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Folder Title:

HIV Refugees [1]

Staff Office-Individual:

Legal Advisor-Derosa, Mary

Original OA/ID Number:

3410

Row:	Section:	Shelf:	Position:	Stack:
39	5	8	1	V

Memorandum



Please

Subject: Additional Guidance Regarding
Waiver Requests from Refugees who Test
Positive for Human Immuno-deficiency
Virus

Date

APR 6 1994

To: All INS Overseas Offices

From: HQIAO

As stated in my memorandum to you of September 30, 1993 (copy attached), an Immigration and Naturalization Service (INS) officer may not exercise the discretionary authority of the Attorney General to waive the exclusion of an HIV+ approved refugee applicant unless the applicant is able to establish:

- (1) the danger to the public health of the United States created by his/her admission to the United States would be minimal;
- (2) the possibility of the spread of the disease created by his/her admission to the United States would be minimal; and
- (3) there would be no cost incurred by any level of government agency in the United States without the prior consent of that agency.

It has come to my attention that there may be some confusion regarding the documentation needed to meet the third of these requirements for the submission of a waiver request. The following guidance restates the types of evidence that INS Headquarters has determined will satisfy the consent requirement.

Proof that no cost would be incurred by any government agency without its consent can include, but is not limited to:

- (1) health insurance coverage under a plan held by a family member already in the United States;
- (2) evidence of financial resources commensurate with the projected medical costs of HIV+ treatment such as letters from a family member's employer, bank statements, recent pay stubs, or recent tax forms;
- (3) statements of consent from local or state health care officials with responsibility for the area in which the HIV+ applicants, if admitted, would resettle; or

All INS Overseas Offices

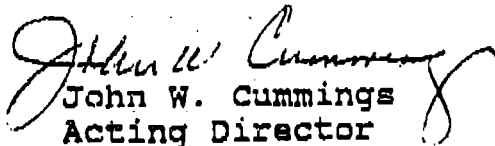
Page 2

(4) statements from specific private or government health care and research facilities assuming responsibility for treatment.

An applicant meeting any one of these criteria or providing similar materials/documentation will be viewed as having satisfied the third requirement for the submission of an I-602 waiver request.

It is our understanding that some voluntary agencies believe that INS requires a Form I-134, Affidavit of Support, to be submitted with an I-602 from an HIV+ approved refugee applicant. We ask that you advise the agencies with which you deal that it is INS policy in HIV+ waiver cases to accept documentation in the forms just described. The submission of an I-134 is not required. Individuals or organizations wishing to submit an I-134 as proof of "financial resources commensurate with the projected medical costs of HIV+ treatment" may, of course, do so, but should be advised that an I-134 is not the only evidence that will satisfy the requirement that no cost be incurred by any government agency without its prior consent.

Should you have any questions regarding the preceding discussion, please contact the Refugee Division of the Office of International Affairs. As needed, the Refugee Division staff will contact the Administrative Appeals Unit for their guidance.


John W. Cummings
Acting Director

Attachment

cc: Administrative Appeals Unit

CO-100\8.3.2

Subject	Date
Waiver Requests from Refugees who Test Positive for Human Immuno- deficiency Virus	SEP 30 1993
To	From
All INS Overseas Offices	Office of International Affairs

This memorandum is a reminder of the HIV+ waiver procedures currently in place and the documentation that must accompany an I-602 filed by an approved refugee applicant who tests positive for the human immunodeficiency virus. Form I-602 will continue to be used for refugee waivers until such time as the new waiver form, I-724, becomes available.

Responsibilities of the District Director/Officer in Charge in HIV+ Cases

Section 207(c)(3) of the Immigration and Nationality Act provides that the Attorney General, in her discretion, may waive certain grounds of inadmissibility for refugees, including section 212(a)(1)(A)(i) which excludes aliens who have been determined to have a communicable disease of public health significance. Waivers may be granted for humanitarian purposes, to assure family unity, or when it is in the public interest. In such cases, 8 CFR 207.3(b) specifies that an Application by Refugee for Waiver of Grounds of Excludability, Form I-602, is filed with the Officer in Charge before whom the application for refugee status (I-590) is pending.

The District Director/Officer in Charge must first weigh the facts in each case and determine whether humanitarian, family unity or public interest grounds exist. Once that determination has been made, the District Director/Officer in Charge will determine whether discretion is to be exercised. Under existing guidelines--wires of 7/8/87 (CO 234-P), 3/2/88 (CO 234-P, and 8/8/88 (CO 234-C)--Immigration and Naturalization Service (INS) officers may not exercise the discretionary authority of the Attorney General unless the approved refugee applicant is able to establish that:

- (1) the danger to the public health of the United States created by his/her admission to the United States would be minimal;

Page 2

(2) the possibility of the spread of the disease created by his/her admission to the United States would be minimal; and

(3) there would be no cost incurred by any level of government agency in the United States without the prior consent of that agency.

Documentation Required to Accompany Form I-602

Before accepting an HIV+ waiver request for adjudication, a District Director/Officer in Charge should determine whether the refugee has met the preceding requirements. Waiver requests submitted without documentation that addresses each of these requirements are not properly filed and should be returned to the applicant or his/her representative.

While there are no uniform documentation requirements, the supporting materials for an I-602 should establish to the Officer in Charge's satisfaction that the refugee has been medically counseled, i.e., understands how HIV is transmitted and is aware of the precautions which must be taken to prevent its spread. It is expected that such counseling would be conducted and documented by panel physicians working with the U.S. refugee program at refugee processing posts.

Proof that no cost would be incurred by any government agency without its consent could include, but not be limited to 1) health insurance coverage under a plan held by a family member already in the United States; 2) evidence of financial resources commensurate with the projected medical costs of HIV+ treatment such as letters from a family member's employer, bank statements, recent pay stubs, or recent tax forms; 3) statements of consent from local or state health care officials with responsibility for the area in which the HIV+ applicant, if admitted, would resettle; and 4) statements from specific private or government health care and research facilities assuming responsibility for treatment.

Once the waiver application has been properly documented and filed, the District Director/Officer in Charge must put his/her decision regarding the waiver request in writing. This decision, whether an approval or denial, is to be certified to the Office of Administrative Appeals (AAU) using Form I-290C. Please note that the applicant must be afforded the appropriate period of time to respond to the certification before the entire record of proceeding (application, documentation, decision, and response of the applicant) is forwarded to the AAU.

When AAU has made a final decision, the record of proceeding will be returned to the District Director/Officer in Charge for preparation of the approval notice, if appropriate, and final processing.

Page 3

IF you require additional guidance on specific HIV+ waiver requests, you should contact the Refugee Division of the Office of International Affairs. As needed, Refugee Division staff will contact AAU for their guidance.

John W. Cummings
Acting Director

US INS
Washington, DC 20536

Routine

Unclassified

2211

08 AUG 1988

CO 234-C

Joseph D. Cuddihy

633-3320

X

OIC NAIROBI (NBK)
DIOIR ROME
BENED NBK, BETIL ROME.

REFTEL YOUR NAIROBI 17763 REGARDING UNHCR CONCERNS
ABOUT HIV-INFECTED REFUGEE APPLICANTS. THE FOLLOWING
GUIDANCE MAY BE QUOTED IN PREPARING A RESPONSE TO THE
UNHCR INQUIRY.

IN PARAGRAPH 3, YOU INDICATE UNHCR HAS ASKED WHAT THE
INS POLICY IS REGARDING HIV DENIED MEMBERS OF REFUGEE
FAMILIES ELIGIBLE TO RESETTLE IN THE U.S.

IN ORDER TO BE ADMITTED TO THE UNITED STATES, A REFUGEE
WHO IS NOT FIRMLY RESETTLED MUST ESTABLISH, AMONG OTHER

THINKS, THAT HE OR SHE IS ADMISSIBLE AS AN IMMIGRANT UNDER VARIOUS PARAGRAPHS OF SECTION 212(A) OF THE INA. (SEE SECTION 207(C)(1)). INDIVIDUALS COMING TO THE UNITED STATES WHO ARE HIV-POSITIVE ARE INELIGIBLE FOR ADMITTANCE TO THE UNITED STATES UNDER SECTION 212(A)(6) OF THE IMMIGRATION AND NATIONALITY ACT (INA). SECTION 212(A)(6) IS ONE OF THE GROUNDS UNDER WHICH REFUGEES MUST ESTABLISH ELIGIBILITY.

THE ATTORNEY GENERAL MAY WAIVE THE APPLICATION OF VARIOUS GROUNDS OF INELIGIBILITY OF A REFUGEE FOR HUMANITARIAN PURPOSES, TO ASSURE FAMILY UNITY, OR WHEN IT IS OTHERWISE IN THE PUBLIC INTEREST, IN ACCORDANCE WITH THE STATUTE, SECTION 207(A)(3) OF THE ACT.

THE BASIC POLICY STATEMENT OF THE SERVICE REGARDING
WAIVERS OF INADMISSIBILITY OF THOSE WHO ARE HIV
INFECTED UNDER VARIOUS SECTIONS OF THE INA IS CONTAINED
IN A POLICY WIRE OF JULY 6, 1987 (REFERENCE CO 234-P).
THAT POLICY IS REPEATED AGAIN FOR YOUR INFORMATION.

THERE IS NO STATUTORY AUTHORITY TO ACCEPT AN
APPLICATION FOR A WAIVER OF 212(A)(6) BECAUSE OF AIDS
IN IMMIGRATION AND PLANCE(E) VISA CASES. ALTHOUGH
THERE IS STATUTORY AUTHORITY TO WAIVE SECTION 212(A)(6)
IN REFUGEE, LEGALIZATION, AND NONIMMIGRANT CASES, THE
DISCRETIONARY AUTHORITY OF THE ATTORNEY GENERAL WILL
NOT BE USED UNLESS THE APPLICANT CAN ESTABLISH THAT (1)
THE DANGER TO THE PUBLIC HEALTH OF THE UNITED STATES
CREATED BY THE ALIEN'S ADMISSION TO THE U.S. IS

MINIMAL. (2) THE POSSIBILITY OF SPREAD OF THE DISEASE CREATED BY THE ALIEN'S ADMISSION TO THE U.S. IS MINIMAL, AND (3) THERE WILL BE NO COST INCURRED BY ANY LEVEL OF GOVERNMENT AGENCY OF THE U.S. WITHOUT PRIOR CONSENT OF THAT AGENCY. ALL DECISIONS ON WAIVER APPLICATIONS REGARDING AIDS WILL BE CERTIFIED TO THE ASSOCIATE COMMISSIONER, EXAMINATIONS, UNTIL FURTHER NOTICE.

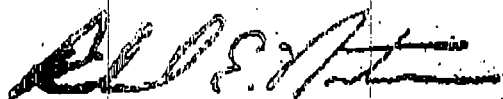
THAT POLICY WAS RESTATED IN A LATER WIRE (CO 234-P OF MARCH 2, 1988) WHICH INCLUDED INFORMATION CONCERNING HIV INFECTION AS WELL AS AIDS. THE POLICY REMAINS IN EFFECT TODAY.

IN ADDITION, THE SERVICE HAS ADVISED THE DEPARTMENT OF

STATE THAT IN THOSE CASES WHERE THE STATUTORY AND/OR POLICY CONSIDERATIONS ARE NOT MET, THE SERVICE WILL, ON A CASE BY CASE BASIS, CONSIDER THE EXERCISE OF THE ATTORNEY GENERAL'S PAROLE AUTHORITY UNDER SECTION 212(D)(5) TO EFFECT THE ENTRY OF AN HIV-INFECTED APPLICANT. PAROLE WILL ONLY BE AUTHORIZED IN THOSE CASES WHERE IT IS IN THE BEST INTEREST OF THE UNITED STATES GOVERNMENT, AS FOR EXAMPLE, TO GUARANTEE THE MEDICAL CARE OF U.S. MILITARY DEPENDANTS.

TO DATE, NO DECISIONS REGARDING HIV WAIVER APPLICATIONS IN REFUGEE CASES HAVE BEEN CERTIFIED TO THE ASSOCIATE COMMISSIONER, EXAMINATIONS. THEREFORE, NO ADDITIONAL INSTRUCTIONS HAVE BEEN ISSUED BECAUSE OF THOSE DECISIONS.

IF THE OFFICER IN CHARGE IN NAIROBI DOES NOT HAVE A
COPY OF THE TWO TELEGRAMS REFERENCED IN THIS TELEGRAM,
THEY SHOULD BE OBTAINABLE FROM THE DISTRICT DIRECTOR IN
ROME.



(CJEN)

cc: CORAP.
CORP
JIM MARTIN, DEPARTMENT OF STATE, SP/RAP

cc: Official File
NATE Log
ADJ Log

INS:COADN:SP/ADJ:433-3320:VLP:07/20/88

MEMORANDUM TO THE PRESIDENT

Subject: Haitian Refugee Processing: Endgame Issues and HIV-Positive Refugees

Termination of In-country Refugee Processing in Haiti

At the time of the intervention, we stopped accepting applications for the in-country refugee processing program. However, we permitted U.S. resettlement for the some 1500 Haitians who were approved for refugee status during the period of military rule but who could not leave Haiti prior to the intervention. We took this action primarily because these Haitians had already been informed that they would be admitted to the United States and many took measures -- e.g., selling their belongings, quitting their jobs -- in reliance of our promise of U.S. resettlement.

Hein
understand
that

HIV-positive Haitian Refugees and the Medical Exclusion

This decision still leaves 26 HIV-positive Haitians on Guantanamo Naval Base who were approved for refugee status at our processing ship in Jamaica last spring and summer but were not permitted entry when other Jamaica-approved refugees were accepted for admission. In addition, there remain in Haiti about 85 HIV-positive Haitians who were approved for refugee status in the in-country program prior to the intervention. These two groups of HIV-positive Haitians have been barred due to a medical exclusion in the Immigration and Nationality Act.

Waiver of the Exclusion

This exclusion may be waived for humanitarian, public interest or family unification reasons. However, a 1988 INS policy directive requires HIV-positive applicants to establish further that 1) the danger to the public health created by admission is minimal, 2) the possibility of the spread of the infection is minimal, and 3) there will be no cost incurred by any level of Government agency of the U.S. without prior consent of that Agency as a result of entry. The third prong of this test -- and the need to find sponsorship -- has prevented most HIV-positive refugees (including the Haitians) from gaining entry.

INS Proposal to Alter the Public Charge Requirement

INS
↓
The INS policy directive's sponsorship requirement is discriminatory, as refugees, by virtue of their status, are by legislation exempt from public charge requirements. This includes refugees with diseases more costly than HIV. For this reason, INS -- with support from State, HHS and the National

Office of AIDS Policy -- proposed earlier this year to modify its policy directive worldwide to eliminate the public charge requirement for HIV-positive refugees. INS estimates that this change would result worldwide in entry of less than 100 HIV-positive refugees each year (out of more than 100,000).

While the logic of the INS proposal is sound, implementing such a policy change in the present political climate could spur a backlash that might result in restrictive legislation, including legislation to impose public charge requirements on all refugees.

Alternatives to a Change in the Policy Directive

We have thus suggested that Justice/INS defer considering a change in its policy directive. Justice understands our position and does not disagree. At the same time, however, the Attorney General intends to take action -- without changing the existing policy directive or its sponsorship requirement -- that will result in entry of the 26 Haitians on Guantanamo and could result in the entry of some number of other HIV-positive refugees in Haiti and elsewhere around the world.

In particular, Justice has now obtained guarantees of private sponsorship for each of the 26 Haitians, thus bringing them into conformity with the requirements of the policy directive. In addition, INS will be informing the 85 others in Haiti -- who have not been able to obtain private sponsorships -- that they will be given a limited time to file or perfect their wavier applications (after which they will cease to be valid).

Finally, in the absence of a change in the policy directive, the Attorney General is prepared to provide globally, and in exceptional circumstances, an exemption from the public charge requirement for approved HIV-positive refugees. Such a circumstance might include a refugee applicant in one of our in-country programs who would be at grave risk if forced to remain in his country of origin after being approved by INS.

Discussion

We have concurred with the Justice Department's course of action for several reasons.

The Guantanamo Haitians have been outside their country of origin for between five and seven months and were formally deemed to have well-founded fears of persecution. Seeking to return a group of already-approved asylum-seekers would break new ground and would be quite controversial. To ensure basic fairness to these Haitians, the UNHCR would rightly press us to re-evaluate their cases prior to return. Such re-evaluation, as well as any

attempt to return some or all of the Haitians, would come under a court challenge similar to that which we faced last year (and which result in the compelled admission of some 200 HIV-positive refugees). ^{was settled}

An attempt to return the Guantanamo Haitians would also focus attention on the discriminatory aspect of the INS policy directive's public charge requirement. And a blanket decision to bar entry of HIV-positive Haitians who meet the existing waiver requirements would conflict with the decision to permit entry of the other Haitians approved for refugee status prior to the intervention.

Finally, we support the Attorney General's judicious use of discretion to provide an exemption to the public charge requirement in exceptional circumstances involving approved refugees. In the absence of a change in the policy directive, we believe that the Attorney General should nonetheless ensure that an applicant whom we have determined to be a refugee is not subjected to grave risks due to our unwillingness to consider entry.

~~MEMORANDUM TO THE PRESIDENT~~

Subject: HIV Positive Refugees at Guantanamo

Purpose

To obtain your guidance on issues relating to HIV-positive refugee applicants at Guantanamo Bay Naval Base.

Background

Haitians at Guantanamo

There are 27 HIV-positive Haitians on Guantanamo Naval Base who were approved for refugee status at our processing ship in Jamaica last spring and summer. However, they have remained at Guantanamo and have not been permitted entry into the United States due to a medical exclusion provision in the Immigration and Nationality Act.

This medical bar may be waived for refugees for humanitarian or public interest purposes or to ensure family unification. Since July 1987, however, the INS has applied a policy of implementing the waiver that requires HIV-positive refugees to show 1) that the danger to the public health through spread of the disease would be minimal; 2) that the possibility of spread of the infection would be minimal; and 3) that, as a result of U.S. entry, there would be no cost incurred by any level of Government agency without prior consent. The third prong -- which is not imposed on refugees with other kinds of costly diseases -- has served to prevent entry of most HIV-positive refugees, including those now at Guantanamo.

