against them and present evidence and testimony on their own behalf.¹⁸³ These basic pro-

172. *Id.*

173. *Id.*

174. *See id.*

175. *See id.* at 1101-02. *See also* 8 U.S.C. § 1231(a)(3) (Supp. IV 1998).

176. *In re: Indefinite Detention Cases*, 82 F. Supp. 2d at 1102.

177. *Id.*

178. *Id.* at 1101.

179. *See id.*

180. *See id.*

181. *Id.*

182. Pearson Memorandum, Aug. 1999, *supra* note 41.

183. *In re: Indefinite Detention Cases*, 82 F. Supp. 2d at 1101.

tections would guarantee a proper evaluation of the aliens' stakes against the government's interest in keeping the community safe and preventing the alien from absconding.

Although the subsequent Ninth Circuit case, *Ma v. Reno*, takes precedence over the *In re: Indefinite Detention Cases* decision, other district or circuit courts might adopt this analysis.¹⁸⁴ As predicted, the Supreme Court has granted certiorari to consider the question of indefinite detention. If the Court interprets the immigration statute to allow indefinite detention, but finds constitutional obstacles, this decision could serve as a proposal to issue new guidelines or regulations.

B. *The Difficulties of Preparing for a Panel Review*

In assessing whether an alien has shown that he is not a threat to the community or a flight risk, the INS looks at the alien's criminal record, any rehabilitative effort or recidivism, and the equities in the United States. A good review requires access to a detailed criminal history, thereby allowing the reviewers to focus not only on the crime, but also on the sentence imposed, the time actually served, and the circumstances surrounding the crime.¹⁸⁵ Unfortunately, sometimes the panels do not attempt to explore the scene behind the criminal history. Other times, panel reviewers take into account criminal charges for which the alien was not convicted of, such as *nolle prosequi* actions.¹⁸⁶ Another factor in assessing flight risk and threat to the community at these reviews is the alien's remorse for crimes committed. It is always helpful to write a remorse letter to the panel.¹⁸⁷

Since many of the detainees are taken into INS custody directly from the correctional centers after serving the sentences,¹⁸⁸ most of the evidence of any rehabilitative effort comes from the previous correctional centers, where inmates have had access to educational, rehabilitative, and vocational programs. However, if aliens continue to be in INS

184. *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) *cert. granted*, 69 U.S.L.W. 3086 (U.S. Oct. 10, 2000) (No. 00-38).

185. Interview with Cheryl Little, Executive Director and Managing Attorney, Florida Immigrant Advocacy Center (FIAC), in Miami, Fla. (Nov. 2, 1999) [hereinafter Little I].

186. *Id.*

187. *Id.*

188. Under INA § 239(d) (codified at 8 U.S.C. § 1229(d) (Supp. IV 1998)), the Attorney General is instructed to begin the removal proceedings of aliens convicted of deportable offenses as expeditiously as possible after the date of conviction. INA § 238(a) (codified at 8 U.S.C. 1228(a) (Supp. IV 1998)) allows the Attorney General to provide for the availability of special removal proceedings at Federal, State and local correctional facilities (county jails) for aggravated felons, aliens convicted of drug offenses, firearms offenses or multiple crimes. Thus, removal proceedings can now take place in the correctional institutions where aliens serve their criminal sentences. Moreover, aliens may receive their final orders of deportation before their release into INS custody. See *id.*; *Reno v. Kim Ho Ma*, 121 S.Ct. 297 (Oct. 10, 2000).

custody, the most current rehabilitative evidence is derived from the institutions chosen for INS detention.¹⁸⁹ Many indefinite detainees are held in state and county jails, which receive a fixed daily income from the INS for each INS detainee.¹⁹⁰ In most of these jails, INS detainees do not have access to educational programs, such as GED or other types of vocational certificates. They are also denied access to rehabilitation programs, such as Alcoholic Anonymous, anger management programs, and work programs, although these programs are available to the general inmate population.¹⁹¹ Thus, when they go to the panels for subsequent reviews, they cannot show a productive use of their time. To the alien's detriment, panel reviewers often do not take this lack of available resources into consideration and simply assume that the alien has not shown an effort to rehabilitate.¹⁹²

