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What We Believe They Deserve: Guantanamo, 9/11, Haitians, Mariel Cubans, and National Security as Pretext for Unchecked Power

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WHAT WE BELIEVE THEY DESERVE: GUANTÁNAMO, 9/11, HAITIANS, MARIEL CUBANS, AND "NATIONAL SECURITY" AS A PRETEXT FOR UNCHECKED POWER

Mark Dow[†]

I. INTRODUCTION

We are in an era of particular shamelessness and duplicity with respect to American power in general, and overreaching executive authority in particular. I want to examine some of the disinformation and hypocrisy constituting this shamelessness by looking backward and forward, making a few connections between post-September 11th policies and related attempts by the U.S. executive to justify mistreatment of disfavored groups by applying the "right" labels to them.

Soon after September 11, 2001, the President invoked the word "evil"[1] for a good and strategic reason: if we are fighting Evil, then by definition, whatever we do under the banner of fighting it is Good. I called the White House press office to ask what George W. Bush meant by the word "evil." My calls were not returned. But in the early arguments over military tribunals and prisoner-of-war status, Dick Cheney provided the following answer: the tribunal, he said, "guarantees that we'll have the kind of

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1. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/release/2002/01/20020129-11.html (last visited Nov. 16, 2004).

treatment of these individuals that we believe they deserve."[2] That's the "we" and the logic of the lynch mob, and it is a pithy summary of the administration's various policies aimed at loosening any legal or moral restraints that might keep us from administering the deserved treatment, whether inside our borders, at our Cuban enclave, or in the estimated thirty-nine prisons around the world, in Iraq, Afghanistan and elsewhere, where "we" are hiding detainees.[3]

II. OUR LAWLESS ENCLAVE

For all the criticism the current administration deserves, it is important to remember that federal law enforcement abuses did not appear out of thin air on September 12, 2001. And neither did Guantánamo. What *we* call "Guantánamo" is actually the U.S. Naval Base occupying some 45 square miles (118 square kilometers) of the Guantánamo province in eastern Cuba. Here is the first point at which a fair person, even knowing little about the intricacies of international law, might feel that some international system is necessary to resolve disputes. Even if the Platt Amendment and the 1903 treaty leading to U.S. presence in Guantánamo were not themselves arguably the result of coercion; and even if the U.S. were not arguably in breach of the treaty which granted U.S. presence for the purposes of its own defense, Cuba's defense, and coaling and Navy stations; still, the Cuban government has protested the legitimacy of the U.S. base since 1961. Even Justice Scalia acknowledged in *Rasul v. Bush* that the Guantánamo acreage was "merely leased for a particular use."[4]

All of this became part of the legal disputes in which, of course, the U.S. government made the argument that precisely because it did not exercise sovereignty over its own Naval base in Guantánamo, it could do whatever it wanted there. In an impressive bit of logic, the dissent in *Gherebi v. Bush* – that is, the 9th Circuit judge who agreed with the government's position – said that the U.S.'s ability to violate the lease with impunity does not mean that the U.S. has sovereignty; it only means, wrote Judge Graber, that the U.S. "simply is big enough and strong enough that

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2. Vice President Dick Cheney, Remarks at the U.S. Chamber of Commerce (Nov. 14, 2001), *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html (last visited Nov. 16, 2004) [hereinafter Remarks at the U.S. Chamber of Commerce].

3. HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM "GHOST DETAINEES," 4 (Oct. 4, 2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf (last visited Dec. 18, 2004).

4. 124 S. Ct. 2686, 2709 (2004) (Scalia, J., dissenting).

Cuba has been unable to enforce its legal entitlements."[5] Presumably someone who believes in the rule of law would want a mechanism of international law enforcement in place here. But let me go back to 1991.