Why Consider Entry for HIV-positive Refugees at Guantanamo?

Despite the political changes that have taken place in Haiti, there are several reasons to consider entry for this small group of Haitians.

First, these Haitians have been outside their country of origin for between five and seven months and were formally deemed to have well-founded fears of persecution. Seeking to return a group of already-approved asylum-seekers would break new ground and would be controversial. To ensure basic fairness to these Haitians, the UNHCR would rightly press us to re-evaluate their cases prior to return. Such re-evaluation, as well as any attempt to return some or all of the Haitians, would come under a court challenge similar to that which we faced last year (and which resulted in the compelled admission of some 200 HIV-positive refugees).

Read
* low?

An attempt to return the Haitians would also focus attention on the discriminatory aspect of the INS policy directive's public charge requirement, as that requirement does not apply to refugees with other diseases that might be more costly than HIV.

Finally, we have recently permitted U.S. resettlement for some 1500 Haitians who were approved for refugee status in our in-country program in Haiti during the period of military rule but who could not leave Haiti prior to the intervention. We took this action ^{because} these Haitians had been informed in writing that they would be admitted to the United States and many took measures -- e.g., selling their belongings, quitting their jobs -- in reliance of our promise of U.S. resettlement. Failure to permit entry for the Haitians at Guantanamo would be compared unfavorably to our action on the others.

Options

There are essentially two options that would permit entry for this population.

Option #1:

Change the INS policy directive globally

Earlier this year, INS proposed modifying its policy directive worldwide to eliminate the public charge requirement for HIV-positive refugees. Such action would end the discriminatory treatment against AIDS sufferers who are refugees. All agencies -- State, Justice and the National Office of AIDS Policy -- supported this proposed policy shift. INS estimated that this would result, worldwide, in the entry of about 200 HIV-positive refugees (who are interviewed by INS overseas and then discovered to have the HIV virus) each year.

WHS ?
DEC.

If refugees, by virtue of their status, are exempt from public charge requirements (as they are), then this proposed change makes sense. On the other hand, implementing such a change in the present political climate could spur a backlash that might result in restrictive legislation, including legislation to impose public charge requirements on all refugees.

Option #2:

Seek sponsorship arrangements for the 27 Haitians at Guantanamo that conform to the current INS policy directive. Provide special exemptions to the INS policy directive for those among the 27 for which we cannot obtain sponsorship arrangements, as

Baker, James E.

From: Halperin, Morton H.
To: Baker, James E.; Feinberg, Richard E.; Kreczko, Alan J.; Rossin, Larry; Schwartz, Eric P.; @DEMOCRACY - Democracy Affairs; @GLOBAL - Global Affairs
Cc: /R, Record at A1
Subject: RE: [UNCLASSIFIED]
Date: Wednesday, December 14, 1994 9:34AM

I concur. There is a "because" missing which I think I have added in all caps. One question, if we think we are going to get the sponsors, would it make sense to continue to delay this memo until we see and can tell the President how many, if any, need to be brought in under the waiver. In other words, we may not have to go to the President at all. Having waited so long, why not wait a bit longer and avoid making the President deal with the issue.

From: Schwartz, Eric P.
To: Baker, James E.; Feinberg, Richard E.; Kreczko, Alan J.; Rossin, Larry; @DEMOCRACY - Democracy Affairs; @GLOBAL - Global Affairs
CC: /R, Record at A1
Subject: [UNCLASSIFIED]HIV MEMO: ANOTHER TRY
Date: Wednesday, December 14, 1994 09:09 AM

<<Attached File: HIVMEM.DOC>>

Apparently, there was some difficulty in transmitting the memo I sent you on this issue. Here is another try.

Please, your comments/concurrence asap -- Jamie, in particular.

Baker, James E.

From: Rossin, Larry
To: Baker, James E.; Feinberg, Richard E.; Kreczko, Alan J.; @DEMOCRACY - Democracy Affairs; @GLOBAL - Global Affairs
Cc: /R, Record at A1
Subject: RE: HIV memo[UNCLASSIFIED]
Date: Wednesday, December 14, 1994 9:50AM

I also concur but I agree with Mort, since you are not seeking to use the Haitian case as a vehicle to gain the general policy shift set out in option 1, you might wait for the NGO sponsorship possibility to play out.

You might redo the para starting "Under this scenario..." (second para discussing option 2) slightly to make it clear to POTUS that you are talking about a general authority to make exceptions going beyond the Haiti case. I see this, but in the hurly-burly it might not be instantly apparent to POTUS. The recommendation could also so state -- "worldwide" or some such.

Finally, there is also a missing word in the first line of that paragraph -- "...you could also permit THE Attorney General..."

From: Halperin, Morton H.
To: Baker, James E.; Feinberg, Richard E.; Kreczko, Alan J.; Rossin, Larry; Schwartz, Eric P.; @DEMOCRACY - Democracy Affairs; @GLOBAL - Global Affairs
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To: Baker, James E.; Feinberg, Richard E.; Kreczko, Alan J.; Rossin, Larry; @DEMOCRACY - Democracy Affairs; @GLOBAL - Global Affairs
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Subject: [UNCLASSIFIED]HIV MEMO: ANOTHER TRY
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well as for other HIV-positive refugees in exceptional circumstances

The Justice Department has recently been contacted by non-governmental organizations which have expressed a willingness to obtain sponsors for the 27 Haitians at Guantanamo to meet the public charge requirement. According to INS, this appears to be a bonafide offer which could result in sponsorship for all 27, and we are pursuing it actively. If we cannot obtain sponsorship for all of the 27, the Attorney General could exempt from the waiver requirement those without sponsors. Because they would be coming as refugees (and not parolees), they would access federal refugee admission monies, which would diminish significantly any impact upon the states.

Under this scenario, you could also permit ^{see} Attorney General, as a general matter, to provide exemptions for other HIV-positive refugees in exceptional circumstances. In particular, such circumstances might include a situation where we have determined that an applicant in one of our in-country programs would be at imminent risk of severe mistreatment if he or she was forced to remain in his or her country of origin. (In this respect, it is worth noting that there are about 85 HIV-positive refugees in Haiti who were approved for refugee status in our in-country program. Under present circumstances in Haiti, however, few if any of these would likely meet an exceptional circumstances test.)

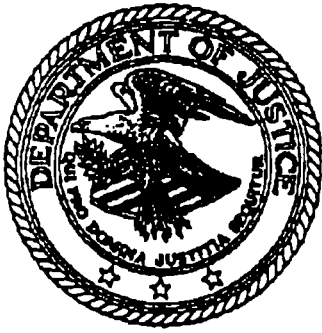
White House and NSC staff believe that you should select option 2, which the Attorney General is willing to implement.

RECOMMENDATION

That you authorize entry for the 27 Haitians at Guantanamo Bay who are HIV positive as described in option 2 and authorize the Attorney General to permit entry of other HIV-positive refugees in exceptional circumstances.

Approve _____

Disapprove _____



U. S. Department of Justice

Civil Division

November 15, 1994
10:10 pm
2 Pages

TO : Mr. Jamie Baker
National Security Council

Fax No : 94569110

From : PHILLIPG

Subject : Haitian HIV Info

Comments :

Jamie:

Attached is an e-mail explaining the current situation as we know it concerning the HIV Haitians.

--George

Date: Tuesday, November 15, 1994 3:46 pm
From: SS80(FEENEY)
Subject: hiv+ Haitians

Dave: I just spoke to Cy Winter who is head of IOM in GTMO. He said they have 27 HIV+ screened-in Haitians with 4 accompanying dependents. The problem is finding sponsors who will guarantee all medical costs associated with the HIV virus. I also spoke to Ken Leutbecker, CRS, who believes he can help find these sponsors so I gave Cy his number. Also, the Cuban repats in GTMO are interviewed exactly as you said by INS with a short interview by UNHCR. True



U. S. Department of Justice

Civil Division

November 15, 1994
11:43 pm
26 Pages

TO : Mr. Jamie Baker
National Security Council

Fax No : 94569110

From : PHILLIPG

Subject : HIV Haitian Questions

Comments :

Jamie:

Attached is the appellate memo that was prepared in the HIV Haitian case requesteing permission to appeal and explaining why we thought the district court's decision was wrong.

--George

FWH:REK:MJS:RMLoeb
D.J. 39-52-561

(202) 514-4332

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Haitian Centers Council, Inc., et al. v.
Chris Sale, Acting Commissioner, INS, et al.,
No. 92-CV-1258 (E.D.N.Y. June 8, 1993)
(Johnson, J.).

TIME LIMITS

The district court entered a permanent injunction on June 8, 1993. A notice of appeal is due on August 9, 1993.

RECOMMENDATIONS

The Department of State recommends appeal (the memorandum in support of the recommendation will follow shortly).

The Immigration and Naturalization Service recommends appeal (the memorandum in support of the recommendation will follow shortly).

The Department of Defense recommends appeal.

The Department of Transportation recommends appeal on the First Amendment access issue (assuming that an appeal is otherwise being taken), and has no objection to an appeal on the remaining issues.

The United States Attorney's recommendation will follow shortly.

I recommend appeal.

QUESTIONS PRESENTED

I. Whether the judgment should be vacated as moot.

II. Whether the district court erred in holding that the government violated the First Amendment rights of the Haitian service organizations by denying them access to the Haitians being held in custody at the Naval Base on Guantanamo, Cuba.

III. Whether the district court erred in holding that the rescreening procedures and treatment of the detained Haitians violated their Fifth Amendment Due Process rights.

IV. Whether the court erred in holding that the Attorney

General abused her discretion by not paroling the Haitians being held on Guantanamo into the United States.

V. Whether the Haitian plaintiffs' due process claims are barred by collateral estoppel.

STATEMENT

1. Executive Order 12324 required the interdiction of aliens attempting to enter this country illegally by sea. See 46 Fed. Reg. 48109 (1981). Pursuant to that Order, the United States entered into an agreement with the government of Haiti, permitting U.S. officials to interdict Haitian vessels suspected of transporting illegal immigrants and to return the interdicted migrants to Haiti. T.I.A.S. No. 10,241 (1981). The Executive Order provided, however, that "no person who is a refugee will be returned without his consent." Id., 2(c)(3). The Order directed the Attorney General to "ensure the fair enforcement of our laws relating to immigration * * * and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." Id., 3. The Immigration and Naturalization Service ("INS") carried out the responsibilities of the Attorney General of determining whether the interdictees may qualify as "refugees" under the Executive Order.

Beginning in 1981, the INS processed interdicted Haitians by conducting an initial "screening" interview, the purpose of which was to determine whether the alien has a credible fear of persecution if returned to Haiti, and may therefore qualify for "refugee" status. See 8 U.S.C. 1101(a)(42) (1980) (defining the term "refugee"). This screening procedure was generally carried out aboard Coast Guard cutters. Persons found not to possess a "credible fear of return" were "screened out" at this stage and repatriated to Haiti without further proceedings. Persons who were found to possess a "credible fear of return" were "screened in" and generally brought to the United States under the Attorney General's parole power, so that they could pursue formal asylum requests pursuant to 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1158. See Haitians Centers Council, Inc. v. McNary, 969 F.2d 1326, 1330-1131 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, No. 92-528 (S. Ct. June 28, 1993) (HCC I). Since October 1991, the INS has "screened in" more than 10,500 Haitians and brought them to the United States. District Court Order dated June 8, 1993 ("D. Ct.") at 12.

2. During the period from November 1991 through February 1992, the INS conducted the "credible fear" screening of interdicted Haitians at the U.S. Naval base at Guantanamo, Cuba. Use of the Naval Base was necessitated by the massive influx of thousands of migrants following the military coup on Haiti and complications engendered by preliminary injunctive relief in the Haitian Refugee Center, Inc. v. Baker ("HRC") litigation, which

temporarily barred the repatriation of "screened-out" Haitians. See HCC I, 929 F.2d at 1330-1331 (detailing the HRC litigation). Between November 1991 and July 1992, approximately 36,000 Haitians were processed through Guantanamo. D. Ct. 16 n.5.

4. Soon after the INS operations at Guantanamo began, the State Department sought out third countries in which the Haitians could be relocated. Two countries, Belize and Honduras, offered to provide limited assistance, but insisted that the migrants first be tested for the Human Immunodeficiency Virus ("HIV"), the virus associated with Acquired Immunodeficiency Syndrome ("AIDS"). D. Ct. 12. The United States acceded to these requests, and tested some of the Haitians, disclosing the presence of the virus in a number of the migrants.

Under 8 U.S.C. 1182(a)(1), aliens are excluded from admission into the United States if they have a communicable disease of public health significance. The Public Health Service has in the past considered the HIV to be such a communicable disease. More recently, Congress enacted an express requirement that HIV be treated as a communicable disease of public health significance under 1182(a)(1); see Pub. L. 103-43, 2011(a) (June 14, 1993). Based upon the statutory exclusion from admission, INS decided not to immediately bring the HIV-infected Haitians to the United States solely on the basis of the initial screening result. Notwithstanding the medical exclusion, the Attorney General has the authority to "parole into the United States temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States * * *." 8 U.S.C. 1182(d)(5)(A). To determine whether use of the parole power was appropriate in particular cases, INS decided to conduct more thorough second "rescreening" interviews to assess the medically-excludable aliens' claims to refugee status. INS intended the conduct of these second interviews to be generally analogous to those conducted in the United States, but without counsel or any of the formal rules applicable to asylum proceedings under 8 U.S.C. 1158.

5. In March 1992, plaintiffs -- several Haitian service organizations, a Haitian who had been "screened out," several Haitians who had been "screened in" and detained on Guantanamo, and several of their immediate relatives -- filed the present class action in the United States District Court for the Eastern District of New York. Plaintiffs claimed that the interdiction program was illegal and that the government's refusal to allow Haitian service organizations to have access to Haitians on board Coast Guard cutters and at Guantanamo Bay violated the First Amendment and the aliens' Fifth Amendment due process rights. See D. Ct. 4-5; HCC I, 969 F.2d at 1331-1332.

On April 6, 1992, the district court entered a preliminary injunction, holding that: 1) the plaintiffs who had been

screened out, and the class of those similarly situated, could not sue because they were bound by the previous adverse ruling in the HRC case; 2) the denial of access appeared to be a content-based speech restriction in violation of the First Amendment; and 3) that the Fifth Amendment applied to the Haitians being held on Guantanamo. The district court ordered the government to allow access by the Haitian service organizations, and barred the government from repatriating, interviewing or "rescreening" any Haitian who had been screened-in until he or she was given an opportunity to consult with counsel.

We appealed the preliminary injunction to the Second Circuit. In June 1992, the court of appeals issued a decision vacating the portion of the district court's ruling requiring the government to provide access to attorneys on Guantanamo, but affirmed the rest of the order. See HCC I. We filed a petition for certiorari from the court of appeals' decision.

6. While the Second Circuit appeal was pending, there was a major change in the government's interdiction policy. The prior policy of interdicting Haitians and screening them at sea was encouraging more and more Haitians to take to the seas, often in dangerous or unseaworthy vessels, in order to emigrate to the United States. To stop this dangerous situation, on May 23, 1992, the President issued a new Executive Order, permitting the Coast Guard to return Haitians interdicted beyond the territorial waters of the United States without any screening. See 57 Fed. Reg. 23,133 (1992). Currently, under this new policy, the processing of refugee claims is being handled in Haiti at the U.S. Embassy.

Plaintiffs asked the district court to enjoin the new policy, arguing that it violated the INA, Article 33 of the U.N. Convention relating to the Status of Refugees, and the 1981 U.S.-Haiti Executive Agreement. The district court denied plaintiffs' request for a preliminary injunction, and plaintiffs immediately appealed to the Second Circuit. The court of appeals reversed the district court, see HCC v. McNary, 969 F.2d 1350 (2d Cir. 1992) ("HCC II"), and on remand the district court entered an injunction barring implementation of the new policy. The Supreme Court then granted our motion for a stay of the injunction, and, subsequently, granted our petition for certiorari to decide the lawfulness of the new policy.

7. Notwithstanding the pending certiorari petition in HCC I and the grant of certiorari in HCC II, the district court proceeded to trial on plaintiffs' claims (except those claims regarding the new Executive Order). See D. Ct. 7-9. Among the issues raised by plaintiffs' amended complaint addressed at trial were: 1) whether Haitian service organizations' First Amendment rights were violated by denying them access to the Haitians detained on Guantanamo; 2) whether the denial of access violated the detained Haitians' First and Fifth Amendment rights to obtain

and communicate with counsel; 3) whether the medical conditions, indefinite detention and punishment of the detained Haitians violate their Fifth Amendment due process rights; 4) whether the rescreening of the detainees was in violation of the law; and 5) whether the Attorney General was acting arbitrarily and capriciously by continuing to detain the HIV-infected Haitians.

On June 8, 1993, the district court issued a decision and permanent injunction.

a. As an initial matter, the court certified the class of:

All Haitian citizens who have been or will be 'screened-in' -- including those who have been or may be subject to or who have resisted additional screening procedures -- who are now, will be or have been detained on Guantanamo Naval Base, or any other territory subject to United States jurisdiction or Coast Guard cutters.