A worksheet produced by the INS with detailed instructions on how to implement these interim procedures attempts to correct these oversights.¹⁹³ It specifies that deportation officers who conduct these panels must consider the lack of participation in vocational or educational rehabilitation programs in the context of their availability.¹⁹⁴ It acknowledges that since the INS frequently moves detainees, rehabilitation programs might not be available at their present place of confinement.¹⁹⁵ However, despite this worksheet, INS decision-makers continue to ignore this practicality and on some occasions base their denials on lack of rehabilitation, even though the alien has not had access to rehabilitation programs.¹⁹⁶

When examining the equities the alien has in the United States, the INS looks for several factors, including: relatives that live in the United States, particularly if they are citizens or legal permanent residents; whether the alien owns property in the United States; and the number of years the alien has filed income tax returns.¹⁹⁷ Such information should be supplemented by support letters from family and friends, letters of job opportunities, marriage certificates and birth certificates of

189. Little I, *supra* note 185.

190. *Id.* The INS pays between \$45 to \$65 per detainee to the local jails. Carol Rosenberg, *Hostages Relay Demands of Jail Captors*, MIAMI HERALD, Dec. 17, 1999, at 1A.

191. Little I, *supra* note 185.

192. *Id.*

193. Instructions for Post-Order Custody Review, Implementing Interim Changes and Instructions for Conduct of Post Order Custody Reviews, INS (Oct. 18, 1999) (on file with the author) [hereinafter Instructions for Post-Order Custody Review].

194. *Id.* at 6.

195. *See id.*

196. Little I, *supra* note 185.

197. *Id.*

children.¹⁹⁸ Thus, the documentation should show the emotional, financial and physical hardship of continued detention to the alien's family.

Aliens usually do not have the capacity to personally prepare the proper documentation for these panels; they need legal assistance. Some are able to retain private lawyers, but others do not have the financial means to do so. Others are fortunate enough to be represented by pro-bono attorneys, but because of the attorneys' limited time and resources, they generally are not available in many detention or correctional facilities. Furthermore, due to space constraints, INS detainees are frequently moved from one location to another, often ending up in facilities hours away from their private or pro-bono attorneys and their families. Some of them are relocated several times while in INS custody forcing them to proceed pro se. This constant movement is prejudicial because attorneys cannot provide effective, let alone adequate, representation when visiting their clients to prepare for the panels becomes very burdensome.¹⁹⁹

C. *Practical Concerns with the Review Process*

Although practitioners acknowledge that the new procedures are an improvement over the lack of guidelines that existed before, they are not pleased with the manner in which the panels are conducted. The main concern is the lack of consistency in the conduct of the panels. Some panels last ten minutes, while others last one hour; some allow the family to testify on behalf of the detainees, others do not, even though the family may be outside the room waiting to be called.²⁰⁰ Some deportation officers allow the testimony of only two members of the family, while others allow all members present to testify.²⁰¹ When INS officials are asked about these inconsistencies, they respond that the manner in which the panels are conducted depends on the detainee's behavior during the interview.²⁰² They claim that because some detainees are more vocal and willing to present their stories than others, their interviews last longer.²⁰³ The problem with this explanation is that there is no transcript of the panel proceedings. Deportation officers, who conduct the panels, simply write down a summary of what the detainees say. Some panelists even throw away their preliminary notes and just transcribe a

198. *Id.*

199. *Id.*

200. Interview with Cheryl Little, Executive Director, Florida Immigrant Advocacy Center (FIAC), in Miami, Fla. (Feb. 22, 2000) [hereinafter Little II].

201. Interview with Boris N. Wijkström, Attorney, Krome Pro Bono Project, Florida Immigrant Advocacy Center (FIAC), in Miami, Fla. (Feb. 25, 2000) [hereinafter Wijkström].

202. Little II, *supra* note 200.

203. *Id.*

summary of their observations to the worksheets.²⁰⁴ Unlike proceedings before immigration judges, there is no court stenographer or audio tape recording.

The American Immigration Lawyers' Association proposed to INS Florida District authorities the possibility of having videotaped panels. The union of INS employees however, refused this proposal.²⁰⁵ Cheryl Little, Executive Director of the Florida Immigrant Advocacy Center, a non-profit organization which provides free legal immigration assistance, proposed audiotaping the panel reviews the INS has expressed extreme reluctance to this proposal.²⁰⁶ This is an important part of the process because other INS officers, at different levels of authority such as the district and INS Headquarters review these decisions. Thus, these transcripts would serve a function analogous to an appellate record. Furthermore, the Instructions for Post-Order Custody Review clearly state, that panel officers "are the eyes and ears for the decision maker."²⁰⁷