In a federal district courtroom in downtown Miami, a number of military men in uniform filed in to fill the front rows so that Judge Clyde Atkins would have a clear view of them. One of the attorneys later told me that it was the kind of military tactic of intimidating a judge that one expects in many Latin American countries. Here the message was "national security," military necessity, and that the local judge should know his place. The case, *Haitian Refugee Center, Inc. v. Baker*, involved the forced repatriation of Haitians fleeing military violence and being picked up at sea by the U.S. Coast Guard.[6] A restraining order had already been issued "barring the government from continuing the repatriations."[7] At this hearing, Judge Atkins heard arguments about the temporary restraining order (TRO), about the court's jurisdiction, and about the enforceability of Article 33 of the United Nations Protocol on the Status of Refugees discouraging the forced return of potential refugees. As I recall, the government's lawyer told the judge (in answer to a direct question) that yes, the interdicted Haitians now in U.S. custody had certain rights, but no, those rights were not enforceable. It seemed, and seems, an extraordinary thing for anyone, but especially a government lawyer, to say. The lawyer was Kenneth Starr. I am told that Washington's decision to send the Solicitor General to argue a case in a district court is also a way of sending a message, and Starr essentially confirmed this when Judge Atkins extended the TRO. Starr said he was not at liberty to agree with the extension and added, "at the highest level of the government there is profound concern about this litigation."[8]

Now why am I making the government's attempt to win a case sound so sinister? There are several reasons, all related to double standards and executive lawlessness, justified with the pretext of "national security," and all of which demonstrate the need to hold nations accountable. First, the authority for the U.S.'s interdiction of Haitians at sea was based on an executive agreement between the Reagan Administration and dictator François ("Papa Doc") Duvalier. Second, the U.S. had supported the Duvalier dictatorship. Third, the U.S. supported and funded the

5. 352 F.3d 1278, 1310 (9th Cir. 2003).

6. 789 F. Supp. 1552 (S.D. Fla. 1991).

7. *Eleventh Circuit Twice Overturns Bar on Repatriation of Hatians* 68 No. 48 INTERPRETER RELEASES 1845 (1991).

8. Author's notes of hearing (regarding *Haitian Refugee Center, Inc.*, 789 F. Supp. 1552), December 2, 1991 (on file with author).

paramilitary group FRAPH responsible for the murder and repression that forced Haitians to flee their country after the 1991 coup against President Jean Bertrand Aristide[9] – these were the Haitians whose forced repatriation led to the scene in the Miami courtroom. Fourth, the detention of Haitian asylum-seekers as a means of deterring other potential refugees from fleeing persecution violates international standards of refugee protection, according to the late Arthur Helton, a refugee policy expert, and others. (Helton was killed in the August 2003 bombing of the UN headquarters in Baghdad.) Fifth, the U.S. government's longstanding claim, in the absence of individualized determinations, that "[t]he majority of Haitian boat people, and the majority of asylum applicants, . . . [are] intending economic migrants"[10] is considered a violation of international law. As early as 1980, the U.S. government was asserting that repatriated Haitians were not persecuted on their return, though White House official Frank White later admitted that "no one inside or outside the government really believed it."[11]

After forced repatriations from Guantánamo, U.S. officials made false claims about U.S. monitoring of returned asylum-seekers.[12] *Haitian Refugee Center, Inc. v. Baker* and subsequent litigation concerned the fairness of asylum screening procedures at Guantánamo and on board U.S. Coast Guard cutters. The United Nations High Commissioner for Refugees (UNHCR) refused to participate in the "cursory screenings," saying that the procedures "deviate significantly from international and U.S. law."[13] But there was little or no recourse from what attorney John Gibbons, in the oral arguments on *Rasul v. Bush*, would call a "lawless enclave."[14] In case there was recourse, the U.S. changed its policy in 1992 "from using Guantánamo as a site for conducting refugee screenings . . . to the policy of automatic interdiction and return of all Haitians interdicted on the high seas."[15] UNHCR called the Supreme Court ruling in *Sale v. Haitian Centers Council,* upholding the legality of interdiction and

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9. Mark Dow, *Occupying and Obscuring Haiti*, 5.2 NEW POLITICS (1995), *at* http://www.wpunj.edu/~newpol/issue18/dow18.htm#r18 (last visited Nov. 20, 2004).

10. THE HAITI FILES: DECODING THE CRISIS 188 (James Ridgeway ed., 1994).

11. DAVID W. ENGSTROM, PRESIDENTIAL DECISION MAKING ADRIFT: THE CARTER ADMINISTRATION AND THE MARIEL BOATLIFT 174 n.47 (1997).