The court held that this class of screened-in Haitians was not barred by the outcome of the HRC case from maintaining this action. The court explained that the HRC case involved different parties (screened-out Haitians), different claims, and different circumstances. D. Ct. 24-25.

b. The court ruled the government violated the service organizations' First Amendment rights by denying them access to the Haitians held on Guantanamo. The court held that the organizations had been denied access because "of the viewpoint of the message they seek to convey." The court said that such discrimination "against disfavored viewpoints strikes at the heart of the First Amendment." D. Ct. 27. The court distinguished the case Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374 (2d Cir. 1990), which held there was no right of access to an alien in custody, on the grounds that (1) here the Haitians had already hired the organizations to represent them, (2) the access was sought without government expense, and (3) numerous other people, other than the Haitian service group lawyers, have been allowed to visit and advise the detained Haitians. D. Ct. 27. Accordingly, the court "permanently enjoined [the government] from denying Haitian Service Organizations immediate access at Guantanamo, on Coast Guard Cutters, or at any place subject to U.S. jurisdiction to any member of the class of Screened In Plaintiffs * * *, subject to reasonable time, place and manner limitations * * *. D. Ct. 52.

c. Next, the district court held that the Fifth Amendment Due Process clause applies to the Haitians being held on Guantanamo because they are being detained by the United States government on territory controlled by the United States. D. Ct. 28-31. The court further held that the screened-in Haitians have

a protected liberty interest in not being wrongly repatriated, and that this liberty interest cannot be denied without adequate due process. D. Ct. 31. The court held that this due process right required the government to provide the screened-in Haitians all of the process that is available to an asylum applicant in the United States, including the right to counsel, notice, and administrative and judicial review. D. Ct. 32-34.

The court also held that the plaintiffs' Due Process rights include the right to "reasonable medical care." D. Ct. 34. The court said that, at a minimum, the Due Process clause forbids the government from being "deliberately indifferent" to the medical needs of non-convicted detainees. D. Ct. 35. The court found that the refusal to evacuate those individuals with T-cell counts of or below 200 (classified as having "full-blown AIDS," D. Ct. 18 n.6), despite inadequate facilities to treat such people on Guantanamo, evidenced deliberate indifference. D. Ct. 36.

The court further held that the "administrative segregation," used at Guantanamo to punish detainees, violates the detainees' Due Process rights because there is no written notice of charges, no hearing or right to call witnesses, and no impartial decisionmaker.

The court then held that plaintiffs have a protected liberty interest in not being indefinitely detained. The court said that plaintiffs' continued detention was the result of the government's action, not the aliens' own choices. D. Ct. 38. The court noted that there had been no indication by the INS when a final parole decision would be made or what would happen to those who were denied parole but nonetheless demonstrated a well-founded fear of persecution if returned to Haiti. The court found that the government had failed to "demonstrate to this Court's satisfaction that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers." D. Ct. 39. The court concluded that, the "Haitians' plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court." Id.

Based upon all of these Due Process holdings, the court permanently enjoined the "well-founded-fear" rescreening, disciplinary proceedings, medical care conditions, and indefinite detention, and ordered that the screened-in plaintiffs "be immediately released (to anywhere but Haiti) from such processing, proceedings, detention, medical care and camp conditions." D. Ct. 51.

d. Citing government admissions that the rescreening interviews were not authorized by either the refugee determination or asylum determination provisions of the INA (207 and 208), the court held that the rescreening was in excess of statutory authority. D. Ct. 41-44. The court explained that the Attorney General's parole authority to temporarily admit other-

wise excludable aliens "does not authorize establishment of a system contrary to Congress' intent and intentionally targeted at persons who would be eligible to participate in the asylum process [established by Congress] but for the fact that the government interdicted them." D. Ct. 44. The court added that the parole power cannot be used to deny the plaintiffs their statutory rights under 207 and 208 of the INA. Id.

e. Finally, the court addressed the Attorney General's failure to exercise her parole power to release plaintiffs from detention. D. Ct. 44-50. The court explained that, although the Attorney General has broad discretion in exercising her parole power, her discretion is limited and may not depart from established policies without a rational explanation. Further, the court held the Attorney General's parole decisions are subject to review under the Administrative Procedure Act.

Here, the court found that the Attorney General abused her discretion on three grounds:

First, the court found that the failure to parole plaintiffs amounted to invidious discrimination. The court pointed out that the bar on admission of aliens with communicable diseases had not been strictly enforced in the past. The court stated that the ban against HIV admission has only been applied to these Haitians.

Second, the court found that the refusal to parole these plaintiffs presented an unjustified deviation from past parole policy. The court cited the parole regulation, 8 C.F.R. 212.5, which lists factors to be taken into account in determining whether parole would be in the public interest. The court noted that the regulation allows parole for emergent reasons and for serious medical conditions. Ct. 46-47. The court ruled that failing to parole these plaintiffs based on their medical conditions under this regulation was an abuse of discretion.

Third, the court held that the denial of parole based upon the HIV status of plaintiffs was an improper consideration. The court held that the statutory bar against admission of HIV-infected aliens does not mandate exclusion in all cases, and does not bar or impair the Attorney General's parole power (because parole is not "admission" into the United States). The court further found that the entry of plaintiffs to the United States would be "unlikely to affect to spread of AIDS in this country," and that their medical condition could not be used to justify their continued "imprisonment" on Guantanamo. D. Ct. 49.

Based upon these findings, the court ordered "that the Attorney General's exercise of the statutory parole power under INA

215(d)(5) to deny Screened In Plaintiffs parole out of

detention be permanently enjoined, held unlawful and set aside pursuant to the Administrative Procedure Act." D. Ct. 51.

8. Shortly after the district court's decision, the Haitians on Guantanamo were brought to the United States pursuant to the district court's order.

9. Thereafter, on June 21, 1993, the Supreme Court issued its decision upholding the lawfulness of repatriating Haitians interdicted on the high seas. See Sale v. HCC, No. 92-344 (S. Ct. June 21, 1993).

10. After the district court entered its permanent injunction, we informed the Court that, in light of the permanent injunction, the petition for certiorari in HCC I from the preliminary injunction was now moot. We explained that the proper disposition now was to grant certiorari, and vacate the Second Circuit's HCC I judgment as moot. On June 28, 1993, the Court followed our suggestion, granting our HCC I certiorari petition and vacating the Second Circuit's judgment as moot. See Sale v. HCC, No. 92-528 (S. Ct. June 28, 1993).

DISCUSSION

I. THE PROSPECTIVE IMPLICATIONS OF THE DISTRICT COURT'S RULING.

The district court's opinion establishes several troublesome precedents -- i.e., extending due process rights (including the right to counsel) and the right to seek review of parole decisions to aliens outside of the United States, and holding that counsel and service organizations have a First Amendment right to have access to aliens lawfully detained outside of the United States. However, the precedential value of this district court opinion may not, by itself, require an appeal, since we remain free to argue against the court's legal rulings in any future cases (not involving the same class) -- even in the same district. Nonetheless, this lengthy opinion is one of the few recent precedents on several important legal issues, and we could fully expect it to be used against us in future cases (cases which are likely to arise in an emergency context). Still, the most pressing consideration is not necessarily the adverse precedent, but the actual continuing impact of the district court's ruling.

Although we have complied with the court's order by bringing in all of those Haitians on Guantanamo to the United States, the court's ruling still raises several problems for future handling of interdicted Haitians. The plaintiff-class of "screened-in Haitians" is open-ended, and to the extent that, now or in the future, the Administration wishes to return to some form of

screening for refugees before returning interdicted Haitians,¹ the court's legal rulings would be binding upon us. Indeed, the district court's decision, if left standing, could possibly interfere with the application of the Administration's proposed summary exclusion legislation to future interdicted Haitians. The decision confers extensive procedural rights to future interdicted Haitians which are not afforded under the proposed legislation.

There are three significant prospective constraints imposed by the district court's decision:

A. The court ordered the government to allow counsel and organizations access to the screened-in Haitians, even upon Coast Guard cutters. Thus, under the court's order, if we begin screening again, we will have to be ready to provide counsel access to the screened-in Haitians -- albeit subject to reasonable time, place and manner restrictions. It is possible that plaintiffs will try to construe the court's order to allow access before the screening (because the plaintiff-class includes those who will be screened in). However, even without extending the ruling to include access to Haitians before screening, this part of the court's decision could be considered to be an unacceptable imposition upon the military and Coast Guard. Obviously, access before screening would pose a far more significant intrusion and could also threaten to taint the screening process.

B. Once we "screen in" any Haitians in the future, the court order requires the government to provide them with the full panoply of procedural and appeal rights that apply to asylum determinations made in the United States. These procedural rights may be inconsistent with the recently proposed summary exclusion legislation. Absent the proposed legislation, however, this ruling may only have minimal prospective effect. Our general policy over the last decade has been to bring the screened-in Haitians to the United States, where they receive all of those rights required by the district court in any event. The only constraint imposed on our actions is limited to screened-in Haitians who we do not bring to the United States. In the past that has primarily involved individuals who are statutorily excluded from admission under the INA (e.g., the medically excludable HIV-Haitians).

¹ Even if the democratically elected regime is peacefully returned to power in Haiti, there is still a reasonable expectation that the Administration may want to return to some form of screening, which was successfully used for almost a decade.

As to the excludable individuals, the prior Administration's policy was to use less formal rescreening interviews so that the Attorney General may assess, on a case-by-case basis, whether she should exercise her parole power to bring them into the United States. This less formal process is now precluded by the district court's decision. Our options under the district court's order would appear to be to provide full procedural and appeal rights outside of the United States, or to simply bring all screened-in Haitians into the United States for processing.

C. The district court's order required us to parole in those Haitians with the HIV being held in Guantanamo. The court also held that holding them in detention for an indefinite time period violated their Due Process rights. These rulings could have on-going effect. It is possible, if not probable, that if we return to screening, we will again be faced with a number of screened-in Haitians who are medically, or otherwise, statutorily excludable. In such instances, the INS may want to detain these individuals outside of the United States, at least until the Attorney General can make an informed parole decision. However, plaintiffs could argue that the district court's decision mandates that these individuals be paroled into the United States. Indeed, with respect to any Haitians detained outside of the United States solely because of their HIV status, such an argument would be quite compelling.

Thus, despite our compliance with the district court's order, by bringing the Haitians on Guantanamo to the United States, and our recent Supreme Court victory, the district court's order still impairs the Administration's ability to screen interdicted Haitians in the future to determine whether they have credible refugee claims. Indeed, the existence of this order, coupled with our victory in the Supreme Court, has the ironic effect of making the rigid policy of summary repatriation largely immune to judicial challenge, while leaving any more flexible policy vulnerable to review.

The Administration requires the flexibility to deal with any and all future contingencies that may occur in Haiti, and should have the option to utilize a less harsh policy than summary repatriation in future crises. For more than a decade, screening has been deemed a necessary and effective method of dealing with interdicted Haitians, and this Administration should have the latitude to return to such a policy, if and when it chooses, without the constraints of this district court decision. Moreover, the constraints imposed by the district court could contribute to the continuation of the policy of summarily repatriating individuals who may have wholly valid refugee claims. While this policy is lawful, and in some instances may be necessary (e.g., to stem the tide of a mass emigration), it certainly should not be forced upon the Administration. Accordingly, these

constraints on screening imposed by the district court are sufficient to warrant an appeal in the present case.

However, it is important to realize that an appeal is not without risk. The Second Circuit already rejected many of our arguments when we appealed the preliminary injunction in this very case. Even though that prior appellate decision does not control here, and has been formally vacated as moot, it is a substantial indicator that we should not overestimate our chances on appeal. If we fail to secure reversal on all or part of the district court order on appeal, we will not obtain the desired practical result (to be freed of the constraints placed on the government by the district court's ruling) and may in fact harm our situation by creating an adverse court of appeals precedent, with only a limited chance of obtaining Supreme Court review.² Nevertheless, given the intrusiveness of the district court's order, the importance of these issues, and the strength of our arguments (discussed below),³ I still believe that an appeal is warranted.

II. APPEAL ISSUES.

A. Mootness And Vacating The Judgment.

We have a good argument that the judgment here should be vacated as moot. However, to do so, we will have to invoke the "prudential mootness" doctrine.

1. We should argue that the court's judgment, as far as it extends to the Haitians who were held on Guantanamo and the service organizations' right to access to Guantanamo, is now moot. Under the compulsion of the district court's injunctive order, we brought all of the Haitians on Guantanamo to the United States. Thus, now, the issues addressed by the district court -- the right to counsel to have access to the Haitians on Guantanamo, and those Haitians' rights to due process and to be paroled into the United States -- are all moot as to these Haitians because they are now physically present in the United States without any restriction on these rights. There simply is no on-going Article III case or controversy between these plaintiffs and the United States. See Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

² Given that the crisis regarding the Haitian refugees has diminished, and the fact that we have already complied with the district court's order as to the Haitians on Guantanamo, the Supreme Court could very well deny a petition for certiorari.

³ Even if the court of appeals upholds all or part of the district court's rulings, there is at least some practical benefit in knowing what the law is in that circuit.

The court of appeals may be attracted to this type of a mootness argument. Many of the issues here are inherently tied to the unique circumstances and conditions that existed at Guantanamo. For example, the question of whether there was viewpoint discrimination in the access restrictions on Guantanamo simply has no future application. The camps used to house the Haitians on Guantanamo have been closed, and there are no plans to use that military base for those purposes in the future. Moreover, even if there were future detainments of interdicted Haitians, it is wholly speculative what our access policy would be. To the extent that any of these issues do arise again in the future, there is no reason to believe that it would evade review. Thus, there is no constitutional controversy anymore regarding the Haitians who were on Guantanamo, or the right of the service organizations to gain access to Guantanamo in order to counsel the Haitians, and there is strong pragmatic inclination to simply end this case now by declaring the controversy moot.

If the court of appeals holds that the matter is moot, it should vacate the underlying ruling. See New York City Employees' Retirement System v. Dole Food Co., 969 F.2d 1430 (2d Cir. 1992). Cf., Reich v. Contractors Welding of Western N.Y., Inc., slip op., No. 92-4181 (2d Cir. June 24, 1993) (demonstrating the Second Circuit's strong position in favor of vacating an order on appeal that has become moot). There are cases holding that vacation is not proper when an appellant's own compliance moots the dispute. Indeed, our amicus brief recently filed in Izumo Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., No. 92-1123 (S. Ct.), seems to support those cases. See Izumo amicus brief at p. 13 n.12. However, the Second Circuit appears to be willing to vacate under such circumstances. See New York City Employees' Retirement System, 969 F.2d at 1434-1435 (vacating the district court's order where the defendant's compliance with the injunction mooted the controversy). We can also argue that it was not our compliance with the injunction that mooted the case but, rather, the improved political situation in Haiti and the Supreme Court's decision of June 21, 1993, sustaining the lawfulness of the government's current policy of summarily repatriating all interdicted Haitians without any screening. Without these occurrences, we would likely still be screening interdicted Haitians.

2. The main problem with any mootness argument raised here is that the district court's order clearly still prospectively governs how we treat future screened-in Haitians. Even though the Administration may lawfully return the Haitians interdicted in the future without any screening, there is a strong possibility that the Administration will return to screening in the future. Hence, as a constitutional matter, it is hard to argue that the whole dispute here is truly moot. See New York City Employees' Retirement System v. Dole Food Co., 969 F.2d at 1434 (compliance with an injunctive order will not moot the case if some part of the controversy remains).

Nevertheless, we can argue that even the prospective portion of the judgment should be vacated under the "prudential mootness" doctrine. The D.C. Circuit has held that when a court exercises its equitable discretion in fashioning prospective declaratory or injunctive relief in a case that is not technically moot under Article III, but where the prospective controversy is attenuated, "considerations of prudence and comity for coordinate branches of government" may "counsel the court to stay its hand, and withhold relief it has the power to grant." Chamber of Commerce v. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980). See also City of New York v. Baker, 878 F.2d 507, 509-510 (D.C. Cir. 1989); Alton & Southern Ry. Co. v. Int'l Assoc. of Machinists & Aerospace Workers, 463 F.2d 872, 877-882 (D.C. Cir. 1972). The D.C. Circuit has further held that it is appropriate to invoke "prudential mootness" where there is uncertainty as to whether the prospective relief will actually benefit the party alleging injury, or where the case involves premature adjudication of constitutional issues. See Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1001, 1019-1020 (D.C. Cir. 1991). These same types of factors are employed by other courts, including the Supreme Court, without the title of "prudential mootness," in assessing whether a court abused its discretion in issuing prospective injunctive or declaratory relief. See e.g., United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). The result of such concerns can be the vacating of the district court's judgment (or at least the prospective portion of the judgment). See City of New York v. Baker, 878 F.2d at 510; Alton & Southern Ry. Co., 463 F.2d at 882.

All of these "prudential mootness"/abuse of discretion factors would appear to support the vacation of the prospective rulings here:

a) The prospective controversy here is plainly speculative and attenuated. We are not screening interdicted Haitians at the present time, and there is no current plan to return to screening. Even if we do return to a policy of screening, it may take on a completely different form and carry different implications for the interdicted Haitians. Furthermore, as discussed above, it is wholly speculative to assume that if Haitians are detained, there will be viewpoint discrimination in the access restrictions. Moreover, the "liberty interests," based upon the legitimate expectation of being brought to the United States after being screened in, which was relied upon by the district court in extending due process rights, is simply inapplicable if the screening process is different or serves a different role in the future. Finally, the question of whether prospective parole decisions, regarding Haitians who may be interdicted and detained in the future, will be an abuse of discretion is baseless conjecture.

b) Comity to the coordinate branches regarding the handling of future interdiction and detainment of aliens is mandated by well-established precedent. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Shaughnessy v. United State ex rel. Mezei, 345 U.S. 206, 210 (1953); Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Here, the district court's prospective order interferes in our handling of sensitive foreign affairs and immigration matters. As a prudential matter, a court should be reluctant to pass judgment and enter permanent injunctive orders based upon this speculative and uncertain context. Cf., Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985).

c) The prospective relief awarded may actually make potential future class members worse off because it deters us from screening at all.

d) The court's prospective rulings prematurely adjudicate important constitutional and statutory issues based upon speculative future events and conditions.

Based upon these factors, we should argue that the prospective relief granted here should also be vacated, or, in the alternative that extending the judgment prospectively was an abuse of discretion.⁴

3. It might be argued that there is some risk in running this mootness argument. For example, it is possible, but in our view highly unlikely, that the court could hold that our appeal is moot, but still not vacate the judgment below. However, I still recommend pressing the argument on appeal.