The lack of adequate translation adds to the scarce record produced in the panel. One function of the thirty-day notice requirement to the alien of the panel review is to allow the INS ample time to arrange for an interpreter, if necessary.²⁰⁸ Even if the detainee speaks English fluently, a member of his family may not. Because of budget constraints, the INS does not provide a translator for these panels.²⁰⁹ This can lead to bilingual attorneys serving as translators while representing their clients.²¹⁰ Other times, INS personnel, such as guards or deportation officers not conducting the panel, translate.²¹¹ Even fellow detainees have served as translators.²¹² But even if a person is perfectly bilingual, translation is not a simple task, because one word might have several meanings when translated. Thus, the wrong word choice alters the meaning of a phrase. These ad-hoc translators paraphrase the essence of what the detainee or the family wants to communicate.

Boris N. Wijkström, the attorney for the Krome Pro Bono Project of the Florida Immigrant Advocacy Center, complains that when some deportation officers translate for the detainee, they use legal terminol-

204. Wijkström, *supra* note 201. A deportation officer conducting a panel specifically told Wijkström that he had to make a request if he wanted the officer to keep the notes.

205. Interview with Elena Díaz de Villegas, Immigration Attorney, in Miami, Fla. (Nov. 18, 1999) [hereinafter Díaz de Villegas].

206. Little II, *supra* note 200.

207. Instructions for Post-Order Custody Review, *supra* note 197, at 5.

208. *Id.*

209. Little II, *supra* note 200.

210. Díaz de Villegas, *supra* note 205.

211. *Id.*

212. *Id.*

ogy, which the detainee did not use.²¹³ This makes detainees look more sophisticated than they are. Then if the panelist asks a follow-up question with the legal terms that the detainee supposedly used, detainees get confused and do not respond adequately.²¹⁴ Thus, inadequate translations “can make or break a detainee’s case.”²¹⁵ If the reviewing officer is fluent or speaks some words in Spanish, then the detainee will not even get access to these ad-hoc translators.²¹⁶ Moreover, the officers conducting the panels will translate the detainee’s answers before writing their comments and recommendations in the review worksheets. Therefore, incompetent translation at the panels creates another hurdle faced by Cuban detainees in obtaining a proper review process, as the record of the panel process reflects incomplete or inadequate translation.

Practitioners also find inconsistencies in the decisions the review process renders. The INS continues to affirm that its main concern is the safety of the community and therefore, it must be very careful in releasing these ex-convicts to the streets, although they have already served their criminal sentences. For example, someone who has been arrested thirty-two times may be released, while another detainee with a five-year probation and no time in prison may not.²¹⁷ This absurd result shows that the INS doubts the efficacy of the criminal justice system, which, by granting probation, has already made a determination that the alien is not a threat to society. Immigration attorneys obviously find this particularly troublesome where they do not have access to the review record.²¹⁸ As a result, they therefore cannot find out the panel’s recommendation, in part because the letters listing the reasons for continued detention are not explicit.²¹⁹ The letters usually simply list the crimes as evidence of a detainee’s threat to society.²²⁰ To Elena Díaz de Villegas, not knowing what decision the panel rendered is the worst aspect of the review process, because lawyers do not know if a decision to deny release came from the review panel, the district office, or INS Headquarters.²²¹ To Ms. Little and Mr. Wijskröm, a good record of the review process is a necessary component for due process.²²²

Ms. Little asserts that the lack of uniformity in the decisions exists because the deportation officers conducting the panels often consider

213. Wijskröm, *supra* note 201.

214. *Id.*

215. *Id.*

216. Díaz de Villegas, *supra* note 205.

217. *Id.*

218. Little I, *supra* note 185.

219. *Id.*

220. *Id.*

221. Díaz de Villegas, *supra* note 205.

222. Little I, *supra* note 185; Wijskröm, *supra* note 201.

two factors that are not listed in the Pearson Memoranda or even in the federal regulations.²²³ The first factors panelists look at is whether a detainee shows an appropriate level of remorse.²²⁴ Little questions this finding of remorse, because it is a purely subjective criteria that depends on how an individual manifests his feelings; there is no litmus test for remorse.²²⁵ The second factor panelists often look at is the corroboration of the detainee's description of the crime with the original arrest report.²²⁶ If the detainee's description of the crime does not match what the police officer wrote in the arrest report, then detainees are seen as not credible.²²⁷ Mr. Wijkström maintains that the primary criteria to meet is credibility.²²⁸ If a detainee's narrative does not corroborate the criminal report, then the detainee is not released, even if he or she meets the criteria for release under the other factors.²²⁹ Panelists base their decisions on unreliable evidence that contains allegations and unproven information.²³⁰ They reevaluate determinations already made by the criminal justice system.