12. Mark Dow, *A Refugee Policy to Support Haiti's Killers*, 5.1 NEW POLITICS (1994), *at* http://www.wpunj.edu/~newpol/issue17/dow17.htm (last visited Nov. 16, 2004).

13. Bill Frelick, *Safe Haven: Safe for Whom?* U.S. COMMITTEE FOR REFUGEES *available at* http://www.refugees.org/world/articles/safehavens_wrs95.htm (last visited Nov. 15, 2004).

14. Oral Argument of John J. Gibbons on Behalf of Petitioners at 3, Rasul v. Bush, 124 S. Ct. 2686 (2004).

15. Frelick, *supra* note 13, at 8.

repatriation, "a setback to modern international refugee law."[16] Most of the Haitians would indeed be repatriated, many of them handed over directly to the Haitian military on disembarking at Port-au-Prince, some forced by high-powered water hoses from the U.S. cutters. (Chinese have also been interdicted at sea by the U.S., held at Guantánamo, and "quietly and summarily returned."[17] So have would-be immigrants from several other countries. Cubans have also been detained in large numbers at Guantánamo though most have been allowed into the U.S.)

The mistreatment of Haitians in the "lawless enclave"[18] demands its own a full-scale history. Here I will just mention that they were unnecessarily confined behind razor wire; their peaceful protests were met by assaults from military police riot squads; they were subjected to the "psy-ops" (psychological operations) technique of blaring music – a technique also used against Manuel Noriega in the Vatican embassy, David Koresh and his followers, and "enemy combatants" at Guantánamo more recently. Unaccompanied Haitian refugee children reported being "cracked" at Guantánamo – "their hands cuffed behind their back, their feet cuffed and then stepped on.... The cuffings often occur[ed] in conjunction with other punishments, such as... being forced to kneel for hours on hot cement or beds of ants."[19] More than 200 Haitians, despite having passed the stringent "screening procedures," which should have allowed them into the U.S. to pursue asylum claims, were further detained because they tested positive for HIV. District Court Judge Sterling Johnson, who would rule in 1993 to allow the HIV positive Haitians in, wrote that the 200 or so sick refugees were "subjected to pre-dawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear."[20] In his dissent in *Rasul*, Justice Scalia would write, as if the Naval Base itself were the victim, that the majority was "subjecting Guantanamo Bay to the oversight of the federal courts."[21] At least one HIV positive refugee said she and other women were forcibly injected at Guantánamo with the contraceptive Depo-Provera.[22] All this must remain beyond the oversight of any court, the executive argues, because of "national security" and because the judiciary has traditionally shown great deference in matters of

16. *Id.*

17. *Id.* at 14.

18. Oral Argument of John J. Gibbons on Behalf of Petitioners, *supra* note 14.

19. *Haitian Children Imprisoned at Guantanamo: Cruel and Unusual Punishment*, HAÏTI PROGRÈS, May 2, 1995, at 9.

20. PAUL FARMER, THE USES OF HAITI 277 (1994).

21. *Rasul*, 124 S. Ct. at 2706.

22. FARMER, *supra* note 20, at 280.

immigration policy (the pretext that intimidation of and violence against asylum seekers are a form of securing our borders). The bottom line is the Haitians were getting "the kind of treatment . . . that we believe they deserve."[23]

These pretexts become clearer when we note a few continuities from the 1990s into the so-called war on terror. The Justice Department refused to release the names of some 200 unaccompanied Haitian children on Guantánamo to the Haitian community in the U.S. because it claimed it was protecting their safety, although around the same time it released the names of unaccompanied Cuban children on Guantánamo to Miami's Cuban community.[24] After the post-September 11th domestic round-ups, the Justice Department refused to release the names of detainees because, it absurdly claimed, it was protecting the detainees' privacy and safety. When the American Civil Liberties Union of New Jersey attempted to force the release of the names based on a New Jersey statute saying such records of inmate names "shall be open to public inspection,"[25] the federal government argued that these were "detainees" and not "inmates" – the word game again. It further argued that because these were federal detainees held in state jails under contract with the federal government, that a federal policy prohibiting the release of names must supercede the local statute. Two months after making the argument in the Superior Court of New Jersey, the federal government argued outside of any court that a United Nation's plan to monitor prisons worldwide "would be unconstitutional in the United States because it does not recognize states' rights."[26] According to news reports, the U.S. opposed the prison monitoring plan "because of potential demands for access" [27] to the post-September 11 Guantánamo prisoners – for reasons that are now clear.