First, the mootness argument is our one and only sweeping argument that could, by itself, completely free us from this adverse district court decision. Our merits arguments are strong on some issues, but uncertain on others. The mootness argument provides a threshold position that would relieve the court of appeals from even having to reach these sensitive merits issues. At bottom, the argument bolsters our chances of ultimately prevailing here and should be made.

⁴ It is, however, not enough simply to vacate the prospective relief. Either the entire judgment must be vacated or, at least, the judgment extending prospective relief (e.g. the prospective access to coast guard cutters). Otherwise, the service organizations and the future screened-in Haitians could argue that we are precluded by collateral estoppel from relitigating these issues against them.

Second, the court will expect the parties to address the question of mootness. Unless we are willing to argue that the restoration of the conditions on Guantanamo is likely (which no one is advertng), the court, sua sponte, may very well consider the case at least partially moot. It is better to take the offensive on the issue and strongly seek to link mootness with vacation rather than to run the risk of the court simply dismissing portions of our appeal as moot. The issue of vacation is complex; either we brief it thoroughly and aggressively, or we run a serious risk.

B. First Amendment.

The district court's First Amendment access holding may be difficult to successfully attack on appeal. In our previous briefs on appeal from the preliminary injunction, we attacked the First Amendment ruling on the ground that it was extraordinary to hold that someone has a right to enter a U.S. military base on foreign soil for the purpose of speaking with lawfully detained aliens. We argued that a military base is a non-public forum, and that the government was, therefore, permitted to restrict access to the base. Further, we claimed that the access restrictions at Guantanamo were rational and not based on the speaker's viewpoint. We explained that the other persons who had been given access were permitted on the basis of the distinct purposes of such access, and not on the basis of their viewpoint.

Our present appeal would be more demanding. When issuing the permanent injunction, the district court made a specific factual finding that access was being denied at Guantanamo based upon the speaker's viewpoint. The court found that the government allowed access to the Haitians by many others and that the Haitians were being given legal advice (often incorrect advice) by government officials (military, INS and even military doctors) and others, but that the government did not allow access by their lawyers because of their viewpoint. See D. Ct. 14, 26-27.

The courts have recognized that military bases are traditionally non-public forums, and the courts have been very protective of the government's right to restrict access and speech on a military base. See e.g., Greer v. Spock, 424 U.S. 828 (1976). Further, the courts have also refused to extend to lawyers the First Amendment right to have access or counsel aliens being lawfully detained by the government. See Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374, 1380-1382 (D.C. Cir. 1990). Indeed, in the HRC litigation, the Eleventh Circuit held that the members of the Haitian Refugee Center had no First Amendment right to enter Guantanamo to counsel Haitians being detained there. See HRC v. Baker, 953 F.2d 1498, 1511-1515 (11th Cir. 1992). However, the courts have never held that the government may discriminate among speakers based upon their viewpoints. See HRC, 953 F.2d at 1512 n.7 (noting that HRC had not made a claim of viewpoint discrimination). Even in a non-

public forum, the government cannot restrict speech based on the speaker's viewpoint. See Lamb's Chapel v. Center Moriches School Dist., No. 91-2024, slip op. at 8 (S. Ct. June 7, 1993).

Here, an appeal will be more difficult because of the finding of viewpoint discrimination. There is still a reasonable chance of at least successfully challenging the ruling as to access to Coast Guard cutters. There was absolutely no finding of discriminatory access to the cutters. Such a partial reversal would enhance our ability to freely screen Haitians on the cutters in the future, without undue burden. However, such a partial victory would still establish a very unfavorable court of appeals precedent -- upholding a First Amendment right to enter a military base on foreign soil to meet with aliens being lawfully detained there.

To achieve full reversal of the court's First Amendment ruling, we will also have to attack the viewpoint discrimination finding. That finding was based upon the perception that the government was letting numerous people see the detainees and that some of these people would provide them with legal advice from the government's prospective. However, this misconstrues the situation. Access was restricted against counsel because of the government's position that: 1) access should be limited to only those personnel performing essential services; and 2) that counsel services would interfere with the informal nature of the rescreening interviews. Numerous individuals with views highly favorable to the Haitians were allowed access. The access restriction turned on the service to be performed by the individual, not their viewpoint. It should make no difference that in fact some of the people who were allowed access may have discussed legal issues with the Haitians. The access was still not restricted based on the speakers' viewpoint or the particular content of what they might actually say.

Moreover, the district court's position -- that if aliens discuss legal issues with government officials, then the government must allow access by counsel -- is untenable. The processing of detained aliens by INS officials will quite frequently involve discussions of the legal consequences and events with the aliens. Under the district court's view, because of those discussions, almost every alien detained by the government outside of the United States would have the right to counsel. That proposition was squarely rejected in the Eleventh Circuit in HRC and the D.C. Circuit in Ukrainian-American Bar Ass'n.⁵

⁵ The district court attempted to distinguish the D.C. Circuit's Ukrainian decision on the grounds that in that case the counsel in question did not yet have a formal relationship with the alien and wanted access at the government's expense. However, these were not the factors underlying that decision. Rather, the D.C. Circuit simply held that the alien had no right

Further, this reasoning, taken to its logical conclusion, would require the government to permit counsel to have access to an alien seeking refugee status at an embassy overseas if the embassy officials discuss the alien's legal status.

Thus, the district court's finding regarding viewpoint discrimination does not necessarily insulate it from appeal, and we still have reasonable arguments and good cause to contend that the First Amendment ruling in its entirety was in error.

C. Due Process.

The district court's Due Process holdings are subject to the same arguments we pressed in our prior appeal and in our certiorari petition. We cited numerous cases holding that even an excludable alien who is physically present within the United States -- let alone an alien who has not yet made it to our shores -- has no Due Process rights regarding his immigration status. See Landon v. Plasencia, 459 U.S. 21, 32 (1982); United States ex rel. Knauff v. Shaughnessy, 338 U.S. at 542; Mezei, 345 U.S. at 210; Jean v. Nelson, 727 F.2d at 964-968. See also Gisbert v. United States Attorney General, 988 F.2d 1437, 1442-1443 (5th Cir. 1993) (holding that a detained alien has no liberty interest in being paroled, and no Fifth Amendment right to procedural Due Process). These cases plainly undermine the district court's ruling here that screened-in aliens being held abroad have a Fifth Amendment liberty interest in being properly processed for entry into the United States.

The district court's remaining Due Process rulings address the conditions upon Guantanamo and the right to not be indefinitely detained without just cause. These rulings seem more likely to be deemed moot because they are keyed to the unique facts that existed upon Guantanamo with the lengthy detention of the HIV-positive Haitians. However, the extension of Due Process rights to aliens being detained abroad is a dangerous precedent. Thus, in addition to arguing that this part of the order is now moot, we should also attack the rulings on their merits. On the merits, we have two primary arguments:

- 1) There is a possible argument that aliens outside of the United States are not even allowed to sue the federal government in federal court. See Johnson v. Eisentrager, 339 U.S. 763, 777-778 (1950) ("The privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over

to counsel and that counsel had no right to speak to the alien. Ukrainian-American Bar Ass'n, 893 F.2d 1377.

which the United States is sovereign.").⁶ However, there are numerous reported cases where aliens abroad were permitted to challenge governmental action. See Jean v. Nelson, 727 F.2d at 973 (citing cases). Indeed, the Supreme Court's decision in HCC II (Sale v. HCC) decided the merits of plaintiffs' claims, rather than hold, as we argued, that plaintiffs' claims were precluded from review in federal court. In our brief to the Supreme Court in HCC II, we argued that the only plausible basis for jurisdiction could be the Administrative Procedure Act, and that judicial review was precluded under that Act because the INA impliedly forecloses review. See Brief for Petitioners 13-18. Notwithstanding our argument, the Court proceeded to review the merits of our summary repatriation policy.⁷

2) Even if aliens outside of the United States can bring suit in federal court against federal officials, we should still contend that they cannot base their claims upon the Fifth Amendment. The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (discussing Johnson v. Eisentrager). The Court in Johnson v. Eisentrager observed that "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view." 339 U.S. at 784. More recently the Court, while acknowledging that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," United States v. Verdugo-Urquidez, 494 U.S. at 271, relied on Eisentrager in

⁶ Although the plaintiff in Johnson was an enemy alien, the Court's opinion makes clear that this fact was not determinative. The Court's prior decisions in Ex parte Quirin, 317 U.S. 1 (1942), and In re Yamashita, 327 U.S. 1 (1946), had permitted the filing of habeas corpus petitions by enemy aliens held within the United States and in the Philippines, an area then within the sovereign jurisdiction of the United States. The Johnson Court distinguished these cases on precisely this basis, see 339 U.S. at 779-80, demonstrating that it was Eisentrager's location outside of the United States -- not his status as an enemy alien -- that precluded him from obtaining access to our courts.

⁷ We note that the sweeping argument based upon Johnson -- that an alien abroad cannot sue at all in federal court -- was not made in our brief. Similarly, the argument was not raised in our certiorari petition in HCC I. We did, however, raise this argument before the district court here.

"reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." Id. at 269.

In light of the fact that the Supreme Court reached the merits in HCC II, we do not recommend pressing the first of these arguments to challenge the district court's due process ruling. We do, however, believe that it is important to raise the second argument. No doubt, the argument that aliens abroad cannot base their claim upon the Fifth Amendment is harsh, in that it leaves open the possibility of egregious abuse without redress in federal court. See D. Ct. 30 (noting that without Due Process protection government officials could, without redress, deliberately starve or beat the detained Haitians). However, extending Due Process rights to aliens abroad is a virtual Pandora's Box. Indeed, in this case and the HRC case, even the temporary extension of rights to the interdicted Haitians substantially impaired the Executive Branch's ability to deal with the Haitian crisis. Further, this district court ruling could be used in later cases to claim Due Process rights for aliens at United States embassies abroad, or other aliens being held at/or outside a point of entry.

D. Parole.

The Attorney General is authorized under 8 U.S.C. 1182, with limited exceptions, in her "discretion to parole into the United States temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest any aliens applying for admission into the United States." The courts have held that the Attorney General's parole decision are reviewable, but must be upheld as long as there is a "facially legitimate and bona fide reason" supporting the decision. See Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982). The Second Circuit has also held that in making a parole decision, the Attorney General's "discretion may not be exercised to discriminate invidiously against any particular race or group or to depart without rational explanation from established policies." Id., 684 F.2d at 212-213. However, the "burden of proving that [parole] discretion was not exercised or was exercised irrationally or in bad faith is a heavy one and rests at all times on the unadmitted aliens challenging denial of parole." Id. at 213.

Here, although there was no expressed reason for denying or delaying parole to the detained Haitians, the plain reason was that they were statutorily excludable aliens, under 8 U.S.C. 1182(a)(1)(A), because of their HIV status. See p. 3, supra. Despite the fact that the HIV positive Haitians are statutorily excluded from admission into the United States, the government's position is that the Attorney General still could use her parole power to bring them into the United States (because 1182(5)(A)

refers to "any alien").⁸

The parole regulations state in "determining whether or not aliens who have been or are detained in accordance with [8 C.F.R.] 235.3 (b) or (c) will be paroled out of detention, the district director should consider the following," and then the regulation proceeds to list several factors. The first factor is:

The parole of aliens who have serious medical conditions in which continued detention would not be appropriate would generally be justified by "emergent reasons."

8 C.F.R. 212.5(a)(1). Here, the district court held that the Attorney General had departed from this regulation by failing to parole in the Haitians with HIV. The court further held that the failure to parole them in amounted to an unjustified deviation from past practice. This parole ruling should be challenged at both a broad and specific level.

1. Our broad argument addresses the serious concern raised by the district court's extending the "right" to review parole decisions to cases where the alien is physically outside of the United States. If Haitians being held at Guantanamo have the right to review the Attorney General's "failure" to parole them into the United States, then any alien abroad seeking asylum in the United States would equally appear to have such rights. While most parole matters involve aliens detained in the United States under 8 C.F.R. 235.3, the INS does on occasion grant "advance" parole to aliens coming to the United States. See 8 C.F.R. 212.5(e). See also 2 Immigration Law and Procedure, 64.02. The district court's reasoning here would allow an alien abroad the right to challenge the denial of an advance grant of parole. Further, the district court's ruling could even permit aliens seeking refugee status at an American embassy to challenge the denial of advance parole.

Moreover, if parole decisions regarding aliens abroad are reviewable, future parole decisions regarding Haitian

⁸ Once a medically excludable alien is paroled into the United States, he may seek an asylum hearing under 8U.S.C. 1158. If he is granted asylum, he can thereafter seek to be officially "admitted" to United States under 8U.S.C. 1159. However, because he is statutorily medically excludable, he cannot be granted "admission" unless the Attorney General grants a waiver under 8U.S.C. 1159(c). See Gordon and Mailman, 2 Immigration Law and Procedure, 33.04[1][e][iii] (rev. ed. 1993). The admission can be important because without an official admission to the United States the refugee is subject to return if in the future the conditions supporting the refugee status change.

interdictees and others being processed for "advance" parole would have to be much more formal in nature. Although parole decisions are reviewed under the deferential "facially legitimate and bona fide reason" standard, courts have still required INS to support its parole decisions with an adequate record. See Marczak v. Greene, 971 F.2d 510, 517 (10th Cir. 1992). Indeed, the Tenth Circuit recently held that a district court may not only review the record to determine whether it supports the parole decision, but may hold its fact-finding hearing as part of the review. Id. at 518.

Our primary argument is that parole decisions regarding aliens outside of the United States are not reviewable in federal court.⁹ These extra-territorial parole decisions are very much akin to refugee determinations made as to aliens abroad -- e.g., at an American embassy. Such extraterritorial refugee determinations (i.e., a determination to conditionally admit an alien so that he may apply for refugee status, see 8 C.F.R. 207; 2 Immigration Law and Procedure, 34.01[4]) have always been considered unreviewable in federal court. Cf., Yui Sing Chun v. Sava, 708 F.2d 869, 875 (2d Cir. 1983); Wan Shih Hsieh v. Kelly, 569 F.2d 1179, 1181 (2d Cir. 1978). See also Kleindienst, 408 U.S. at 766.

We should also argue that parole power does not extend to aliens abroad. The decision as to an interdicted Haitian who is paroled in by the Attorney General is properly characterized as a decision to bring the alien to a point of entry, where he will be paroled. The actual final, reviewable parole decision does not come into effect until the alien is physically present in the United States. The INS parole regulations support this view. Section 212.5(a), which sets out the standards for parole, is limited to detentions under section 235.3 (b) or (c), which both address the detention of aliens at a point of entry or where the alien is physically present in the United States. See 8 C.F.R. 212.5(a), 235.3 (b)-(c).

⁹ We could also contend, as discussed above (pp. 15-16, supra), that an alien abroad has no right to even sue federal officials in federal court. Even if that restriction were to be limited to immigration claims (see Jean v. Nelson, 727 F.2d 972-975 (distinguishing the non-immigration cases which permitted aliens abroad to invoke constitutional rights), seeking review of a parole decision would still clearly fall within the litigation prohibition. See Clark v. Smith, 967 F.2d 1329, 1331 (9th Cir. 1992) ("an alien's freedom from detention [by the grant of parole] is only a variation of the alien's claim of an interest in entering the country"); Jean v. Nelson, 727 F.2d at 963 (the decision whether to parole "an excludable alien is an integral part of the admission process"). However, as discussed above, we do not recommend that argument on appeal.

This argument is also supported by our victory in Sale v. HCC, No. 92-344, slip op. (S. Ct. June 21, 1993). In Sale, the Court relied heavily upon the presumption that "Acts of Congress do not ordinarily apply outside our borders." Slip op. at 17. Consistent with that presumption, we should argue that the Attorney General's statutory and regulatory parole powers only extend to aliens detained within the United States or at a point of entry. The only problem with this argument is that, in fact, as discussed above, the Attorney General does on occasion employ "advance parole" for aliens outside of the United States.¹⁰ We could still rely on the presumption, nonetheless, because INS considers advance parole to simply provide an alien the right to present himself at the border. The actual parole decision is not effectuated until the alien actually reaches the point of entry. See 2 Immigration Law and Procedure, 64.02[3] (the INS advance parole form (Form I-512) speak in terms of parole "upon arrival").

2. In addition to our broad argument regarding the review of extra-territorial parole decisions, we should also challenge the specific findings and holdings here supporting the district court's parole ruling.

a. There is a forceful argument that the district court erred in issuing a class-wide parole ruling. Parole is a discretionary decision by the Attorney General and is never mandated under any particular facts. See Gisbert, 988 F.2d at 1443. The regulatory parole standards relied upon by the district court are not an exhaustive list of factors to be considered. See Marczak, 971 F.2d at 515. At bottom, the parole decision are made on an individualized basis. See Jean v. Nelson, 472 U.S. 846, 857 (1985); Marczak, 971 F.2d at 515 (holding that the determinations must be individualized). Thus, review of a parole decision should ordinarily be made on an individualized, as opposed to a class, basis. Cf., Jean v. Nelson, 727 F.2d at 979 (suggesting that the district court reconsider the propriety of class treatment in review of the Attorney General's parole discretion).