Furthermore, this poses the question of whether the panel is making a recommendation, or a finding of credibility. The Instructions for Post-Order Custody Review indicate that the deportation officers make a finding of credibility and a finding as to whether the individual poses a flight risk and/or a threat to the community.²³¹ This is problematic because the detainees should have notice regarding the criteria by which their case will be evaluated, as listed in the Pearson Memoranda, but they are not provided notice of these other two factors.

Little alleges that there is "so much opportunity for abuse of discretion and arbitrary decision making" because the officers making the determinations have their own ideas about what is important (i.e., a show of remorse or criminal history) and there seems to be no uniform procedures at any district level; thus, there is ample room for biases and misconceptions.²³² Little recalls talking to a deportation officer in Georgia about a client who had served three years in prison for committing a serious crime and had been detained by the INS for another three years.²³³ This officer, who was to conduct the review panel for the

223. Little II, *supra* note 200.

224. *Id.*

225. Little II, *supra* note 200.

226. *Id.*

227. *Id.*

228. Wijkström, *supra* note 201.

229. *Id.*

230. *Id.*

231. Instructions for Post-Order Custody Review, *supra* note 193, at 5.

232. Little II, *supra* note 200.

233. *Id.*

detainee, told Little that the alien had a good case for release (i.e., good conduct during detention, evidence of rehabilitation, strong family support), but that the serious nature of his criminal conviction reduced his possibility of release.²³⁴ This clearly shows a lack of understanding of the INS instructions since the August, 1999, Pearson Memorandum affirmed that the alien's criminal history alone does not create a presumption that the alien is a danger to the community.²³⁵ Since there are no local guidelines in place, district offices should strictly follow the INS national procedure because that is what attorneys and aliens are relying on to prepare their cases. Because immigration is a federal power, variations from one district to the other should not exist. Otherwise, the procedure will continue to be unfair.

The INS national procedures are ambiguous in other aspects. For example, the District Office determines how many deportation officers conduct the panels.²³⁶ In Florida, officers decide on their own whether to include another officer during the panel review, based on their prediction of how difficult the case will be.²³⁷ There are no written criteria on how to determine this. It is simply left to the officers' discretion.²³⁸

The annual Headquarters review might be the solution to this lack of uniformity at the District level. To Díaz de Villegas, this annual review is one of the positive aspects of the review.²³⁹ On the other hand, Little does not trust this layer of review.²⁴⁰ She claims that the INS Headquarters will probably acquiesce to the District decision, especially if the decision is to continue detention.²⁴¹ Thus, this annual review may just add an appearance of formality and due process, with out a meaningful review, even though its existence is a sign of comfort to some.

Immigration attorneys also complain that the review process takes too much time. Linda Osberg-Braun, a private immigration lawyer in Miami, complains that the different layers of review extend the process, and its time frame, unnecessarily.²⁴² She would prefer to see fewer layers of review, with a faster result. Although decisions should be communicated to the detainees within thirty days after the interview, Little states that the District Office frequently does not issue these decisions

234. *Id.*

235. Pearson Memorandum, Aug. 1999, *supra* note 41.

236. *See id.*

237. Little II, *supra* note 200.

238. *Id.*

239. Díaz de Villegas, *supra* note 205.

240. Little II, *supra* note 200.

241. *Id.*

242. Interview with Linda Osberg-Braun, Hackley, Bernstein & Osberg-Braun, in Miami, Fla. (Feb. 7, 2000) [hereinafter Osberg-Braun].

on time.²⁴³ This timing concern adds to the uncertainty detainees experience while in INS detention.

D. *Suggestions to Improve the Review Process*

Practitioners vary in their suggestions as to which aspects of the current process should be improved. Díaz de Villegas thinks that the panel reviews are a good idea, if they are done consistently and in accordance with the INS instructions.²⁴⁴ As Díaz de Villegas suggested to Florida district authorities, videotaping the interviews could tremendously improve the process because it would encourage deportation officers to conduct fair interviews.²⁴⁵ It would also bolster confidence in the system among the aliens, their families and their attorneys.²⁴⁶