III. ASYLUM SEEKERS, TERRORISTS, ETC.

Since September 11, 2001, the "terror" pretext has intersected with anti-Haitian immigration policies. In October 2002, a boat carrying 216

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23. Remarks at the U.S. Chamber of Commerce, *supra* note 2.

24. Mark Dow, Keeping the Haitians Out: A Conversation with Cheryl Little 14 (Tap Tap Haitian Restaurant 1995) (on file with author).

25. Press Release, New Jersey ACLU, ACLU of New Jersey Files Lawsuit Seeking Information

on Post-September 11 Detainees (Jan. 22, 2002) *available at*

http://archive.aclu.org/news/2002/n012202c.html (last visited Dec. 18, 2004).

26. Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, N.Y. TIMES, July 25, 2002 at A7.

27. *Id.*

people from Haiti and the Dominican Republic sailed into Biscayne Bay off Miami. Most of the passengers were taken into custody. In November, an immigration judge found that one of these Haitians, an 18-year-old, could be released on bond. The Board of Immigration Appeals upheld the bond decision. Attorney General John Ashcroft intervened, however, so that neither "D-J-" nor the other Haitians could be released even on the basis of individualized case determinations, citing "national security"[28] interests together with "sound immigration policy."[29] The Attorney General ordered the young Haitian man and others "similarly situated" to remain in detention pending their asylum proceedings, whatever an immigration judge and the Board of Immigration Affairs might rule. Ashcroft cited a statement from a Defense Department official invoking the "war on terrorism," and claiming that the release of the Haitian asylum applicant could "trigger mass migration events"[30] from Haiti, which would also create a possibility of terrorist infiltration.[31]

Ashcroft uses the magic words "national security interest" and, even more immune to argument, "the terrorist attacks of September 11," then informs us that the State Department "has 'noticed an increase in third country nations (Pakistani, Palestinians, etc.) using Haiti as a staging point for attempted migration to the United States.'"[32] That "etc." seems like a tip-off, but we even have an anonymous State Department official – like a twenty-five-year delayed echo of that Carter State Department official – saying "[w]e all are scratching our heads" [33] about the source of the Attorney General's assertion. In any case, there was no claim, as far as I know, that the eighteen-year-old Haitian was himself in reality Pakistani, Palestinian, or "etc."[34] In his edict, the Attorney General assures us he is not violating international law. We might take it as a positive sign that he felt the need to make this claim, but surely in a just world he would not be the one to determine that.

Since *In re D-J-*, Margaret H. Taylor observes, it seems that the Department of Homeland Security has been expanding its use of the "remarkably broad" rationale for detention-without-bond to other groups

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28. *In re* D-J-, 23 I. & N. Dec. 572, Int. Dec. 3488 (A.G. 2003).

29. *Id.*

30. *Id.* at 578.

31. *Id.*

32. *Id.* at 579.

33. *Ashcroft Leaking Logic*, PALM BEACH POST, Apr. 29, 2003 at A16.

34. D-J- was deported to Haiti on November 29, 2004. Alva James-Johnson, *U.S. deports Haitian youth held for more than 2 years*, KAN. CITY STAR, Nov. 30, 2004, *available at* http://www.kansascity.com/mld/kansascity/news/nation/10307675.htm?1c (last visited Dec. 18, 2004).

– for example, to "all noncitizens who have been convicted of a sex offense, regardless of the seriousness of the underlying offense, the detainee's risk of flight, or danger to the community."[35] In Arizona, Taylor reports, Brazilians are being detained without bond because DHS has decreed them "a heightened risk of flight because of smuggling activity,"[36] and "[e]choing the rationale" of the latest anti-Haitian policy, DHS has justified the Brazilian detentions by claiming that the use of resources for apprehending the Brazilians on the Southwest border "poses a threat to national security."[37]