Here, the facts supporting each detained Haitian's claim to parole were different. The strength of the refugee claims, the U.S. familial connections, and the medical conditions of each varied considerably. Taking into account these individual facts, the Attorney General did voluntarily parole in a number of the detainees on humanitarian grounds (mostly pregnant women). In this context, where parole decisions are made on an individualized basis, there simply is no basis for ordering

¹⁰ While advance parole is sometimes used as to aliens outside of the United States, it is much more frequently granted to aliens in the United States who are going abroad and want an assurance of being paroled in when they return.

class-wide relief.

b. Moreover, there was never any formal denial of parole or a formal statement of reasons why individuals were not being granted parole. The district court here should have, at most, ordered the Attorney General to formally exercise her discretion and develop an adequate record.

c. We should also attack the court's finding that parole was compelled under the regulation (quoted above, p. 17) regarding aliens with serious medical conditions. First, this regulation does not compel the parole of persons with serious medical conditions. Second, and more importantly, it is absurd to read this regulation to require the parole of statutorily medically excludable aliens. Under the district court's construction, most, if not all, of those aliens excluded from admission, under 8 U.S.C. 1182(a)(1), because they have a communicable disease of public health significance, would also qualify for parole into the United States under the regulation's "serious medical condition" standard. It is a bizarre construction of the regulation to read it to require the physical admission of those statutorily excluded from admission by Congress, based upon the very reason they are statutorily excluded.

d. Under the Second Circuit's precedent in Bertrand v. Sava, 684 F.2d at 212-213, the Attorney General's parole decisions must be upheld if there is a legitimate and bona fide basis. Here, the fact that these individuals are statutorily excluded from admission certainly is a legitimate and bona fide reason for not bringing them into the United States in the first instance. While the Attorney General still may have the power to parole a medically excludable aliens into the United States, it is appropriate, out of deference to Congress, to at least ensure that there are compelling reasons supporting the parole. Thus, we should argue that there was a legitimate basis here for denying or delaying the grant of parole.

e. Further, we should argue that it was wholly proper for the Attorney General to "rescreen" the individuals to determine whether parole was warranted. The district court was correct in stating that the rescreening was not a procedure provided for by statute. However, the statute does not define how the Attorney General shall exercise her parole powers. See 8 U.S.C. 1182(d)(5)(A); 2 Immigration Law and Procedure, 64.02[1]-[2]. As discussed above, the parole decisions are to be made on an individualized basis, and it certainly makes sense for the individualized decision to be an informed one. There is no statutory limit on the numbers of time the Attorney General (acting through her agents) can "screen" or interview the parole candidate before arriving at a determination.

The district court's bar on the conduct of "rescreening" interviews is not only clearly incorrect, it also creates an

unfavorable precedent. Currently, we are facing a new interdiction situation with Chinese aliens. The Administration may wish to screen the interdicted Chinese by distributing questionnaires to assist in determining whether any might qualify as refugees. This district court ruling could easily be invoked by those Chinese who are "screened-in" to bar any "rescreening" before the Attorney General exercises her parole power.

f. The district court also clearly erred in finding that the government only barred these HIV Haitians from admission and did not enforce the bar elsewhere. The evidence presented below clearly demonstrated that all refugees applying for admission are tested for HIV. See Transcript 517-518. Further, as a matter of law, when an alien is applying for refugee status abroad, he cannot be approved until he is given a full medical examination. See 8 C.F.R. 207.2(c); 2 Immigration Law and Procedure, 34.01[4][c][iv]. If the applicant is found to be HIV positive, then he cannot be approved unless he receives a waiver of the statutory exclusion. See 8 C.F.R. 207.3(b). Thus, the court was clearly incorrect in holding that the statutory exclusion against HIV aliens is only being enforced against Haitians.

E. Collateral Estoppel.

Finally, one of the primary arguments raised in our prior appeal from the preliminary injunction, and in our certiorari petition, was that the Haitian plaintiffs were collaterally estopped from arguing that they have either First Amendment or Due Process rights to allow them access to counsel, in light of the adverse disposition of those issues in the HRC litigation. We argued that the HRC class included all interdicted Haitians (including the Haitian plaintiffs here), and that because these issues were raised in the HRC case and rejected, the Haitian plaintiffs could not relitigate the issues here.

The collateral estoppel argument would not help us on either the First Amendment or parole rulings. That is because HCC and the other service organizations were not parties to the HRC litigation and hence cannot be bound to the HRC First Amendment ruling, and the parole issue was not raised or litigated in the HRC case.

Moreover, the argument has little chance of success given its reception in the prior rounds of this litigation. Not only did the Second Circuit reject our collateral estoppel argument in the now vacated HCC I, 969 F.2d at 1334-1338, it also rejected it in HCC II, 969 F.2d at 1354-1357. On certiorari from the HCC II decision, we raised collateral estoppel as one of our primary arguments in favor of reversal. See Brief for Petitioners, pp. 18-27. While the Supreme Court ruled in our favor on the merits -- holding that the government may lawfully repatriate aliens interdicted on the high seas without screening them for refugee status -- the Court completely ignored our collateral estoppel

argument. In its thirty-two page opinion, the Court never even mentions our argument, despite its prominence in our briefs. In that context, it is possible to construe the Court's ruling as implicitly rejecting our collateral estoppel argument (because, ordinarily, a court will reach issue preclusion issues first before reaching the merits of the case).

Even though we could raise collateral estoppel again in this appeal, we should not devote too much attention to this argument. Having lost twice on the issue already in the Second Circuit and having received a possibly implicit rejection of our argument in the Supreme Court, the prospect that a new panel of the Second Circuit will now embrace our argument would be hoping for too much. Thus, we suggest merely raising the issue to preserve it in case of a need for further review.

CONCLUSION

For the foregoing reasons, I recommend appeal.

FRANK W. HUNGER
Assistant Attorney General
Civil Division

PRIVILEGED WORK PRODUCT

TIME SENSITIVE:

PLEASE REVIEW AS SOON AS POSSIBLE

MEMORANDUM TO SAMUEL BERGER

THROUGH: MORT HALPERIN, DICK CLARKE

FROM: ERIC SCHWARTZ

CONCURRENCE: JAMIE BAKER

SUBJECT: GTMO Litigation and Policy Issues Relating to Haitians

Justice has identified a number of issues that could arise in the context of Cuba/Haitian litigation as early as this week and that raise serious policy considerations. As I think you know, advocates for the Haitians have sought to intervene in the Cuba litigation and have been given provisional permission to do so.

In order to best represent the government's legal view and preserve policy options, it would be very useful -- in advance of their consideration by the courts -- to consider a number of policy issues which we had in some cases purposefully put off. If we adopt certain policies and rule out others, the courts may be persuaded to step back from the litigation and let U.S. policy run its course. The alternative would be to risk having the courts decide these policy issues.

This memorandum seeks your agreement on recommended positions on five issues.

1. Parole

Issue: the Haitian plaintiffs will likely ask for an order granting Haitians parity with Cubans on parole decisions -- children, the elderly and medical hardships.

Recommendation: Parity is not required as a matter of law. In view of our position that the Haitians have a relatively stable and democratic country to which they can return, we think we can also make a good faith distinction on policy grounds and should do so.

2. Request for a permanent injunction granting parole to all pregnant Cuban

Recommendation: If we believe that there is adequate medical care at GTMO and Panama (as we do), we think we need to oppose this for the time being. If we decide to expand parole to children and accompanying relatives, we may wish, as a matter of policy, to revisit this question.

3. HIV-positive Haitians at GTMO.

Issue: There are between 20 and 30 HIV-positive approved refugees at GTMO, and, with the recent influx of lawyers into GTMO, we expect that these Haitians will shortly sue for admission. We will then probably re-live many of the unpleasant issues we confronted with the HIV-GTMO litigation last year.

As I mentioned in a previous memo to you, I was told that a decision was taken last week (while I was away) to bring in Haitians approved for refugee status prior to the intervention.

As I understand it, however, there was no decision taken on what to do with those among these Haitians who are HIV-positive.

As you will recall:

1. there are about 80 HIV-positive approved refugees remaining in Haiti;
2. there are between 20 and 30 HIV-positive approved refugees at Guantanamo; and
3. an INS proposal to ease a waiver requirement for HIV-positive refugees worldwide would probably result in entry of most of these refugees. (All relevant agencies approved the INS proposal.)

How do you want to deal with the HIV issue at this point? In particular, if you want an HIV memo for the President, do we assume that the prior question (what to do with refugees approved prior to the intervention) has been resolved?

In view of the litigation, I need to hear from you as soon as possible.

4. Voluntary repatriation

Issue: We expect that the plaintiffs for the Haitians will request an order similar to that issued by the Court of Appeals regarding Cuban migrants: no repatriation unless a migrant signs a form that such repatriation is voluntary. They could make this request on their own initiative or as a result of any further

efforts at Haitian repatriations -- either voluntary or involuntary. Such a request will likely result in entry of an order similar to the existing order with respect to the Cubans -- no repatriation unless it is voluntary.

This will immediately raise the issue of our policy on involuntary return of the remaining 5000 or so Haitians and Justice would like guidance on this question.

Discussion: State and Defense have different views on the issue of involuntary return of Haitians at GTMO. DOD's position is that, with the change in Haiti, everyone should go back and that this should happen as quickly as possible. They argue that we need not bother to assess claims of those who might express fears of return; with thousands of troops in the country, return is safe.

State's position is that we should not force anyone back, but that we should continue to emphasize voluntary return. Those who refuse to go back (as well as those few who continue to leave Haiti by boat) should be given the option of returning to Haiti or going to our facility in Suriname (which State would be willing to finance). State reasons that given these choices, the overwhelming majority would return to Haiti.

State makes a number of arguments in favor of its position.

- Safe haven is the only migration policy we have tried with Haiti that works -- that meets the concerns of the immigration control community as well as the NGOs and the UNHCR.
- Safe haven has resulted in very small outflows, which will be even further reduced with a democratic government in Haiti.
- If we forcibly return Haitians, we should screen them before doing so if we want to avoid renewed criticism from the UNHCR and NGOs (which will contrast forced return of Haitians with our policy toward Cubans), and if we wish to ensure that we are not returning any bonafide refugees. (State argues that there may well continue to be some small number of refugees from Haiti.) However, screening will create expectations of U.S. resettlement which we want to avoid; safe haven avoids creating such expectations.

Evaluation: These issues have very important policy consequences and require more detailed briefing of you as well as Deputies level review which may not be possible prior to your departure. At the same time, it is to our advantage to be in a position to answer the court's questions and we therefore propose interim

responses below. If you agree, we think you need to work them with John Deutch. We can take care of State and Justice.

Do we tell the Court that we seek to retain the option of involuntary return?

This is an easy call. We should retain the option of involuntary return and can easily distinguish the Haitians from the Cubans as the former are returning to a country led by a democratically elected government.

What do we tell the Court about when we will begin such involuntary return and what procedures we will implement prior to such returns?

To preserve our options, we would recommend that we say the following:

- Our safe haven policy has demonstrated that we are deeply committed to the welfare and well-being of Haitians who feared civil conflict and persecution in Haiti.
- There are now thousands of U.S. troops in Haiti, a democratically elected government and conditions of much greater peace and stability that have permitted thousands to return voluntarily.
- While, under U.S. law, we could involuntarily return all of remaining Haitians, we have instead emphasized voluntary return as a further demonstration of our willingness to deal with this population with sensitivity.
- Nonetheless, as a matter of policy, we may indeed need to move to involuntary return of those who can return to their country of origin but refuse to do so.
- In implementing such action, we will, as a matter of policy, continue to consult closely with the UNHCR and others to ensure against return of bonafide refugees who might face risk of persecution in Haiti.

Discussion

To be sure, this response may oblige us to conduct some sort of (undefined) review prior to forced return. But it has several important advantages:

- It binds us to a policy of basic fairness which we should support on the merits.
- It will help us to avoid criticism from NGOs, UNHCR and others. (UNHCR has expressed deep concern that we will undermine the significant gains we made with adoption of safe haven if we return to direct return without any sort of assessment prior to return.)
- Our stated commitment to fairness may help to dissuade the courts from imposing equitable remedies that are probably wrong on the law but which the courts feel obliged to impose on fairness grounds. (I have run this specific point by DOJ counsel who concurs.)

Again, if you agree with the proposed course of action, you need to speak with John Deutch to ensure DOD is on board.

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SUBJECT: GTMO Litigation and Policy Issues Relating to Haitians

Justice has identified a number of issues that could arise in the context of Cuba/Haitian litigation ~~as early as this week~~ and that raise serious policy considerations. (As you know, advocates for the Haitians have sought to intervene in the Cuba litigation and have been given provisional permission to do so.)

In order to best represent the governments's legal view and preserve policy options, it would be very useful if we could provide policy guidance on the following questions. ~~More importantly, it is possible that by adopting certain~~ In adopting

This memorandum seeks your agreement on recommended positions on five issues. ~~Certain policies and ruling out others~~

1. Parole

Issue: the Haitian plaintiffs will likely ask for an order granting Haitians parity with Cubans on parole decisions -- children, the elderly and medical hardships.

Recommendation: Parity is not required as a matter of law. In view of our position that the Haitians have a democratic country to which they can return, we think we can make a good faith distinction on policy grounds as well. ~~we may encourage the courts~~ ~~may be persuaded to step back from the litigation and let U.S. policy run its course.~~

2. Request for a permanent injunction granting parole to all pregnant women

Recommendation: [Mort, is this OK?] If we believe that there is adequate medical care at GTMO and Panama (as we do), we think we need to oppose this. ~~Moreover, any such order~~ ~~has obvious repercussions for embassy~~

3. Request for an order permitting Cubans at GTMO with visas to come directly to the United States

Recommendation: Mort???

4. HIV-positive Haitians at GTMO.

when to be screened
Issue: There are between 20 and 30 HIV-positive approved refugees at GTMO, and we expect that they will shortly sue for admission.

with the recent "influx" of lawyers to GTMO is no longer.
 As I mentioned in a previous memo to you, I was told that a decision was taken last week (while I was away) to bring in Haitians approved for refugee status prior to the intervention.

As I understand it, however, there was no decision taken on what to do with those among these Haitians who are HIV-positive.

As you will recall:

1. there are about 80 HIV-positive approved refugees remaining in Haiti;
2. there are 39 HIV-positive approved refugees at Guantanamo; and
3. an INS proposal to ease a waiver requirement for HIV-positive refugees worldwide would probably result in entry of most of these refugees.

How do you want to deal with the HIV issue at this point? In particular, if you want an HIV memo for the President, do I assume that the prior question (what to do with refugees approved prior to the intervention) has been resolved?

In view of the litigation, I need to hear from you as soon as possible.

5. Voluntary repatriation

Issue: We expect that the plaintiffs for the Haitians will request an order similar to that issued by the Court of Appeals regarding Cuban migrants: no repatriation unless a migrant signs a form that such repatriation is voluntary.

This issue could arise in a number of ways. For one thing, the District Court -- when it learned that we planned to return some Haitians voluntarily -- issued a TRO against such action. Should we seek to have that TRO removed (as we did with the Cuban TRO), the Court of Appeals would then undoubtedly consider the issue of voluntary versus involuntary return.

or wish to preserve that option
 If we are going to ~~take the view that we do plan to~~ involuntarily return Haitians from GTMO, our litigators should know, so that they can prepare to distinguish the two groups and factual scenarios before the courts. As a matter of law, Justice believes that involuntary repatriation (with or without screening)

but the passage³ of time will have significant pol'g costs
is permissible under US law and that we will ultimately win on the law. Justice also believes that as long as the lawsuit is pending, more Haitians will not volunteer to return.

Discussion: State and Defense have different views on the issue of involuntary return of Haitians at GTMO. DOD's position is that, with the change in Haiti, everyone should go back. State's position is that we should not force anyone back, but that we should continue to emphasize voluntary return. Those who refuse to go back (as well as those few who continue to leave Haiti by boat) should be given the option of returning to Haiti or going to our facility in Suriname (which State would be willing to finance). State reasons that given these choices, the overwhelming majority would return to Haiti.

State makes a number of arguments in favor of its position.

- Safe haven is the only migration policy we have tried with Haiti that works -- that meets the concerns of the immigration control community as well as the NGOs and the UNHCR.
- Safe haven has resulted in very small outflows, which will be even further reduced with a democratic government in Haiti.
- If we forcibly return Haitians, we will have to screen them before doing so if we want to avoid renewed criticism from the UNHCR and NGOs (which will contrast forced return with our policy toward Cubans), and if we ensure that we are not returning any bonafide refugees. However, screening will create expectations of U.S. resettlement which we want to avoid; safe haven avoids creating such expectations.

Evaluation: These issues require more detailed briefing of you as well as Deputies level review which may not be possible prior to your departure. At the same time, ~~we do need to be in a position to give the Court answers to the following questions.~~ Here are my recommendations. If you agree, I think you need to work them with John Deutch. I can take care of State and Justice.

Do we tell the Court that we seek to retain the option of involuntary return?

This is an easy call. We should retain the option of involuntary return and can easily distinguish the Haitians from the Cubans as the former are returning to a country led by a democratically elected government.

What do we tell the Court about when we will begin such involuntary return, and what procedures we will implement prior to such returns. *should we announce such a policy before the courts*

To preserve our options, I would recommend that we say the following:

- Our safe haven policy demonstrated that we are deeply committed to the welfare and well-being of Haitians who feared persecution in Haiti. *act (and so advise the Court (s))*
- There are now some 15,000 U.S. troops in Haiti, a democratically elected government and conditions of much greater peace and stability that have permitted thousands to return voluntarily.
- While, under U.S. law, we could ~~have~~ involuntarily returned all of these Haitians, we have ~~rather~~ emphasized voluntary return as a further demonstration of willingness to deal with this population sensitively. *with*
- Nonetheless, as a matter of policy, we may indeed need to move toward involuntary return of those who can return to their country of origin but refuse to do so.
- In implementing such action, we will, as a matter of policy, continue to consult closely with the UNHCR and others to ensure against return of bonafide refugees who would face risk of persecution in Haiti.

Discussion

To be sure, this response may oblige us to conduct some sort of (undefined) review prior to forced return. But it has several important advantages:

- It binds us to a policy of basic fairness which we should support on the merit.
- It will be help us to avoid criticism from NGOs, UNHCR and others.
- Our commitment to fairness may help to dissuade the Court of imposing equitable remedies that ~~are~~ *may be* wrong on the law but which they feel obliged to impose on fairness grounds.

Again, if you agree with the proposed course of action, you need to speak with John Deutch to ensure DOD is on board.

Baker, James E.

From: Baker, James E.
To: Halperin, Morton H.; Malley, Robert; Longoria, Michael A.; Schwartz, Eric P.; Rossin, Larry
Cc: /R, Record at A1; Kreczko, Alan J.; Wolin, Neal S.
Subject: GTMO Litigation: Issues [UNCLASSIFIED]
Date: Tuesday, November 08, 1994 10:25AM

ATTORNEY-CLIENT PRIVILEGED

Justice has identified a number of issues that could arise in the context of the Cuba/Haitian litigation this week that raise serious policy considerations. In order for litigators to best represent the government's legal view and preserve its policy options it is important that we provide guidance on the questions presented below as soon as possible. A follow-on lawyers meeting is scheduled for Wednesday.