Boris Wijkström believes that the INS should bear the burden of proof in the process.²⁴⁷ It is INS that has a strong interest in not releasing potential criminals to the streets, even after serving their criminal sentences. Therefore, there should be a presumption in favor of releasing the alien if he meets certain criteria.²⁴⁸ A detainee with strong family ties and support, equities in the United States and a job offer should satisfy these requirements.²⁴⁹ This burden shifting proposal is in accord with the recent memorandum decision from a California district court, mentioned above.²⁵⁰

Little laments the lack of community involvement in the process.²⁵¹ She believes that independent oversight and monitoring of the review process should be essential ingredients.²⁵² During the hunger strike led by parents of Cuban indefinite detainees that took place in the spring of 1999 in front of Krome Service Processing Center, the Archdiocese of Miami played a key role as mediator between the strikers and INS local and national authorities.²⁵³ Little suggested that the review panelists include members of religious institutions, as well as local community leaders.²⁵⁴ After all, if the INS is allegedly acting in the best interest of the community, then the community should have some involvement in how these decisions are made. This was precisely one of Marta Berros's

243. Little II, *supra* note 200.

244. Díaz de Villegas, *supra* note 205.

245. *Id.*

246. *Id.*

247. Wijkström, *supra* note 201.

248. *Id.*

249. *Id.*

250. See *In re: Indefinite Detention Cases*, 82 F. Supp. 2d 1098 (C.D. Cal. 2000).

251. Little II, *supra* note 200.

252. *Id.*

253. See Colon, *Detainee Procedures*, *supra* note 18, at 1B.

254. Little II, *supra* note 200.

complaints about the new process. Berros, the mother of the only detainee that was not released after the hunger strike, asserted that the guidelines in the Pearson Memoranda did not address one of the strikers' main demands: "that the review panels . . . include people not connected with the INS."²⁵⁵ Involvement from different sectors of the community might supplant the lack of trust detainees, families and attorneys have in the process.

The most reformist proposal suggests having immigration judges take the place of the INS panels, as the *Phan* court proposed.²⁵⁶ Aliens could be granted an impartial hearing before an immigration judge with the proper due process guarantees, such as consistency in the procedure, adequate translation and a complete record of the proceedings. Immigration judges are in a better position to perform the panels' function because they are presumably unbiased, and better trained to balance equities. They would also be in a position to make findings of credibility.²⁵⁷ This would significantly expand the judges' dockets, but it would also eliminate the additional personnel needed at the District and Headquarters offices to deal with indefinite detention. Immigration judges are not judicial officers under Article III of the United States Constitution, since they are under the oversight of the Attorney General.²⁵⁸ However, they function much as a judicial court does, with black gowns, gavels and other accoutrements protocol. They are members of the bar with vast legal training. Their decisions could be appealed to the Board of Immigration Appeals ("BIA"). Aliens might better accept a negative decision from an immigration judge than from an INS panel because of a heightened sense of legitimacy afforded to the judges.

VI. CUBAN VICTIMS OF INDEFINITE DETENTION

A. *The Experience and Suggestions of a Cuban Detainee*

Dagoberto Monrabal was the only detainee not released after his mother, along with five other Cuban parents, held a hunger strike for forty-seven days in front of Krome Service Processing Center in Miami, Florida.²⁵⁹ Dagoberto came from Cuba when he was four years old.²⁶⁰ He confronted various problems with the criminal justice system due to his drug addiction.²⁶¹ He was sentenced to 366 days in jail for his last

255. See Colon, *supra* note 18, at 2B.

256. Phan v. Reno, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1998).

257. Osberg-Braun, *supra* note 242.

258. ALEINIKOFF ET AL., *supra* note 124 at ____.

259. See Viglucci, *Sons of Hunger Strikers*, *supra* note 42.

260. Interview with Dagoberto Monrabal, Cuban ex-convict detained by the INS for over two years, in Miami, Fla. (Feb. 24, 2000) [hereinafter Monrabal].

261. *Id.*

conviction.²⁶² The circumstances surrounding this conviction, which was his only violent crime, indicated that Dagoberto had pled guilty to a crime he did not commit, partly because of adequate legal advice.²⁶³ Upon finishing his sentence in August, 1997, Dagoberto was kept in mandatory detention by the INS, according to IIRIRA.²⁶⁴ Dagoberto thought the INS would hold him for two or three months until the agency conducted a check on him and his family.²⁶⁵ He never imagined that he would be detained for over two years, without knowing when he would be released. At times, he thought that he was "doing life in immigration."²⁶⁶ INS authorities denied his release on various occasions because he was categorized as a habitual offender, since he had been convicted of burglary, auto theft, forgery and robbery with a firearm.²⁶⁷ On November 24, 1999, Dagoberto's deportation officer told him to call home because he was being released that afternoon from Krome, where he had been detained since April after having been transferred from other county jails.²⁶⁸ Dagoberto thought that the officer was playing a trick on him. Although at times he felt disappointed with the system, his conduct under INS detention was irreproachable. He was a model detainee.²⁶⁹