While there are continuities in current U.S. anti-Haitian policies going back twenty-five years, there is also a new shamelessness on the face of these policies in terms of both the participation of the U.S. in forcing Aristide from office and supporting anti-democratic forces, and in the related anti-Haitian immigration policies. In early 2004, groups that were apparently "armed by, trained by, and employed by the intelligence services of the United States"[38] pulled off a second coup against Aristide. One of Aristide's former bodyguards told of U.S. troops running things in the unmarked plane that removed Aristide from Haiti: "They sat us down and didn't tell us where we were going."[39] Cheney said Aristide had "worn out his welcome," and that "[w]e helped facilitate his departure when he indicated he was ready to go."[40] According to attorney Ira Kurzban, who had argued the 1991 case in that Miami courtroom, the U.S. had made "contingency plans for Guantanamo" weeks before the operation.[41] On the same day that Kurzban described the links between the U.S. and Haitian paramilitary forces, George W. Bush told the Haitian people, "[w]e will turn back any refugee that attempts to reach our shore."[42] The U.S. Committee for Refugees noted that Bush "has finally spoken the

35. Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 168 (2004).

36. *Id.*

37. *Id.* at n.99.

38. Amy Goodman & Jeremy Scahill, *Haiti's Lawyer: US Is Arming Anti-Aristide Paramilitaries in* GETTING HAITI RIGHT THIS TIME: THE U.S. AND THE COUP 47 (2004).

39. *Aristide's Bodyguard Describes the US Role In His Ouster in* GETTING HAITI RIGHT THIS TIME: THE U.S. AND THE COUP 151, 152 (2004).

40. Eric Green, *Cheney Says Aristide Made Own Choice to Resign as Haiti's President, at* http://japan.usembassy.gov/e/p/tp-20040304-26.html (last visited Nov. 16, 2004).

41. Goodman & Scahill, *supra* note 38, at 47.

42. Press Release, U.S. Committee for Refugees, President Bush Finally Speaks the Truth about America's Unlawful Treatment of Haitian Refugees, Feb. 26, 2004, *at* http://www.regugees.org/news/press_releases/2004/022604.cfm (last visited Nov. 14, 2004).

truth about American practice toward Haitian refugees,"[43] that he had "flagrantly rejected the legal and ethical obligation"[44] of refugee protection which "no [other] state claims the right to violate."[45] Three of 2000 interdicted Haitians were found to have a credible fear of persecution in the summer of 2004.[46] Despite widespread political violence, hurricane damage, and a humanitarian crisis caused by flooding, the Department of Homeland Security (DHS) continued and continues to deport Haitians, while Nicaraguans and Hondurans in the U.S. have been granted extensions of Temporary Protected Status (TPS) here after recent hurricane damage in their home countries.[47]

Anti-Haitian policies and the "war on terror," different as they are, have at least three things in common: 1) if you categorize a person in a certain way, her rights and protections are gone; 2) if you categorize the place where you hold that person in a certain way, her rights and protections are gone; and, 3) using the pretext of war or national security, you can do anything at all to a person – certainly to a non-citizen.

Consider a few permutations of the government's exploitation of war and national security, and more specifically of "danger" and "dangerousness":[48] with regard to Haitian asylum-seekers, successive administrations have lied about the danger Haitians were fleeing, even while supporting or financing that very danger. (In the 1980's we saw a similar pattern with Salvadorans and Guatemalans.) With regard to Yaser Hamdi of Louisiana, there is not much to say now: the government would have us believe he was dangerous enough to be confined at Guantánamo for three years, quite possibly tortured there, but that now it is safe to release him on his word that he will not participate in terrorism. And of course, to be really safe, the government claims that Hamdi renounced his U.S. citizenship. I presume this is to give the U.S. more leeway in mistreating him should the need arise. Note that I say the government "claims" Hamdi agreed to renounce his citizenship; that is because one legal expert has argued that this aspect of the coerced "agreement" is "legally meaningless."[49]

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *U.S. Policy Grants TPS to Many – Except Haitians*, MIAMI HERALD, Oct. 20, 2004, at 26.

48. *See* Taylor, *supra* note 35.

49. David R. Dow, Letters, *Yaser Hamdi, U.S. Citizen*, N.Y. TIMES, Oct. 15, 2004, at A24.

With respect to Abu Ghraib and dangerousness, CBS News twice postponed its broadcast of the now infamous photos at the Pentagon's request, finally airing them because the competition was about to do so.[50] The reason given for the delay was the potential danger to American soldiers and other hostages in Iraq – legitimate concerns. Earlier, it had been necessary to bar the International Committee of the Red Cross (ICRC) from Abu Ghraib in order to protect the dangers being imposed on the Iraqi prisoners by the Americans.