1. Parole: The Haitian plaintiffs will likely ask for an order granting Haitians parity with Cuban migrants on parole decisions, i.e., parole for children, the elderly and medical hardships. This argument would likely be cast as an equal protection, due process, abuse of discretion claim.

NOTE: DOJ is not aware that the Administration has ever been asked, or considered parole concessions for Haitians. As a matter of law, parity is not required, although it is not clear how a five member CA panel would come out on this issue. Further, the scenarios are factually different – Haiti is a democracy, Cuba is not, etc.

2. Voluntary Repatriation: Haitian plaintiffs will likely ask for an order similar to that issued by the Court of Appeals regarding Cuban migrants: no repatriation unless a migrant signs a form that such repatriation is voluntary.

NOTE: If policy-makers are considering, or are going to take, a different view, i.e., involuntary repatriation of Haitians, it would be useful for litigators to know now, so that they can prepare to distinguish the two groups and factual scenarios before the courts and be careful to preserve options if asked on the record, e.g., the Haitian case is distinguishable for among other reasons because we were offering safe haven from a regime whose days were numbered and therefore repatriation requires different analysis. As a matter of law, Justice believes involuntary repatriation is legally available and that we will ultimately win on the law if enjoined. It is also the lawyers' view that so long as this lawsuit is pending, more Haitians will not volunteer to return.

In the event, we were to get an injunction against involuntarily repatriating Haitians beyond the 14 Haitians already covered are we prepared to say to the court(s) that Haiti is in fact stable and safe in an effort to oppose? Are we considering moving to a policy of involuntary return? When? Are we prepared to repatriate before UNMIH. At what point will the sewage situation at GTMO dictate policy?

3. Request for a permanent injunction granting parole to all pregnant women.

4. Cuban plaintiffs may request an order permitting Cubans at GTMO with visas to come directly to the U.S. from GTMO.

5. Due Process and other Constitutional Rights: While litigators think the law is clear, if not necessarily the results, on the issues above, the question of migrant due process rights to a particular standard of conditions at GTMO is a tougher question. For example, do migrants have a DP right to a particular standard of medical care, or safety. That we are providing safe haven to migrants and are not holding them against their will, does not end the discussion as there is a body of law, which courts may choose to apply to GTMO, involving the conditions of persons who voluntarily put themselves in state custody. Further, some groups of migrants, such as children and unborn babies, are not in a position to exercise the types of choices that makes one's presence in GTMO

voluntary. Bottom line: it is not likely at all that we will get the votes in the Court of Appeals or S.Ct. that the only rights that apply to migrants at GTMO are non-enforceable standards under international law. Indeed, it is not clear this is a position Justice litigators are prepared to take as a matter of law. Clearly, there are remedies available other than bringing migrants to the U.S., but planners should consider and anticipate a requirement to provide additional doctors, or facilities to improve conditions at GTMO.

6. 22 HIV Haitians. We understand that there remain 22 screened in HIV Haitians at GTMO. Lawyers consider it a matter of time, and short time given the availability of additional attorney access to GTMO, before these 22 sue for admission. Do we have plans to admit them?

As noted above, your feedback on these matters is greatly appreciated.

ATTORNEY-CLIENT PRIVILEGED



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 1994

VIA FACSIMILE

Mr. Morton Halperin
Mr. Jamie Baker
National Security Council

Mr. Allen Weiner
Ms. Michele Klein Solomon
Department of State

Mr. Joel Klein
Mr. Cliff Sloan
Office of the General Counsel
The White House

Mr. Stephen Preston
Office of the General Counsel
Department of Defense

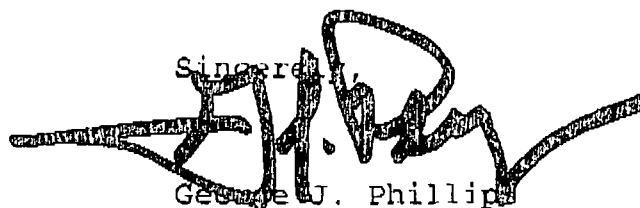
Re: Cuban American Bar Association, Inc., et. al. v.
Christopher, et. al., Case No. 94-2183.

Sirs and Madam:

Attached is the ~~Eleventh Circuit's~~ Order which grants "in part Appellants' Motion to the extent ... it enjoins repatriation of Cuban detainees presently at 'Camp November,' Guantanamo Bay and who have requested to be returned to Cuba." The Eleventh Circuit ordered that we were "to communicate forthwith the fact of the entry of this stay to the affected detainees residing at 'Camp November.'"

The oral argument is still scheduled tomorrow on our motion for summary reversal, or, in the alternative, for an emergency stay pending appeal.

Sincerely,



George J. Phillips

Attachment

cc: Frank W. Hunger
Seth Waxman

IN THE UNITED STATES COURT OF APPEALS FILED
FOR THE ELEVENTH CIRCUIT U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-5138

NOV 3 1994

GUEL J. CORTEZ
CLERK

CUBAN AMERICAN BAR ASSOCIATION, INC., CUBAN
LEGAL ALLIANCE, INC., DUE PROCESS, INC., LIZBET MARTINEZ,
ARIANNA GONZALEZ NOBAEZ, et al.,

Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., GARRY JOSEPH,
PAULOMME EDMOND, PIERRE ONEL ANTOINE,
VOIDIEU JEAN LOUIS, BERGELINE JEAN LOUIS,
PADECI JEAN LOUIS,

Provisional Intervenor-Appellees,

versus

WARREN CHRISTOPHER, Secretary of State,
WILLIAM J. PERRY, Secretary of Defense, DORIS
MEISSNER, Commissioner, Immigration and
Naturalization Service, JANET RENO, Attorney
General, IMMIGRATION AND NATURALIZATION SERVICE,
BRIGADIER GENERAL MICHAEL WILLIAMS, Commander Joint
Task Force,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, BIRCH and CARNES, Circuit Judges.

Given the emergency nature of this matter, the court will hear oral argument on the appellants' motion for summary reversal, or, in the alternative, for an emergency stay pending appeal (or a writ of mandamus) on Friday November 4, 1994, at 1:30 p.m. as previously scheduled.

The appellants are hereby instructed to communicate forthwith the fact of the entry of this stay to the affected detainees residing at "Camp November."

BY THE COURT:

Pending before the court are appellants' motion for an emergency stay pending further appeal of the district court's order in Case No. 94-2183-CIV-ATKINS dated October 31, 1994, denominated "Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order,"¹ ("Appellants' Motion") and appellees' motion to dismiss the appeal. This court deems the district court's order to be a preliminary injunction conferring jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Accordingly, we deny appellees' motion to dismiss the appeal.

This court hereby grants in part Appellants' Motion to the extent that in Par. 1(b) it enjoins repatriation of Cuban detainees presently at "Camp November," Guantanamo Bay and who have requested to be returned to Cuba. This stay shall remain in effect until further order of this court.

We are concerned that without such a stay of the district court's injunction the likelihood of the loss of life will continue. Indeed, it appears from the record in this case² that loss of life may have already occurred as a result of reaction to the district court's injunction barring repatriation.

¹The October 31, 1994 injunction, by its terms, forbids the continuing repatriation of those Cubans who have affirmatively requested that they be returned to sovereign Cuba from Guantanamo Bay Naval Base.

²See Declaration of Lt. Colonel Randy Garver, Commander of the 716th Military Police Battalion dated October 30, 1994, and Declaration of Lt. Colonel Randy Garver dated November 1, 1994, attached to this order.



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 7, 1994

VIA FACSIMILE

Mr. Morton Halperin
Mr. Jamie Baker
National Security Council

Mr. Allen Weiner
Ms. Michele Klein Solomon
Department of State

Mr. Joel Klein
Mr. Cliff Sloan
Office of the General Counsel
The White House

Mr. Stephen Preston
Office of the General Counsel
Department of Defense

Re: Cuban American Bar Association, Inc., et. al. v.
Christopher, et. al., Case No. 94-2183.

Dear Sirs and Madam:

Attached is the Order that the Eleventh Circuit released today.

Sincerely,

George J. Phillips

Attachment

cc: Frank W. Hunger
Seth Waxman

11/07/94 12:28 FAX 404 331 3785

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002/004

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-5138

NOV 7 1994

MIGUEL J. CORTEZ
CLERK

CUBAN AMERICAN BAR ASSOCIATION, INC., CUBAN
LEGAL ALLIANCE, INC., DUE PROCESS, INC., LIZBET MARTINEZ,
ARIANNA GONZALEZ NOBAEZ, et al.,

Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., GARRY JOSEPH,
PAULOMME EDMOND, PIERRE ONEL ANTOINE,
VOIDIEU JEAN LOUIS, BERGELINE JEAN LOUIS,
PADECI JEAN LOUIS,

Provisional Intervenor-Appellees,

versus

WARREN CHRISTOPHER, Secretary of State,
WILLIAM J. PERRY, Secretary of Defense, DORIS
MEISSNER, Commissioner, Immigration and
Naturalization Service, JANET RENO, Attorney
General, IMMIGRATION AND NATURALIZATION SERVICE,
BRIGADIER GENERAL MICHAEL WILLIAMS, Commander Joint
Task Force,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, BIRCH and CARNES, Circuit Judges.

BY THE COURT:

The court denies the appellants' motion for summary reversal with respect to the order of the district court entered on October 31, 1994 denominated "Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order" ("the Injunction"). The parties are instructed to file briefs on the schedule set out below.

This court hereby stays all of the district court's injunctive relief set out in the Injunction except as hereafter provided:

- (a) defendants shall afford reasonable and meaningful access for legal counsel (i.e., officers of the court) to only the named detained plaintiffs and any other detainees who in the future request counsel by written declaration;
- (b) plaintiff organizations and counsel need not be afforded access to any other detainees pending the resolution of this appeal;
- (c) the defendants may repatriate all current detainees in "Camp November" who have expressed a desire, by written declaration, to be returned to sovereign Cuba;
- (d) the defendants may repatriate any other detainees who express a desire by written declaration to be returned to sovereign Cuba; and
- (e) the defendants shall not repatriate any detainees who do not express, by written declaration, a desire to be returned to sovereign Cuba.

The briefing schedule is as follows: the government's opening brief is due November 21, 1994; the appellees' answer brief is due

December 7, 1994; and the government's reply brief, if it chooses to file one, will be due December 14, 1994. These dates are the date that the briefs must be received in the Clerk's Office and in the office of opposing counsel.

Counsel are advised that all Eleventh Circuit rules relating to the length and format of the brief, including type size and margins and footnotes must be strictly adhered to. Counsel are further advised that the court will not grant any motion to file a brief exceeding the page limitations or any motions for an extension of time to file a brief.

Oral argument will be held on Monday, December 19, 1994 at 10:00 a.m. at 56 Forsyth Street, Atlanta, Georgia. Each side shall be allotted 45 minutes for argument.



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 7, 1994

VIA FACSIMILE

Mr. Morton Halperin
Mr. Jamie Baker
National Security Council

Mr. Allen Weiner
Ms. Michele Klein Solomon
Department of State

Mr. Joel Klein
Mr. Cliff Sloan
Office of the General Counsel
The White House

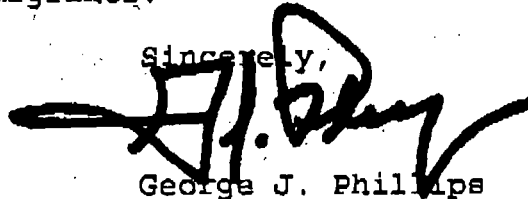
Mr. Stephen Preston
Office of the General Counsel
Department of Defense

Re: Cuban American Bar Association, Inc., et. al. v.
Christopher, et. al., Case No. 94-2183.

Dear Sirs and Madam:

I just sent you the Order we received from the Eleventh Circuit. We have now received an additional facsimile from the Eleventh Circuit containing a partial dissent from Judge Kravitch. She would have allowed the plaintiffs' attorneys general access to the migrants.

Sincerely,



George J. Phillips

Attachment

cc: Frank W. Hunger
Seth Waxman

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the order of the Court denying Appellants' Motion for Summary Reversal. I also concur in that portion of the stay relating to the District Court's injunctive relief except as to paragraph (b) of this Court's order, from which I dissent. I would permit legal counsel, pending the resolution of this appeal, to have access to any detainee, who has not expressed the desire to be returned to sovereign Cuba, under such reasonable conditions as would be set by the District Court.

OPTIONAL FORM 99 (7-80)

FAX TRANSMITTAL

of Pages 1

To <i>Mike Singer</i>	From <i>Margaret Callier</i>
Dept./Agency <i>DOJ, Appellate</i>	Phone # <i>404/331-3833</i>
Fax # <i>202/514-8151</i>	Fax #

NSN 7540-01-217-7368

5010-101

GENERAL SERVICES ADMINISTRATION

OCT 31 '94 16:34 FROM U S ATTORNEY OFFICE

PAGE.002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION,
INC. CUBAN LEGAL ALLIANCE, INC.,
DUE PROCESS, INC., LIZBET
MARTINEZ, ARIANNA GONZALEZ NOBAEZ
and ARNIEL DEL CAMPO GONZALEZ, on
Behalf of Themselves and All
Others Similarly Situated; JOVANI
MIGUEL FIFFE PINO, NESTOR
RODRIGUEZ LABORI, NELSON TORRES
PULIDO, MARITZA EXPOSITO, DAVID
BUZZI and ALBERTO RODRIGUEZ
GARCIA, on Behalf of Themselves
and All Others Similarly Situated;
LEYDIS MILAGROS RUIZ MENDEZ, on
Behalf of Herself and All Others
Similarly Situated; and ELENA
PINO, and VIRGINIA PEREZ, on
Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

v.

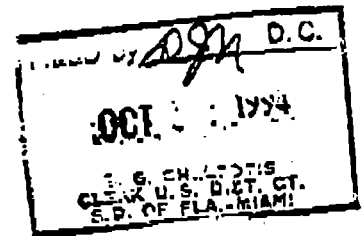
Case No. 94-2183-CIV-ATKINS

WARREN CHRISTOPHER, Secretary of
State; WILLIAM J. PERRY, Secretary
of Defense; DORIS MEISSNER,
Commissioner, Immigration and
Naturalization Service; JANET
RENO, Attorney General; IMMIGRA-
TION AND NATURALIZATION SERVICE;
and BRIGADIER GENERAL MICHAEL
WILLIAMS, Commander, Joint Task
Force,

Defendants.

**ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER**

THIS CAUSE comes before the court on Plaintiffs' Emergency Motion for Temporary Restraining Order filed on October 24, 1994. In their Motion, plaintiffs ask this Court to enjoin temporarily the government from denying plaintiff "Cuban Refugee Service Organizations [(CRSOs)] and other lawyers" access to and



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communication with their clients; to order the government to provide the CRSOs reasonable access; and to enjoin involuntary repatriation of the detained plaintiff refugees to Cuba.

The court held a hearing on plaintiffs' motion on Wednesday, October 26, 1994. Both parties were represented at the hearing and presented arguments. At the close of the hearing, the court advised the parties that it would take the matter under consideration. A review of the record suggests that a temporary restraining order is warranted in this case.

FACTUAL BACKGROUND

The genesis of this case goes as far back as 1960 and Fidel Castro's institution of a Communist regime in Cuba. Since that time, the United States has had a favorable policy towards Cubans fleeing Castro's totalitarian regime. This policy granted the Cubans refuge and asylum in the United States, eventually leading to permanent residence and citizenship.¹ At that time, and up to the recent past, the Cuban government prohibited Cubans from leaving for the United States. However, in August of 1994, the Cuban government rescinded this policy and began allowing Cubans to leave for the United States by the thousands. As a result, on August 19, 1994, President Clinton announced at a press conference that no more Cubans would be allowed into the United States and that any Cubans found at sea would be detained in Guantanamo Bay.

On September 9, 1994, as a result of negotiations between the

¹ See Cuban Democracy Act, 22 U.S.C. § 6001 et seq.; Refugee Act of 1980, 8 U.S.C. § 1521 and Cuban Adjustment Act, 8 U.S.C. § 1255.

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PAGE.004

governments of the United States and the Republic of Cuba, the two governments signed a Joint Communiqué designed to ensure that migration procedures were safe and legal. The agreement will allow 20,000 Cubans entry into the United States each year. Those given permission to enter will consist of persons who qualify as refugees and their families, persons issued visas and their families and persons who are selected based on a "lottery" system. However, in order to receive any benefit from this agreement, the Cubans must return to Cuba and invoke the procedures established by recent negotiations between the United States and Cuba. Until they voluntarily decide to return, they will be held in safe havens like Guantanamo Bay. At present, the government has repatriated 42 refugees and is ready to repatriate as many as 1,014 more.

On October 11, 1994, the CRSOs and other attorneys asked the United States government for access to refugees at Guantanamo. At an October 20, 1994 meeting between the CRSOs and government representatives, the CRSOs were informed that some access would be allowed, but no specifics were given. On October 23, 1994, the CRSOs and certain detained refugees filed suit against the government alleging that the government was denying the attorneys and the detained refugees certain statutory, Constitutional and international law rights.² On October 24, 1994, the government

² The plaintiffs base their claims on certain sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; the Cuban Adjustment Act of 1966, 8 U.S.C. § 1255; the Refugee Act of 1980, 8 U.S.C. § 1521; the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; the First and Fifth Amendments of the United States Constitution, and various principles of international law.