Dagoberto's story captures the reality of many other Cuban indefinite detainees. Although he did not undergo the panel reviews implemented in the Pearson Memoranda, he went through the special review panels that the INS termed "an experiment" in November, 1998, and under which he was denied release, like most of the few detainees interviewed.²⁷⁰ He offered his comments on the current procedure and suggestions for a new process.

Instead of panel interviews conducted by deportation officers, Dagoberto suggested delegating part of this decision-making to the INS officers who regularly watch the detainees. He thinks that INS's criteria for releasing these detainees should be based on the detainee's attitude while in INS detention: whether the alien has a positive and respectful attitude to his immediate supervisors.²⁷¹ INS guards should make this determination since they are the ones who observe the detainees day-to-

262. *Id.*

263. See Viglucci, *Cuban-Born Detainee*, *supra* note 49, at 2C.

264. Monrabal, *supra* note 260.

265. *Id.*

266. *Id.*

267. See Viglucci, *Cuban-Born Detainee*, *supra* note 49, at 2C.

268. Monrabal was transferred from Hernando County Jail in Florida. Monrabal, *supra*, note 266.

269. See Viglucci, *Cuban-Born Detainee*, *supra* note 49.

270. See Viglucci, *INS Tackling*, *supra* note 24.

271. Monrabal, *supra* note 260.

day.²⁷² Although panelists should take into account the alien's conduct, they tend to overemphasize his criminal past. While Dagoberto's suggestion is practical, when aliens are detained in INS processing centers such as Krome, the situation differs significantly when they are detained in county jails, where the local guards, not INS officers, watch the detainees.

Dagoberto was detained at six different county jails in Florida over the two years of INS detention.²⁷³ He describes the situation in these jails as the most desperate part of INS detention.²⁷⁴ INS pays various country jails a fixed daily rate for each detainee. However, in most county jails, INS detainees do not have access to any rehabilitation, vocational, or educational programs and have only minimal access to the library and any other recreational activity.²⁷⁵ Thus, they remain locked in their cells for most of the day, with only one hour of recreation per day.²⁷⁶ Dagoberto thinks that INS should survey more closely how these facilities spend INS's money.²⁷⁷ They should allow detainees to make their time as productive as possible.²⁷⁸ Otherwise, detainees start becoming resentful toward the whole system.²⁷⁹ The INS may end up "making monsters,"²⁸⁰ especially since some of these detainees have never been imprisoned prior to being placed in INS custody, as they served probation sentences.²⁸¹

Dagoberto maintains that indefinite detention is not the solution; instead, the INS should spend its resources rehabilitating these aliens, who will have to be released at some point, because the INS cannot keep thousands of Cubans in custody pending a political change in Cuba.²⁸² It is ridiculous to keep aliens in confinement who the INS detained while they were on probation. However, aliens whose criminal records are not very sympathetic, but who demonstrate a positive attitude in INS detention, should be released to supervised facilities with rehabilitation programs.²⁸³ Dagoberto was released under an order of supervision specifying that he would undergo a sixty-day residential drug rehabilita-

272. *Id.*

273. Monrabal was detained at Ft. Lauderdale, Key West, Hernando County, Bradenton, Palmetto and Jackson County. *Id.*

274. *Id.*

275. Little I, *supra* note 185.

276. *Id.*

277. Monrabal, *supra* note 260.

278. *Id.*

279. *Id.*

280. *Id.*

281. See *supra* note 4. Recall that IIRIRA expanded the list of aggravated felonies, which makes aliens deportable even if they have not served any time in jail.