In the oral arguments in *Rasul,* Solicitor General Theodore Olson's opening statement began: "The United States is at war."[51] Justice John Paul Stevens soon interrupted with a question: "Mr. Olson, supposing the war had ended, could you continue to detain these people on Guantanmo? Would there then be jurisdiction? . . . So the existence of the war is really irrelevant to the legal issue?"[52] Olson essentially conceded the point, but couldn't let it go: "It is not irrelevant, because it is in this context that that question is raised . . . It doesn't depend upon that" (that is, his argument doesn't depend on the war), "but it's even more forceful. And more compelling."[53] Let's not forget that this is the undeclared war without end. What strikes me in these various cases is the executive's claims for limitlessness in every sense: in place, in time, and in action. "What matters," writes Justice Kennedy in his concurring opinion in *Rasul*, "is the unchallenged and indefinite control that the United States has long exercised over Guantánamo Bay."[54] There we have limitlessness in place and time.

Here is limitlessness in time and action: in the arguments in *Rumsfeld v. Padilla* about the executive's authority to detain a U.S. citizen indefinitely, Justice Ginsburg asked Deputy Solicitor General Paul Clement: "[I]f the law is what the executive says it is, whatever is necessary and appropriate in the executive's judgment"[55] (here she was alluding to the post 9/11 congressional authorization for the president to use necessary and appropriate force) "what is it that would be a check against torture?"[56] Ginsburg tried two or three times to get an answer. Clement was evasive,

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50. Stephen J. Berry, *CBS Lets the Pentagon Taint Its News Process*, 58.3 NIEMAN REP. 76, 77-78.

51. Oral Argument of Solicitor General Theodore B. Olson on Behalf of Respondents at 21, Rasul v. Bush, 124 S. Ct. 3686 (2004) (No. 03-334).

52. *Id.* at 22.

53. *Id.*

54. *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

55. Oral Argument of Paul D. Clement on Behalf of Petitioner at 18, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (Nos. 03-1027).

56. *Id.*

but he did answer that there is no check on torture if the president or his people want to use it; "the fact that executive discretion in a war situation can be abused is not a good and sufficient reason for judicial micromanagement and overseeing of that authority."[57] Clement said that "the military ought to have the option of proceeding with" its captives in such a way that it can "get actionable intelligence to prevent future terrorist attacks."[58] In *Hamdi v. Rumsfeld*, Clement again referred to the necessity of "interrogation without access to counsel"[59] when the citizen being interrogated might be of "paramount intelligence value."[60] This time Justice Stevens asked whether anything in the law limits interrogation methods. Clement reassuringly told the court "that the last thing you want to do is torture somebody or try to do something along those lines,"[61] since that would affect the "reliability" of information obtained. The photos from Abu Ghraib were broadcast that evening.

IV. MAINLAND GUANTÁNAMO

The Supreme Court heard arguments related to torture and summary execution in the October 2004 term as well (*Clark v. Martinez* and *Benitez v. Rozos*). But this case is not about alleged terrorists or "enemy combatants"—which is part of the reason it has received so little attention, even among those with civil liberties high on their agendas. The victims here are Mariel Cubans[62] and other so-called "inadmissible aliens." Once again the premise is that if we categorize certain people in a certain way, then they cease to be persons at all – at least as far as due process and humanity are concerned. In a sort of mainland Guantánamo, the government says it can do anything at all to certain people who are here because (in a bizarre legalistic sense) they are not people and they are not here.

Allowed by Fidel Castro to depart the island in 1980 from the port of Mariel, some 125,000 Cubans came to the United States over a six-month period. Many of them have committed crimes here, and detention typically begins on completion of a criminal sentence for anything from murder to shoplifting, though one Mariel Cuban was locked up for not

57. *Id.* at 19.

58. *Id.* at 20.

59. Oral Argument By Paul D. Clement on Behalf of Respondents at 24, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696).

60. *Id.* at 23.

61. *Id.* at 41.