This Court has jurisdiction based on 28 U.S.C. § 1331; 8

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PAGE.005

10 sent a letter to plaintiff attorneys granting up to six attorneys access to refugees at Guantanamo for two days. Meanwhile, the plaintiffs ask this Court to enjoin the government from denying the CRSOs unlimited access to their clients and from repatriating any more refugees before the attorneys have an opportunity to consult with them and ensure that their decision to return to Cuban is voluntary. Counsel do not dispute that refugees may repatriate of their own free will at any time. The issue is whether the detained plaintiff refugees taken by the government to Guantanamo Bay, over which area the government has complete control and jurisdiction, are entitled to advice of counsel to assure their 'voluntary' decision to repatriate.

DISCUSSION

This court may enter preliminary injunction relief, such as a temporary restraining order, only if the movant shows all of the following: (1) a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury if the relief is not granted; (3) that this irreparable harm outweighs the harm the relief might cause the non-movant; and (4) that the relief would not be adverse to the public interest. Haitian Refugee Center v. Nelson, 872 F.2d 1555, 1561-62 (11th Cir. 1989), aff'd, 111 S. Ct. 888 (1991).

(1) Likelihood of Prevailing on the Merits

As previously mentioned, the plaintiffs' claims are based on various statutory, Constitutional and international law principles.

U.S.C. § 1329; 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202.

OCT 31 '94 16:36 FROM U S ATTORNEY OFFICE

PAGE.006

The plaintiffs' main contention, for purposes of this Motion,³ is that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the "voluntary" repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent. In support of their position, the plaintiffs ask this Court to consider Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (hereinafter Sale).

In response to these claims, the government argues that the detained plaintiff refugees have no substantive legal rights and, thus, the attorneys have no First Amendment right to access to them. Furthermore, even assuming the existence of a First Amendment right, that right does not mandate that the government assist the attorneys in advising their putative clients. Additionally, the government argues that the refugee's repatriation decisions are made voluntarily after full disclosure of their options. To support its arguments, the government relies on Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993)

³ The court emphasizes that it does not state any opinion regarding policies towards Cuba or conditions at Guantanamo. The scope of this Order is limited to the issues of right to access and voluntary repatriation. As plaintiffs argue, there are two key elements to voluntariness: full information so as to have informed consent and a non-coercive environment, such as adequate living conditions. At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation. The issue of adequate living conditions will be examined at a later stage, if necessary.

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(hereinafter HCC) and Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (11th Cir.), cert. denied 112 S. Ct. 1245 (1992) (hereinafter Baker).

The court's review of these arguments in light of the relevant law suggests a substantial likelihood that plaintiffs ultimately will prevail. First, the rules set forth in Sale support the plaintiffs' position. The Haitian plaintiffs in the Sale case asserted causes of action very similar to those asserted by the detained plaintiff refugees.⁴ Additionally, Sale and the present case have several controlling factual similarities: 1) both the Haitians and the Cubans are being detained in Guantanamo; 2) the attorneys for both requested permission to communicate with their clients; 3) in both situations, other groups were allowed contact and communications with the detainees, indicating possible viewpoint discrimination, and 4) the attorneys in both cases sought and seek to communicate with their clients at their own expense,

⁴ Specifically, they alleged

1) denial of the Haitian Service Organizations' First Amendment rights to provide advocacy and counselling to their clients detained in Guantanamo; 2) denial of the Haitian detainees' First and Fifth Amendment constitutional rights to obtain and communicate with counsel; 3) denial of the Haitian detainees' constitutional due process right to adequate medical care, to be free of indefinite detention and arbitrary punishment; 4) failure of the Government to follow rulemaking procedures; 5) arbitrary and capricious agency action not in accordance with the law; 6) judicial enforceability of the duty of non-refoulement; and 7) equal protection.

Sale, 823 F. Supp. at 1034.

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not the government's. Based on this similar set of facts, the Sale court found that:

1. The United States has complete jurisdiction and control over Guantanamo Bay and, thus, the First Amendment applies there. Id. at 1036, 1040.

2. The government's decision to deny Haitian Service Organizations (HSO) access to the detainees "is based solely on the content of what they had to say and the viewpoint they would express," id. at 1036, in violation of the First Amendment. Id. at 1041. Furthermore, the HSOs' First Amendment right does not depend on whether the detainees have a right to counsel. Id.

3. That the Haitians have due process rights because they "are at a military base solely because the defendants chose to take them there If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." Id. at 1042.

4. That the detainees had a right to review under the Administrative Procedure Act. Id. at 1045-49.

Therefore, it appears to this Court that the Sale decision suggests a substantial likelihood that plaintiffs ultimately will prevail. Notably, no appeal was taken from that ruling.⁵

⁵ Two of the defendants in Sale were Warren Christopher, Secretary of State, and Janet Reno, Attorney General, who are also defendants in this action sub judice.

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Second, the cases that the government relies on for support contain significant factual distinctions. The government relies on HCC for the assertion that "the Supreme Court has held that section 243(h) of the [Immigration and Naturalization Act], which the plaintiffs claim prohibits the Attorney General from repatriating Cubans from Guantanamo, does not apply to extraterritorial actions or procedures." Defendant's Opposition to Plaintiffs' Request for Injunctive Relief at 2.⁶ A careful reading of HCC shows that this case dealt with Haitians being interdicted by the Coast Guard on the high seas and returned to Haiti pursuant to an Executive Order. The Court reviewed the history of both § 234(h) and Article 33 of the United Nations Convention Relating to the Status of Refugees⁷ and determined that they only apply to aliens who have

⁶ Section 243(h) provides in pertinent part:

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

. . . .

Immigration and Naturalization Act § 234(h), as amended, 8 U.S.C. § 1253(h).

⁷ Article 33.1 states:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

. . . .

Convention Relating to the Status of Refugees, July 28, 1951, 19

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already been admitted to the United States or are already within United States territory but not yet admitted. Accordingly, the Court concluded that neither provision placed any limitations on the President's authority to repatriate aliens intercepted on the high seas. HCC has no bearing on the present case, where the refugees are not on the high seas but rather within United States territory at Guantanamo Bay.

The government also relies on Baker. There, the Eleventh Circuit determined that Haitian refugees on Coast Guard cutters had no substantive legal rights. Consequently, the attorneys for the Haitians had no First Amendment right to access and advise their clients because that right was "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." Baker, 953 F.2d at 1513. The court further concluded that even assuming the attorneys have some right of access, the Constitution does not require the government to assist the attorneys in obtaining that access. While these rulings facially appear to be binding on the present case, the factual distinctions between Baker and the present case indicate that the opposite is true.

The first significant distinction is that Baker focuses on the Haitian refugees located on Coast Guard cutters outside United States territory.¹ Conversely, the detained plaintiff refugees are

U.S.T. 6259, 6276, T.I.A.S. No. 6577.

¹ See Baker, 953 F.2d 1512, 1515 (Hatchett, J., dissenting) ("For the majority, that is the heart of the matter; the refugees are outside of the United States.")

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located at Guantanamo, a United States territory. The fact that the Haitian refugees where on the high seas led to the Baker court's ultimate determination that they had no substantive rights and, thus, the attorneys had nothing on which to base their First Amendment right to associate with and advise the Haitians. That is not the case here. As the Sale decision indicates, once the Cuban refugees where detained in Guantanamo, they became entitled to certain due process and substantive rights, which serve as a predicate to the CRSOs' First Amendment claim in this case.

Another distinction is the fact that the plaintiffs in Baker did not allege any viewpoint discrimination.⁹ The opposite is true here. The detained plaintiff refugees, like in Sale, are alleging that while they are being denied access to and communication with the refugees, other groups are not, resulting in viewpoint discrimination by the government.

A third vital distinction is that the Baker plaintiffs were asking the government for assistance in obtaining access to the refugees at extreme cost to the United States. The court presumed that this meant finding and funding transportation to the cutters or bringing the Haitians ashore, concluding that such assistance "would impose a substantial burden on the United States." Id. at 1514. No such burden exists here. The CRSOs have repeatedly indicated that they are ready to provide transportation and shelter

⁹ "The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." Baker, 953 F.2d at 1512 n.7.

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at their own expense. All they ask of the government is to provide access and a forum. In light of the fact that the government has given permission for six attorneys to travel to Guantanamo for two days, there does not appear to be any substantial burden on the government.

Having determined, for purposes of the present inquiry, that the Sale case is most factually related to the present case and that the cases the government relies on are inapplicable because of material distinctions, the court finds that the facts demonstrate a substantial likelihood that plaintiffs will prevail on the merits. Accordingly, plaintiffs have satisfied the first requirement for preliminary injunctive relief.

Irreparable Harm

Plaintiffs have demonstrated irreparable injury in the absence of a temporary restraining order in the form of declarations indicating that many detained plaintiff refugees may suffer persecution and other negative consequences if repatriated to Cuba. Additionally, irreparable injury will result if these detained plaintiff refugees are repatriated without being afforded their substantive and due process rights. The government has already repatriated forty-two (42) Cuban refugees. Another one thousand fourteen (1,014) are ready to be processed for repatriation. There is no question in the court's mind that the harm that would result from repatriating these refugees to a country from which they risked their lives to flee, without providing them their rights and determining if their decisions are truly voluntary, is

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unquestionably irreparable.

Balance of Hardships

In considering the balance of hardships, courts take into account the burdensomeness of a temporary restraining order on the defendants. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 at 447 (1973). The court's review of the record suggests that any burden to the government in this case is minimal. The CRSOs have indicated that they are not asking the government to subsidize access to the detained refugee plaintiffs. The only 'burden' on the government is to provide access and the proper forum. In light of the fact that the government has already agreed to limited access, the court finds that this burden is substantially outweighed by the above-described irreparable harm to the plaintiffs.

Disservice to Public Interest

Finally, the government has failed to show, and the record does not reveal, any disservice injunctive relief would cause to the public interest. Therefore, the court finds that no disservice to the public interest would result from the present temporary restraining order.

CONCLUSION

Having considered the filings and oral argument of counsel, it is

ORDERED AND ADJUDGED that:

1. Plaintiffs' October 24, 1994 Emergency Motion for Temporary Restraining Order is GRANTED as follows:

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(a) Defendants shall refrain from denying Cuban Refugee Service Organizations and other counsel reasonable and meaningful access to the detained refugee plaintiffs; and

(b) Defendants shall refrain from repatriating any detained plaintiff refugees, including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25, 1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

2. Plaintiffs shall deposit, no later than 5:00 p.m. on November 1, 1994, the sum of \$500.00 into the court registry to serve as security during the pendency of this Order.

3. Counsel are to submit within five (5) days a proposed agreed plan for the visitation of a requisite number of lawyers for the necessary time to conduct the proposed interviews of the subject refugees. If counsel cannot agree on appropriate details of the arrangements, the court will, on application, consider appointing a Special Master to supervise the proceedings.

4. Counsel are to submit a joint report every 30 days as to the progress in accomplishing the above objectives.

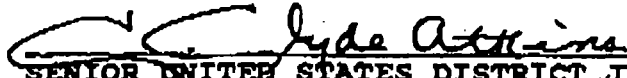
5. This Order will remain in effect until further order of the court. In light of the twenty-four (24) declarations submitted by the parties, the court assumes no further factual development is to be made and the court may proceed to enter a Preliminary Injunction, preserving all objection heretofore made. However, if counsel desire a further hearing to submit additional, non-

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duplicative evidence, in support of their respective positions, they are to advise the court in writing within five (5) days of the file date of this Order.

DONE AND ORDERED at Miami, Florida, this 31st day of October, 1994 at 3:05 P.M./P.M.


SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record.



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 2, 1994

VIA FACSIMILE

Mr. Morton Halperin
Mr. Jamie Baker
National Security Council

Mr. Allen Weiner
Ms. Michele Klein Solomon
Department of State

Mr. Joel Klein
Mr. Cliff Sloan
Office of the General Counsel
The White House

Mr. Stephen Preston
Office of the General Counsel
Department of Defense

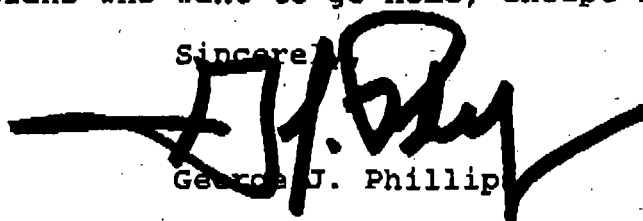
Re: Cuban American Bar Association, Inc., et. al. v.
Christopher, et. al., Case No. 94-2183.

Dear Sirs and Madam:

At this morning's hearing Judge Atkin's orally granted the Haitians' request for "provisional permissive intervention." He took under advisement the Haitians request for a TRO. At 2:00 p.m. he called the Assistant U.S. Attorney, Dexter Lee, to the Court along with the other side and presented them his written order memorializing the earlier oral grant of provisional intervention and granted a TRO in respect to the "fourteen (14) refugees not seeking medical attention on the ground that their decision to be repatriated is not voluntary." We had given him notice that the government intended to repatriate fifty-four (54) Haitians today (the Coast Guard, however, postponed the repatriation for reasons unrelated to the litigation). Of these fifty-four (54), all but fifteen (15) had been diagnosed with tuberculosis. The plaintiffs had not contested the return of the TB Haitians.

Additionally, the Court said that the order was limited to those specific Haitians and that it was not ruling on the plaintiffs' overall request for a TRO applying to all the Haitians who wanted to go home. We assume, of course, that if we provided notice to the Court that we intended to repatriate any other Haitians who want to go home, he would modify the TRO to include them. In effect, he has enjoined the government from repatriating any Haitians who want to go home, except for those with TB.

Sincerely,



George J. Phillip

Attachment

cc: Frank W. Hunger
Seth Waxman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION,
INC., et al.,

Plaintiffs,

and

Haitian Refugee Center, INC.,
et al.,

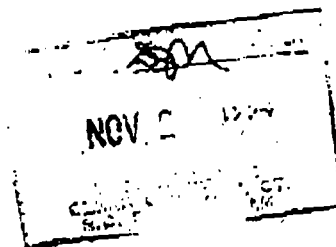
Provisional Intervenors

Case No. 94-2183-CIV-ATKINS

v.

WARREN CHRISTOPHER, Secretary of
State, et al.,

Defendants.



ORDER ON MOTION TO INTERVENE AND MOTION
FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Haitian Refugee Center's (HCC) Motion to Intervene, filed October 31, 1994, and on HCC November 1, 1994, Oral Motion for Temporary Restraining Order restraining the government from repatriating fourteen Haitian refugees from Guantanamo Bay. The court heard arguments on both issues on November 2, 1994.

Motion to Intervene

After hearing arguments from all sides on the issue of whether HCC should be allowed to intervene under Rule 24 of the Federal Rules of Civil Procedure, the court, in its discretion, orally granted HCC provisional permissive intervention. This Order is to memorialize that decision. The court will make a permanent decision regarding HCC's right to intervene after the government

and the plaintiffs have had an opportunity to respond in writing to HCC's Motion.

Motion for Temporary Restraining Order

The court also heard arguments on HCC's Oral Emergency Motion for Temporary Restraining Order. On November 1, 1994, the government filed a Notice to Court of Scheduled Voluntary Repatriation of Haitian Citizens on Wednesday, November 2, 1994. Upon receipt of this Notice, HCC orally asked this Court for a hearing on the repatriation of these Haitians. At the hearing, the parties agreed that: 1) the government, in a decision unrelated to the hearing, postponed the departure date until November 3, 1994; 2) fifty-four (54) Haitian refugees are being repatriated; and 3) forty (40) of those refugees are returning to Haiti for medical attention. Consequently, HCC only challenges the repatriation of those fourteen (14) refugees not seeking medical attention on the ground that their decision to be repatriated is not voluntary.

Upon consideration, the court finds that a temporary restraining order is appropriate at this time with respect to the fourteen (14) Haitian refugees. The court emphasizes that this Order is limited to these specific refugees and that the court is not ruling on HCC's Motion for Temporary Restraining Order filed October 31, 1994. HCC's October 31, 1994 Motion necessarily encompasses issues addressed in this Court's October 31, 1994 Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order. Since the government has appealed this Order, the court, in an effort to avoid repetitious or unnecessary procedures, will

defer ruling on that motion pending a decision by the Eleventh Circuit of the Court of Appeals. Accordingly, it is

ORDERED AND ADJUDGED as follows:

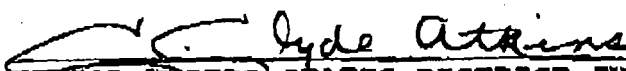
(1) HCC's October 31, 1994 Motion to Intervene is hereby PROVISIONALLY GRANTED pending further review by this Court.

(2) HCC's Oral Motion for Temporary Restraining Order is hereby GRANTED. Accordingly, the government shall refrain from repatriating those fourteen (14) Haitian refugees not seeking medical attention.

(3) HCC shall deposit, no later than 5:00 p.m. on November 2, 1994, the sum of \$500.00 into the court registry to serve as security during the pendency of this Order.

(4) This Order will remain in effect until further order of the court.

DONE AND ORDERED at Miami, Florida, this 2nd day of November, 1994 at 11:50 a.m.


SENIOR UNITED STATES DISTRICT JUDGE

cc: Honorable Magistrate Judge Turnoff
Roberto Martinez, Esq.
Marco Jimenez, Esq.
Dexter Lee, AUSA
Ira Kurzban, Esq.

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

November 14, 1994

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: RICHARD CLARKE *esfor*

FROM: ERIC SCHWARTZ *ES*

SUBJECT: HIV-Positive Refugees

I have enclosed a draft memorandum to the President as you suggested. It does not yet have Carol Rasco's concurrence. Her staff believes that these issues need a political vetting at the White House before being submitted to the President. I agree.

Please let us know how you want to handle this and, in particular, whether we should begin to share the memo with others in the White House beyond Carol (or whether we should wait for your return).

RECOMMENDATION

That you let us know how you think we should proceed.

Attachment

Tab I Memo for the President

THE WHITE HOUSE
WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE
SUBJECT: HIV-positive Refugees

Purpose

To obtain your guidance on issues relating to HIV-positive refugee applicants overseas who have been granted refugee status by the INS.