282. Monrabal, *supra* note 260.

283. *Id.*

tion program at The Village, a residential program in Miami.²⁸⁴ That condition was never met because the INS did not authorize the funds to pay for it.²⁸⁵ Dagoberto sadly regrets this because he thought his case could open the door to other detainees like himself, who were labeled habitual offenders, but had shown progress and had strong family support.²⁸⁶ He thinks the INS would be doing a better service to the community if it would allocate its funds to making productive citizens instead of "caging a person like an animal."²⁸⁷

Dagoberto also finds tremendous inefficiency in how the INS handles cases after releasing detainees on orders of supervision. His order of supervision requires him to report to the INS every month.²⁸⁸ Every time he reported, he was just asked to sign in.²⁸⁹ No one asked him for a pictured identification, nor did anyone questioned him about his employment.²⁹⁰ In other words, the INS is not seriously supervising these aliens, who would have been deported if they had not been born in Cuba or another country that refuses to take its own nationals. Nevertheless, this is consistent with the INS position that they are not releasing aliens who pose a threat to society; however, Dagoberto thinks that their COMPROMISE should extend for at least some time after detention.²⁹¹ After all, some of these aliens have not seen the streets in years and do not have strong family ties. Roman Catholic Auxiliary Bishop Thomas Wenski, from the Archdiocese of Miami, who helped mediate between the hunger strikers and the INS, also complained about the lack of rehabilitation programs that Mariel refugees had access to after their release, such as placement with Catholic agencies.²⁹²

Dagoberto also complains that detainees have to wait eighty days after their release for their work authorizations, for which they have to pay one hundred dollars.²⁹³ He believes that the INS should accelerate this process for these detainees since some jobs may not be held open that long.²⁹⁴ They should also consider waiving the fee for those detainees that show economic hardship.²⁹⁵

Dagoberto understands that INS detention might rehabilitate some

284. See Viglucci, *Cuban-Born Detainee*, *supra* note 49, at 1C.

285. Monrabal, *supra* note 260.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. Monrabal, *supra* note 260.

292. See Colon, *Detainee Procedures*, *supra* note 18, at 2B.

293. *Id.*

294. *Id.*

295. *Id.*

criminal aliens, who are not willing to abide by the disciplinary rules. INS detention could positively change the hearts and minds of aliens, but it should not reach the extreme of deteriorating the spirit of the individual.²⁹⁶ He does not think that new procedures would be greatly beneficial, because some decisions to deny release are taken a priori; in some cases panels are perfunctory but without any real fairness.²⁹⁷ He would like to see a process that would give "a fair chance to everyone," particularly the first time an alien is in INS detention.²⁹⁸ He admits that rules should be tougher for those who return to INS custody.²⁹⁹ The system is still more generous with Cubans and other indefinite detainees because aliens of other nationalities face automatic deportation with almost no avenue of relief, especially if they are aggravated felons.³⁰⁰

B. *Indefinite Detention Detonates at a Louisiana Jail*

A group of seven Cuban and one Bahamian indefinite detainees held hostages for six days at the St. Martin's Parish Jail in Louisiana.³⁰¹ On December 13, 1999, the group ran out of patience and took the warden and three guards while being escorted to a recreation area.³⁰² They demanded to be released and sent to their native country or to any other country that would accept them.³⁰³ After arduous days of negotiation and the intercession of the mother of one of the detainees, the group released the hostages, without harming them, after being promised safe passage to Cuba.³⁰⁴ The Cuban government agreed to take these ex-convicts, supposedly to "avoid a bloody outcome."³⁰⁵ On December 20,

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *See* 8 U.S.C. § 1227-1228 (Supp. IV 1998).

301. The detainees were: Jonne Ponte-Landrian, convicted of resisting arrest, burglary, aggravated assault on a police officer (under INS detention since 1992); Mario Mora-Medina, convicted of burglary, sexual assault, escape and drug sales (in INS detention since 1995); Juan Miranda Salote, convicted of possessing a firearm in prison, forcible rape, burglary and robbery (held under INS since 1995); and Miguel Aguirre-Canton, convicted of cocaine possession and aggravated assault (detained by INS since 1997). Lazaro Orta Elisante, convicted of homicide, drug sales and resisting arrest (held in INS since 1997); Jorge Ramfrez-Acosta, convicted of burglary and marijuana possession (in INS custody since 1997); Roberto Villar Grana, convicted of drug sales, resisting arrest and assault and was now jailed in Louisiana on unspecified state charges; Anthony De Veaux, from the Bahamas, convicted of homicide, robbery, burglary and simple assault (detained in INS custody since 1998). *See* Alan Clendenning, *Records Released on Hostage-Takers*, Dec. 16, 1999, WL, APWirePlus Database; Carol Rosenberg, *2 Surrender in Hostage Drama*, MIAMI HERALD, Dec. 18, 1999, at 1A.

