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COURT URGED TO PERMIT DETENTION OF ALIEN CRIMINALS PENDING DEPORTATION

(Benitez v. Mata, No. 03-7434)
(Crawford v. Martinez, No. 03-878)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to overturn lower-court decisions that could result in the release from detention of more than 1,100 illegal aliens convicted of violent crimes.

In a brief filed in *Benitez v. Mata* and *Crawford v. Martinez*, WLF argued that society's interest in being protected from violent criminals and terrorists far outweighs any interest that illegal aliens may have in being free from detention during the time it takes to arrange their deportation. WLF filed its brief on behalf of U.S. Representatives John Doolittle, Lamar Smith, and Dave Weldon; the Allied Educational Foundation; Friends of Immigration Law Enforcement; and the National Border Patrol Council.

"Congress has adopted numerous laws in recent years to ensure that the American public is protected from dangerous alien criminals; yet the holdings of two federal appeals courts result in a rule that provides the public with even less protection than it had prior to the adoption of those laws," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The cases also have important national security implications, because they address the power of the federal government to prevent a foreign country from dumping all of its undesirable citizens on our shores," Samp said.

The cases before the Supreme Court involve Daniel Benitez and Sergio Martinez, two Cubans who came to this country illegally in 1980 as part of the Mariel boatlift. They were taken into custody, but because Fidel Castro would not allow any of the Mariel Cubans to return home, Benitez and Martinez (along with virtually all of the Mariel Cubans) were temporarily released into American society until arrangements could be made for their repatriation. In the ensuing years, both Benitez (who was serving time in a Cuban prison for armed robbery at the time of the Mariel boatlift) and Martinez were convicted on numerous occasions of violent felonies. When they completed their most recent prison sentences, the Immigration and Naturalization Service (INS) ordered them detained pending their return to Cuba. The INS periodically reviews their detention but repeatedly has determined that they would pose a danger to public safety if released.

However, to date Cuba has refused to accept them back into the country. The U.S. Court of Appeals for the Ninth Circuit in San Francisco granted Martinez's petition for a writ of habeas corpus in August 2003, on the ground that the *indefinite* detention of a criminal alien pending removal violates the alien's constitutional rights if there is no country willing to accept him. The Sixth Circuit issued a similar decision. However the Eleventh Circuit in Atlanta (which heard Benitez's case) reached the opposite conclusion; the Supreme Court has agreed to resolve the conflict. If the decisions of the Sixth and Ninth Circuits are expanded nationwide, the federal government will be required to release more than 1,100 excludable aliens whom it has determined pose a risk to public safety.

In its Supreme Court brief, WLF argued that the Sixth and Ninth Circuits totally misconstrued relevant immigration law. WLF argued that federal law explicitly permits the indefinite detention of excludable aliens who have been ordered deported and whose release has been adjudged to constitute a threat to the community. WLF noted that "indefinite" detention does not mean life-long detention because Cuba can be expected eventually to agree to take back its citizens and because the INS has a policy of reviewing all such cases every six months and releasing from custody those aliens who the INS determines pose no threat to society. WLF argued that while citizens and permanent resident aliens may have a constitutional right that protects against incarceration based on predictions of future dangerousness, "excludable aliens" such as Benitez and Martinez (that is, aliens who were intercepted while attempting to sneak into the country) have no such right.

WLF also argued that the decisions fail to take into account society's strong interest in ensuring that violent criminals not be permitted to roam the streets freely. WLF also argued that the cases raise serious national security and foreign policy concerns. The Sixth and Ninth Circuits have essentially held that the federal government is powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back, WLF argued. That is exactly what happened during the Mariel boatlift, WLF argued: Castro emptied out his prisons and mental institutions and sent the inmates by boat to this country.

The Supreme Court is likely to hold oral arguments in October 2004, with a decision to be issued in early 2005. WLF is a public-interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to combatting illegal immigration and ensuring that aliens who engage in criminal activities are excluded from American society.

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For further information, contact WLF Chief Counsel Richard A. Samp (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.