62. *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS ch. 14 (2004).

being able to afford medical care. Cuba will not take them back, and the U.S. says it can detain them for any length of time. In 2001, at least 160 Mariel Cubans had been detained by the Immigration and Naturalization Service (INS) for a decade or more after completing criminal sentences.[63] In 2004, thirty-three Cubans were reported to have been detained so far -- again, after completing criminal sentences for fifteen years or more.[64] Many do get released, but the immigration service can detain them again, as one court put it, for "almost any reason."[65]

The Department of Homeland Security's Bureau of Immigration & Customs Enforcement is authorized to detain noncitizens so that it can deport them. In 2001 the Supreme Court ruled in *Zadvydas v. Davis* that when a detainee's deportation cannot be carried out within a "reasonably foreseeable" period, defined by the court as six months in most cases, she must be released. Obviously the *Zadvydas* ruling applies to immigrants who are present in the United States. But the government argues that it does not apply to the Mariel Cubans, who have been here since President Jimmy Carter welcomed them twenty-five years ago. That is because the Mariel Cubans were "paroled" into the U.S. by the executive and are thus legally considered not to have "entered." Exploiting this so-called "entry fiction" – never intended to apply to circumstances like those of the Mariel refugees – the U.S. government argues that the 917 Mariels currently in detention, as of October 2004, have no right to be free from detention here, ever.

Yet in the government's duplicitous logic, because the prisoners receive annual custody reviews by low-level bureaucrats, their detention is not "indefinite" at all; "the passage of time is relevant to [their] claim," according to the government.[66] Never mind that those "annual reviews" are often *not* given annually, that the decisions are notoriously arbitrary, that there is no appeals process, that the prisoners are not entitled to lawyers, or that when they do get representation the legal representatives are regularly barred from the reviews in violation of the government's own guidelines. In the words of a classic Supreme Court decision: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[67]

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63. Dan Malone, *851 Detained for Years in INS Centers*, DALLAS MORNING NEWS, Apr. 1, 2001 at 1A.

64. Gaiutra Bahadur, *Boat-Lift Refugees Fighting Limbo Mariel Cases Could Affect 1700 – Plus U.S. Detainees*, PHILADELPHIA INQUIRER, Oct. 13, 2004 at A01.

65. Rosales-Garcia v. Holland, 322 F.3d 386, 395 (6th Cir. 2003).

66. Brief for Appellee at 62, Carballo v. Luttrell, 2001 WL 1194699 (6th Cir. 2003) (No. 99-5698).

67. Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

Here are a few examples of the victims of this policy. Soon after his arrival on the boatlift, one man was given probation for attempted robbery. Then he served two years for misdemeanor marijuana possession, a parole violation. Then the U.S. immigration agency kept him imprisoned for twenty years.

Another Mariel Cuban was sentenced to ninety days for misdemeanor cocaine possession after a series of earlier misdemeanors. Then the INS held him for fifteen years. Then one day, apparently, he was no longer dangerous, and he was released.

A Mariel Cuban man who served five years for attempted murder was imprisoned after his sentence for another fifteen years by the INS. After one custody review, immigration officials denied him release on the basis that he showed insufficient remorse for his crime. After a subsequent review, they denied him release on the basis that his expression of remorse was merely a "tactic" to get released.

The logic is not only arbitrary, it mirrors that of the meaningless crime of *pelegrosidad*, or dangerousness, in Cuba, for which many of the Mariel Cubans were imprisoned by Castro, and for which many fled in 1980. Others left Cuba after local police threatened them with prison for *pelegrosidad* if they did not leave. I have been talking about Mariel Cubans who are taken into custody after committing crimes here; a study remains to be written on the truth about the number of prisoners or criminals released from Cuban jails to join the Mariel exodus. Even the INS commissioner (admittedly on the defensive against media hysteria in the 1980s about Mariel crime) told the press that 21,000 of the oft-cited 23,000 so-called criminals in the Mariel boatlift "were involved in very minor misdemeanors or, in many cases, political kinds of crimes that would not be crimes in the U.S."[68] Still, in law-enforcement circles here the term "Marielito" became synonymous with "criminal." Speaking about crimes allegedly committed here, the INS commissioner said that the numbers of Mariel criminals was greatly exaggerated:

> There's an unfortunate tendency now in some quarters for every Hispanic arrested to be labeled a Marielito. For example, there were some 800 names that New York officials gave us of suspected Marielitos who were involved in criminal activity. It turned out that *only 80 of them were actually Cuban* and only 19 were Marielitos.[69]

On top of that, some criminals were actually welcomed because of their crimes: in 1980, the Cuban government "noted that the United States

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68. *U.S. Won't "Let Another Mariel Happen,"* U.S. NEWS & WORLD REPORT, Jan. 16, 1984, at 30.