302. Brett Martel, *Inmates Going Back to Cuba, State Department Says*, Dec. 20, 1999, WL, APWirePlus Database.

303. *See id.*

304. *See* Carol Rosenberg, *Jail Crisis Ends*, MIAMI HERALD, Dec. 19, 1999, at 1A.

305. *See* Carol Rosenberg, *Deal Turns Sour for Inmate*, MIAMI HERALD, Dec. 22, 1999, at 3A.

1999, six of the Cubans were repatriated, while a seventh one was removed from the airplane because local officials alleged he had raped a female inmate during the crisis.³⁰⁶ Upon the Cubans' arrival in Havana they were imprisoned.³⁰⁷

Immigration advocates were not surprised to hear about the hostage crisis in the St. Martin Parish Jail. After visiting this jail, Roger Bernstein, an immigration lawyer from Miami thought to himself: "This is one of the worst places on earth."³⁰⁸ Tom Adams, a New Orleans immigration attorney stated that the crisis at St. Martin "was something that was waiting to happen."³⁰⁹ Human Rights Watch, an international group, stated that they had received complaints about the conditions from INS detainees at St. Martin's, and other local jails.³¹⁰ The complaints are easily summarized: inadequate medical care; absence of rehabilitative programs; very limited recreation time outside their cells; abusive correction officers with no special language or immigration-related skills; and, worst of all, isolation from family and lawyers.³¹¹ Because of these and other complaints, advocates and human rights groups have urged the INS to stop using local jails to hold INS detainees.³¹² Advocates reproached the INS for leaving these detainees at the mercy of local sheriffs and not monitoring how county jails used money received from the INS.³¹³ INS authorities responded by saying that they had confidence that these INS detainees were treated "safely, humanely and securely" because they conduct annual inspections of local jails to guarantee these conditions.³¹⁴ In the last inspection, the St. Martin Parish Jail was considered in compliance, even though the INS required five hours of recreation a week, instead of the four and a half hours given by jail's administrators.³¹⁵ For advocates familiar with the conditions in local jails, the deplorable situation of these facilities adds to the detainees' frustration of not knowing when their "INS sentences" will end.

VII. CONCLUSION

The problem of indefinite detention is not easy to resolve. On one

306. Roberto Villar-Grana, held on state charges, was not sent to Cuba. See Carol Rosenberg, *Inmate Still Being Held Got Safe-Passage Pledge*, MIAMI HERALD, Dec. 24, 1999, at 1A.

307. See *id.*

308. Gail Epstein Nieves, *Advocates Decry Conditions at Louisiana Prison*, MIAMI HERALD, Dec. 18, 1999, at 21A.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

hand, there is a need to have a fair review procedure in place because these detainees might face a virtual life sentence in INS custody. On the other hand, the INS has to comply with the legislative wish that undesirable criminal aliens, whose contribution to U.S. society may be minimal, are removed and banned forever from the United States.³¹⁶ Thus, the INS is not to blame for the harshness of the 1996 laws. However, the INS has the authority to implement procedural guarantees that comport with the notions of fairness so entrenched in the minds of Americans and in the U.S. legal system. The procedures should be uniformly applied by all District Offices. Certain federal courts have recently recognized that authority, and have required the INS to be bound by it. Other courts have chosen to follow the plenary power doctrine and not to intrude in this area, so strongly guarded by the political branches. It is now in the hands of the Supreme Court of the United States to reconcile the differences between the circuits. Whether these aliens should receive the minimum constitutional protections bestowed upon any "person" in this country or whether they should remain as political prisoners of this nation, without a criminal sentence, is the ultimate question for the Court to resolve this term.³¹⁷

This Comment chose to focus on the destinies of indefinite detainees; however, the majority of other aliens are not even eligible for a "second opportunity." Most criminal aliens are physically removed from the United States soon after receiving a final order of deportation. Other criminal aliens, who are indefinitely detained because their country of origin has not agreed to a repatriation agreement with the United States, are languishing in detention centers because the INS does not review their cases properly. This is a distressing situation for many of them, who have been in the United States for most of their lives and now must leave behind their family, property, and a part of their lives. It is also a severe penalty if they committed the offense years before the enactment of the law. It is a very abrupt ending to the American dream.

LOURDES M. GUIRIBITEY*

316. Aggravated felons are banned forever from the United States; they are inadmissible after their removal. *See* 8 U.S.C. § 1182(a)(9)(A)(ii) (Supp. IV 1998).

317. *See Reno v. Ma*, 121 S. Ct. 297 (2000).

* This Comment is dedicated to my family, for their constant support, and for being my source of values and inspiration.