Supplementary Material

Chapter 10: The Reagan Era—Foundations/Sources/The Law of Nations

---

Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986)

Moises Garcia-Mir was one of approximately 100,000 Cubans who in 1980 traveled by boat from Cuba to the United States with the hopes of gaining citizenship or, at least, refugee status. Many Cuban refugees were immediately detained. Others were allowed to reside in the United States, provided they met certain conditions. Garcia-Mir was initially allowed to remain in the United States, but was later found to violate the statutory conditions for his freedom. As a result, he was detained in a penitentiary for Cuban refugees in Atlanta. Garcia-Mir and other detainees filed a class-action lawsuit against Edward Meese, the attorney general of the United States. They claimed that the Reagan administration's failure to provide them with adequate hearings violated their constitutional rights and international law. The Reagan administration responded that these refugees had no constitutional rights and that the executive decree detaining the aliens was a higher legal authority in the United States than international law. A lower federal court ruled that the Reagan administration was violating the constitutional rights of the detainees. Government officials appealed to the Court of Appeals for the Eleventh Circuit.

The Court of Appeals for the Eleventh Circuit ruled that Garcia-Mir and others were legally detained. Judge Johnson agreed with Reagan administration claims that no constitutional rights were violated and that executive decrees were higher legal authority than international law. Judge Johnson asserts, "The public law of nations was long ago incorporated into the common law of the United States." Why did he nevertheless deny Garcia-Mir's claim? After Garcia-Mir*, under what circumstances, if any, do governing officials have obligations to obey international law?*

The Supreme Court denied certiorari when Garcia-Mir sought to appeal. In theory, Garcia-Mir *merely binds the Eleventh Circuit. That decision, however, is now routinely cited by many courts as standing for the proposition that executive decrees are higher legal authority than international law.*

JOHNSON, CIRCUIT JUDGE:

. . .

At issue here is the difficult question whether there exists some right, based not on the Constitution but derived from some other source, that rises to the level of a due process liberty interest and accordingly merits protection. The question is made more difficult by the fact that, once we enter the rarefied domain of non-constitutionally-based due process rights, the appellees here are excludable aliens and hence have virtually no constitutional rights in any event.

The Due Process Clause of the Fifth Amendment affords direct protection to certain "core" values. The obvious example is that the government cannot throw a citizen in jail without informing him of the charges and giving him an opportunity for a fair trial.

Beyond the core of the Due Process Clause are certain rights or interests that are not actually resident in the common law notion of due process but which nonetheless cannot be taken away without affording process due. Thus, for example, the state has no obligation to set up a system of "good-time credits" as an incentive for good behavior in the prisons. But if the state chooses to set up such a system and promulgates rules and regulations that effect a significant restriction on the discretion of administrative officers to grant or withhold such credits, then before credits may be rescinded a prisoner

has a due process right to have the rules and regulations followed and applied in a non-arbitrary fashion. . . .

. . .

Were this the usual case involving domestic parties our analysis would begin here; we would review the relevant agency decision-making process to determine if sufficiently particularized standards exist to implicate due process values. But this case is fundamentally distinct from the norm in that the appellees are unadmitted aliens, members of a legal classification with a long and lamentable history. While aliens once in the United States have been extended a plethora of important rights under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has held that excludable aliens are largely outside the mantle of the Due Process Clause of the Fifth Amendment. . . . "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." . . .

. . . Even if we assume, *arguendo,* that the rules applicable in the domestic context also apply to aliens, the appellees here are not entitled to relief because they fail to demonstrate the existence of the particularized standards of review that yield a protected liberty interest. . . Thus, we can and do decide this case on more narrow grounds and avoid the constitutional question whether unadmitted aliens have actionable nonconstitutionally-based due process rights.

. . .

Appellees provide us with no precedent or logical basis for the proposition that the President or one of his subordinates can, through written or oral public statements alone, create actionable liberty interests. The long-range implications of such a holding would be both profound and dangerous. It is a hallmark of our system of government that certain rights and liberties are enshrined in the social compact. These guarantees may be expanded or contracted through any of several constitutionally provided-for processes. But to give countenance to the notion that one of the political branches can simply wave a magic wand and "create" (and by implication extinguish) constitutional rights would be to undo completely the notion of limited government through separated, checked and balanced powers. This is a step we decline to take.

. . .

The special treatment that the appellees received will not support a due process claim unless they can point to "substantive limitations on official discretion" or "particularized standards or criteria [to] guide the State's decisionmakers" . . . in making parole decisions. The record here is simply barren of such evidence. . . .

The public law of nations was long ago incorporated into the common law of the United States. *The Paquete Habana* (1900) . . . To the extent possible, courts must construe American law so as to avoid violating principles of public international law. . . . But public international law is controlling only "where there is no treaty and no controlling executive or legislative act or judicial decision. . . ." Appellees argue that, because general principles of international law forbid prolonged arbitrary detention, we should hold that their current detention is unlawful.

. . .

The trial court found, correctly, that there has been no affirmative legislative grant to the Justice Department to detain the Second Group without hearings. . . . Thus we must look for a controlling executive act. The trial court found that there was such a controlling act in the Attorney General's termination of the status review plan and in his decision to incarcerate indefinitely pending efforts to deport. The appellees and the *amicus* challenge this by arguing that a controlling executive act can only come from an act by or expressly sanctioned by the President himself, not one of his subordinates. . . .

As to *The Paquete Habana,* that case involved the capture and sale as war prize of several fishing boats during the Spanish-American War. The Supreme Court found this contrary to the dictates of international law. The *amicus* characterizes the facts of the case such that the Secretary of the Navy authorized the capture and that the Supreme Court held that this did not constitute a controlling executive act because it was not ordered by the President himself. This is a mischaracterization. After the capture of the two vessels at issue, an admiral telegraphed the Secretary for permission to seize fishing ships, to which the Secretary responded that only those vessels "'likely to aid enemy may be detained.'"

Seizing fishing boats aiding the enemy would be in obvious accord with international law. But the facts of *The Paquete Habana* showed the boats in question to be innocent of aiding the Spanish. The Court held that the ships were seized in violation of international law because they were used solely for fishing. It was the *admiral* who acted in excess of the clearly delimited authority granted by the Secretary, who instructed him to act only consistent with international law. Thus *The Paquete Habana* does not support the proposition that the acts of cabinet officers cannot constitute controlling executive acts. At best it suggests that lower level officials cannot by their acts render international law inapplicable. That is not an issue in this case, where the challenge is to the acts of the Attorney General.

. . . [T]he President, "acting within his constitutional authority, may have the power under the Constitution to act in ways that constitute violations of international law by the United States." The Constitution provides for the creation of executive departments, and the power of the President to delegate his authority to those departments to act on his behalf is unquestioned. Likewise, . . . the power of the President to disregard international law in service of domestic needs is reaffirmed. Thus we hold that the executive acts here evident constitute a sufficient basis for affirming the trial court's finding that international law does not control.

Even if we were to accept, *arguendo,* the appellees' interpretation of "controlling executive act," *The Paquete Habana* also provides that the reach of international law will be interdicted by a controlling judicial decision. In *Jean v. Nelson,* we [held] that even an indefinitely incarcerated alien "could not challenge his continued detention without a hearing." This reflects the obligation of the courts to avoid any ruling that would "inhibit the flexibility of the political branches of government to respond to changing world conditions. . . ." We find this decision sufficient to meet the test of *The Paquete Habana.*