69. *Id.* (emphasis added).

had welcomed as heros [sic] those Cubans who had forcibly hijacked boats."[70]

Even today the *Scarface*-assisted version of reality persists.[71] That film's opening informs us that Castro sent "the dregs of his jails," repeating the figure of 25,000 prisoners that apparently includes Castro's political prisoners.[72] In a twentieth anniversary DVD of the movie, released last year to widespread uncritical acclaim, Oliver Stone self-importantly informs viewers that he performed actual law-enforcement research in three Florida cities. When the movie was in danger of receiving an X rating, which would have meant less profit, producer Martin Bregman "appealed to the ratings board, bringing along some law enforcement officers . . . who said that the movie carried an antidrug message."[73]In the recent Supreme Court arguments, Oliver Stone spoke again, this time through Antonin Scalia: "they just open their jails and say, hey, you know, go wherever you want."[74] Today the U.S.-Cuban collaboration continues as the Mariel prisoners are held as pawns in diplomatic maneuvering and migration talks.

After doing time on drug charges, a Mariel Cuban woman was denied release by the INS because she had nowhere to live. Denied her anti-depressant medication, she became suicidal, and after a subsequent custody review was denied release because of a suicide attempt. Even the warden of the Louisiana jail holding her for the federal government had recommended her release.

Or can they? If Mariel Cuban prisoners are not entitled to any more "due process" than the administration claims, wrote the Sixth Circuit Court of Appeals in 2003, "we do not see why the United States government could not torture or summarily execute them."[75] In the *Clark/Benitez* arguments, Justice John Paul Stevens raised the same question, wondering whether the government could just "shoot" the Mariel Cubans. Government attorney Edwin S. Kneedler replied "absolutely not."[76] But he avoided saying clearly why the claimed authority for endless detention could not also be used for summary execution.

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70. ENGSTROM, *supra* note 11, at 122.

71. SCARFACE (Universal Studios 1983).

72. *Id.*

73. Bernard Weinraub, *A Foul Mouth with a Following*, N.Y. TIMES, Sept. 23, 2003, at E1.

74. Oral Argument of John S. Mills on Behalf of Petitioner Benitez at 45, Clark v. Suarez Martinez, 124 S. Ct. 2851 (2004) (Nos. 03-878, 03-7434).

75. *Rosales-Garcia*, 322 F.3d 386 at 410.

76. Oral Argument of Edwin S. Kneedler on Behalf of Government, Clark v. Suarez, 124 S. Ct. 2851 (2004) (Nos. 03-878, 03-7434) at 25.

In the hallway after the argument I asked him for the reason. He declined to answer when I declined to go "off the record," and said only that the government doesn't argue cases in the media. So I was not quite accurate when I said above that the government asserts it can do anything at all to these people: in this case, lacking the terrorist cover, even the government mouthpiece seemed unable to let himself articulate the deeper truth of what he was arguing for.

This case is not about the "hordes of aliens" conjured by Kneedler.[77] Neither is it about the "the fundamental power of the United States to protect its borders."[78] And it is certainly not about the Al Qaeda attacks on New York and Washington – the "events of recent years," as Kneedler delicately put it, joining the September 11th attacks in a sentence with "migration crises involving Haitians and Cubans."[79] This case is about the limits of executive authority against those whose humanity would be denied for the sake of – what? For the sake of that very authority. It is the same circular, self-justifying logic of power that Cheney articulated so well.

77. Rebuttal Argument of Edwin S. Kneedler on Behalf of the Petitioners at 55, *Clark* 124 S. Ct. 2851.

78. Oral Argument of Edwin S. Kneedler on Behalf of the United States at 4, *Clark* 124 S. Ct. 2851.

79. *Id.*