Background

I. INS Intention to Modify a Worldwide, Discriminatory Restriction on Entry of HIV-positive Refugees

INS intends to modify a worldwide restriction on entry of refugees who test positive for the HIV virus. This modification would affect persons who are interviewed by INS in their countries of origin through our in-country refugee programs, as well as those outside their home countries who are interviewed in countries of first asylum.

All concerned agencies -- State, Justice and HHS -- as well as the National Office of AIDS Policy -- support the proposed INS policy modification.

Basis for the Modification: Discrimination against HIV-positive refugees: HIV is considered a "communicable disease of public health significance" and is therefore a ground for exclusion under the Immigration and Naturalization Act (INA). Under the INA, however, this ground for exclusion may be waived -- in the case of refugees, for humanitarian or public interest purposes or to ensure family unification.

A 1988 INS directive established yet additional waiver requirements for refugees who are HIV-positive. Before being permitted to apply for the waiver, HIV-positive refugees must show that 1) the danger to public health and the possibility of the spread of the disease would be minimal and 2) there would be no cost incurred by any level of government agency without prior consent as a result of the disease.

CC: Vice President
Chief of Staff

INS now proposes to remove this second requirement, as our immigration law explicitly exempts refugees (by virtue of their status) from public charge requirements. INS, State, HHS and Justice point out that the public charge requirement in the current INS directive unfairly discriminates against HIV-positive refugees, as refugees with more costly diseases enter the U.S. each year. According to the agencies, the directive has worked to deny protection to persons deemed by INS to fear persecution in their countries of origin.

Worldwide numbers involved and costs: INS estimates that of the some 110,000 refugees to which we provide entry each year, there may be about 200 approved applicants who test positive for the HIV virus and who would be considered (but not in all cases approved) for the waiver.

HHS estimates that the annual costs for HIV sufferers without active AIDS is about \$10,000 and that the lifetime costs for caring for HIV sufferers is about \$100,000. These costs are lower per capita than the costs for other diseases suffered by refugees (such as some heart diseases and cancers). Moreover, some refugees will obtain private health care at no cost to the states and HHS already provides refugees with aid for medical assistance.

Discussion: There is no principled reason to retain this public charge restriction on HIV-sufferers and modification at this point would strengthen the U.S. position at the World AIDS Summit in France in December (Donna Shalala will attend).

On the other hand, such modification might be criticized by anti-immigration and conservative groups, as well as states and localities. We could attempt to respond to their concerns by allocating additional monies from the refugee admissions budget to ease adjustment of HIV-positive refugees. This, however, would not guarantee against criticism.

II. Implications of the policy shift for HIV-positive Haitian refugees

General Refugee Resettlement Processing of Haitians: As you know, we operated an "in-country" refugee program for those Haitians who feared persecution and sought escape from Haiti during the military regime. Just prior to the intervention, we stopped accepting new cases in the in-country system.

At the time of the intervention, however, there were some 1500 Haitians who had been approved for refugee status during the period of military rule but had not yet left Haiti for the U.S.

Some had been prevented from leaving when we banned commercial air travel and the military regime did not permit the refugees to leave by charter flights; other had not yet completed post-approval processing procedures.

Our current policy is to permit U.S. resettlement for those approved prior to the intervention (about 1000 approved Haitians remain), for the following reasons:

- All of these Haitians had been informed in writing by U.S. officials that they would be admitted to the United States subject to post-interview processing that includes a medical exam and identification of sponsorship. They had also received from the Immigration and Naturalization Service (INS) detailed information on procedures for departure to the United States.
- Many sold their belongings, quit their jobs, etc., in reliance on the promise of resettlement.
- In the past (e.g., Poland) we have permitted resettlement of previously approved refugees after a change in country conditions.
- Moving approved refugees has not proven controversial or burdensome to our refugee admissions program. On the other hand, cutting off the process would be met with strong opposition from the NGOs and possibly the UN (especially if we did it without the opportunity for individual case reappraisal).

HIV-positive Haitian Refugees: There are about 22 HIV-positive Haitians at Guantanamo who were approved for refugee status at our processing ship in Jamaica. There are also about 88 HIV-positive approved refugee applicants within Haiti. Under the INS policy shift, these Haitians would also be subject to the modified waiver requirement. If their waiver applications were approved, they would be considered for entry in the same manner as other approved refugees.

Under our refugee admissions program, these persons would be assisted by non-governmental organizations on arrival and would be eligible for cash and medical assistance provided through the refugee admissions program, federal legislation that benefits Cubans and Haitians, and other federal, state and local social service programs.

III. The HIV-positive refugees at Guantanamo

Even if you decide to deny the INS request to eliminate the existing waiver requirement (item I in this memorandum), you may

want to choose to permit entry for the 22 HIV-positive Haitians at Guantanamo who were approved for refugee status at our processing ship in Jamaica. For one thing, these approved refugees have been outside their country of origin for nearly four months. Moreover, a decision to bar their entry would probably result in HIV litigation similar to that which we faced last year. As you recall, we did not prevail at the District Court level and ultimately permitted entry for some 250 HIV-positive Haitians who had been deemed to have credible claims for asylum.

RECOMMENDATIONS

1. INS PLAN TO MODIFY THE WAIVER REQUIREMENT FOR HIV

That INS be permitted to go forward with the waiver modification. [All relevant agencies -- State, Justice, INS and the Office of the National AIDS Coordinator -- approve.]

Approve _____ Disapprove _____

[If disapprove, then need to consider recommendation #2, below.]

2. THE 22 HIV-POSITIVE REFUGEES AT GUANTANAMO

That, regardless of the decision on recommendation #1, above, entry be permitted for the some 22 HIV-positive Haitians approved for refugee status at our processing ship in Jamaica. [All agencies approve of entry of the HIV-positive refugees at Guantanamo.]

Approve _____ Disapprove _____

HIV

U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 11/15/94

TO:

Jamie Baker

FACSIMILE NO.:

456- 9110

TELEPHONE NO.:

456-9111

FROM:

George J. Phillips
Acting Deputy Assistant Attorney General

FACSIMILE NO.:

(202) 514-8071

TELEPHONE NO.:

(202) 514-5713

NO. OF PAGES: _____

COMMENTS:

Jamie:
I gave up on the computer fax. Here
are the documents I promised you in respect
to the HIV Haitians.

— JGP

Date: Tuesday, November 15, 1994 3:46 pm
From: SS80 (FEENEY)
Subject: hiv+ Haitians

Dave: I just spoke to Cy Winter who is head of IOM in GTMO. He said they have 27 HIV+ screened-in Haitians with 4 accompanying dependents. The problem is finding sponsors who will guarantee all medical costs associated with the HIV virus. I also spoke to Ken Leutbecker, CRS, who believes he can help find these sponsors so I gave Cy his number. Also, the Cuban repats in GTMO are interviewed exactly as you said by INS with a short interview by UNHCR. True



FWH:REK:MJS:RMLoeb
D.J. 39-52-561

U.S. Department of Justice

Civil Division

(202) 514-4332

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR MR. WEBSTER L. HUBBELL,
ASSOCIATE ATTORNEY GENERAL

Re: Haitian Centers Council, Inc., et al. v.
Chris Sale, Acting Commissioner, INS, et al.,
No. 92-CV-1258 (E.D.N.Y.), on appeal,
No. 93-6216 (2d Cir.).

TIME LIMIT: The Second Circuit has scheduled a pre-briefing conference for October 8, 1993. The government's opening brief is due October 25, 1993. Immediate action is requested.

OFFER IN COMPROMISE

NATURE OF CLAIM:

Plaintiffs brought this action arguing that the government's detention of "screened-in" Haitians on Guantanamo, Cuba, conditions of confinement and refusal to permit access to those Haitians for legal counseling violated the Haitians' Due Process rights and the legal service organizations' First Amendment rights. Plaintiffs further contended that the Attorney General's failure to "parole" the detained screened-in Haitians was an abuse of discretion.

JUDGMENT AT ISSUE:

The district court entered an injunctive order requiring the government to provide access to detained Haitians, release the remaining Haitians on Guantanamo, and grant them parole. In compliance with the district court's order, the remaining detained Haitians were brought to the United States. However, because the certified class includes Haitians who will be interdicted in

the future, the injunction could have prospective impact. Plaintiffs have not yet filed a petition for attorneys' fees. A fee petition could seek more than \$2,000,000.

SETTLEMENT OFFER:

Plaintiffs have offered to agree to the full vacation of the district court's order and the dismissal of the civil action, in return for our withdrawal of the appeal and our payment of \$634,100 in attorneys' fees, expenses and costs. [The full terms of the settlement are set out in the attached memorandum.]

RECOMMENDATIONS

The United States Attorney (Scott Dunn, AUSA; 718-330-7180), Department of State (Michele Klein Solomon; 647-9328), Immigration and Naturalization Service (Paul Virtue; 514-3195), Department of Defense (Thomas J. Connelly; 703-697-1137), Department of Transportation (Paul Geier; 366-4731), and Coast Guard (Thomas Cahill; 267-0132) all recommend settlement on these terms.¹ The Office of the Solicitor General (Edwin S. Kneedler; 514-3261)² and the National Security Council (Neal Wolin; 395-3854) also support a settlement on these terms.

I concur.

QUESTION PRESENTED

Whether the proposed settlement should be authorized.

STATEMENT

A detailed background and analysis of this case are set out in the attached appeal memorandum and summarized below.

¹ There is some dispute, however, over how much of the fees and expenses, if any, each agency should be held responsible for paying. This matter should be resolved by the appropriate authority well in advance of the district court's entry of the requested vacatur and order of dismissal, so that the payment of fees can be promptly made in accordance with the agreement.

² Because the Acting Solicitor General (Solicitor General Days is recused) has not yet made a determination to authorize appeal, his formal certification that the appeal need not go forward (see 28 C.F.R. § 0.163) is not required.

1. Pursuant to Executive Order, the United States entered into an agreement with the government of Haiti that permits U.S. officials to interdict Haitian vessels suspected of transporting illegal immigrants and to return interdicted migrants to Haiti. Until May 24, 1992, however, the Executive Order also provided that no person so interdicted who is a refugee would be returned to Haiti without his consent. As to persons interdicted prior to May 24, 1992, the Immigration and Naturalization Service (INS) conducted an initial "screening" interview to determine whether each interdictee had a plausible claim to refugee status. Persons who were "screened out" were repatriated to Haiti; those who were "screened in" were brought to Guantanamo Naval Base for further processing, including medical testing.

Though most screened-in Haitians were brought to the United States for formal adjudication of their claims to asylum, screened-in Haitians who were excludable on medical grounds -- e.g., those infected with the HIV virus -- were treated differently. As to these interdictees, INS policy was to conduct second interviews on Guantanamo in order to determine whether particular migrants were refugees, a determination that would bear on the question whether waiver of the medical exclusion would be appropriate. Plaintiffs in this case argued that the INS policy concerning reinterviews of HIV-positive migrants violates constitutional and statutory provisions which purportedly confer upon these migrants a right to counsel during any such interviews. The district court entered a preliminary injunction to bar the government from reinterviewing any previously screened-in Haitian migrant who was not given access to counsel. That order was based both upon the Fifth Amendment claims of the migrants themselves and the First Amendment claims of organizations that sought to provide legal advice and representation to these migrants. The injunction also mandated that plaintiff organizations were to be given immediate access to migrants detained at Guantanamo.

Following a stay entered by the Supreme Court and an expedited appeal, the Second Circuit (Cardamone, Pierce; Mahoney [diss.]) modified the preliminary injunction and affirmed the injunction as modified. The panel concluded that the balance of hardships weighed in plaintiffs' favor and that plaintiffs had demonstrated a sufficient likelihood of ultimate success on the merits of their due process claim to warrant the entry of a preliminary injunction. In the panel's view, the interdiction of migrants on the high seas, their detention at a site under plenary U.S. control, and their successful completion of the initial screening interview were sufficient, taken together, to give them a constitutionally protected liberty interest in avoiding wrongful repatriation. The panel modified the preliminary injunction, however, so as to eliminate the requirement that attorneys be given immediate access to migrants held at Guantanamo. The dissenting judge would have vacated the injunction in its entirety.

After the Second Circuit denied rehearing, we filed a petition for writ of certiorari in the Supreme Court. The Court held the petition pending its disposition of a different part of this case, which had come up on a separate track, involving plaintiffs' challenge to the May 24, 1992 Executive Order directing a change in policy from screening to summary repatriation.

2. Meanwhile, the district court held a trial on plaintiffs' claims. On March 26, 1993, following the trial's conclusion, the court entered an "interim order" requiring, in essence, that some 53 individuals, of the 215 HIV-infected Haitians then in custody at Guantanamo, be brought to the United States for better medical care. The government did not seek a stay or take an appeal from that order.

On June 8, 1993, the district court issued a permanent injunction, ordering the government to grant the service organizations access to the Haitians, to provide certain procedural rights to screened-in Haitians, and to parole in the remaining Haitians being held on Guantanamo. This broad ruling, embodied in a 53-page memorandum and order (copy attached), was based on (1) the First Amendment rights of the service organizations, (2) the Fifth Amendment Due Process rights of the detained Haitians, (3) the lack of statutory authority to conduct rescreening/asylum-type proceedings outside the United States, and (4) the abuse of discretion in refusing parole. The district court also certified this case as a class action that applied not only to all screened-in Haitians who had already been detained on Guantanamo, but also to those who "will be 'screened in'" and who "will be detained on Guantanamo Bay Naval Base, or any other territory subject to United States jurisdiction, or on Coast Guard cutters." Dist. Ct. Op. 50.

3. Within a few weeks after this decision was issued, all Haitians remaining on Guantanamo were brought to the United States in accordance with the district court's decree. As this process of complying with the district court's injunction was being completed, the Supreme Court, on June 21, 1993, decided the other part of the case -- the challenge to the May 24, 1992 Executive Order directing summary repatriation -- in favor of the government. A week later, on June 28, the Supreme Court granted our petition for certiorari from the Second Circuit judgment affirming the preliminary injunction in the Guantanamo part of the case, and then vacated the Second Circuit's judgment as moot in light of the district court's entry of the permanent injunction on June 8.

Thus, following the issuance of the district court and Supreme Court rulings in June 1993, the situation was this: all Haitians detained on Guantanamo had been brought to the United States, while no new class members existed because no interdicted Haitians were being screened; instead, they were all being summarily repatriated under the May 24, 1992 Executive Order. The case had become essentially moot, but the injunction continued to present a live

controversy because it applied to an open-ended class; if any future Haitian interdictee were ever again screened-in, the June 8 injunction would govern.³

The government filed a protective notice of appeal to the Second Circuit on August 9, 1993.

DISCUSSION

1. As explained at length in the attached appeal memorandum, the district court's injunctive order and opinion established several troublesome precedents. For example, the court extended constitutional Due Process rights (including the right to counsel), and the right to seek review of immigration parole decisions, to aliens lawfully detained outside of the United States. Further, the court held that counsel and legal service organizations have a First Amendment right to have access to aliens lawfully detained outside of the United States, even aboard Coast Guard cutters. In addition, and perhaps most significantly from a practical standpoint, the court's injunctive order continues to have an impact on the Executive's future handling of interdicted Haitians because the certified class includes Haitians who "will be" interdicted in the future.

Because of the seriousness of the adverse precedent and the prospective implications of the district court's order, the Civil Division recommended to the Solicitor General that he authorize an appeal to the Second Circuit. As our appeal memorandum explains, however, although we have strong arguments on the merits, success on appeal is far from assured. Indeed, our track record in the Second Circuit in this very case, where we have already lost on both prior appeals, strongly counsels against reliance upon an appeal to fully relieve the Executive Branch from this adverse injunctive order.

2. Plaintiffs' settlement offer provides a very attractive alternative to pursuing an appeal. Indeed, the settlement offer provides us with all of the relief we could reasonably ask and hope for in this context. The proposed agreement provides that the opinion of the district court would be vacated. Further, all of the injunctive and declaratory relief would be vacated and the

³ On July 9, 1993, at our request and without objection by plaintiffs, the district court clarified its June 8 injunction to provide that Haitian class members who have been brought to the United States in compliance with the court's decree would not be exempt from the usual immigration enforcement provisions that apply generally to all aliens, e.g., detention of aliens who engage in criminal activities.

action dismissed with prejudice.⁴ Thus, the adverse precedent would be vacated and the prospective impact of the injunctive decree would be entirely eliminated. Achieving this desirable result, however, depends upon the district court's agreeing to go along with the parties' wishes.⁵ The proposed settlement agreement has been made contingent upon the entry of the requested order to vacate and dismiss with prejudice, so the government is fully protected in this regard. See ¶¶ 4-5.⁶

With respect to fees, an analysis of the risks and likely outcome of fee litigation reveals that the \$634,100 settlement figure is eminently reasonable. Although, of course, our position in litigation would be that plaintiffs are not entitled to any fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), because the government's actions were "substantially justified," the district court in this case would certainly reject that view and would likely be receptive to a generous fee award. In any event, the substantive settlement terms are so favorable to the government that it would be worth paying even a somewhat inflated amount in order to close the deal on the merits.

Plaintiffs have provided us with numerous documents to support their claim for a very large fee award plus \$300,000 in litigation expenses and costs. Turning briefly to the details of plaintiffs'

⁴ There is one limited exception to the dismissal with prejudice, namely, the dismissal is without prejudice as to potential future members of the certified class. See Settlement Agreement, ¶ 3. It is unlikely that the settlement would hold up without this exception, since it would be patently unfair to attempt to deprive all Haitians who may ever be interdicted in the future from ever again being able to bring this kind of suit if they should find themselves in circumstances similar to those successfully challenged by the existing class plaintiffs here. Although such potential future litigants would therefore suffer no prejudice from the dismissal of this action, it is also true that the government would be free to raise any and all defenses to such an action, as though the June 8, 1993 decision had never been issued.

⁵ The matter must go back to the district court because settlement of a class action requires district court approval. See Fed. R. Civ. P. 23(e).

⁶ The Second Circuit, unlike some of the other courts of appeals, provides an especially favorable forum in which to seek vacatur of a district court judgment in light of a settlement between the parties. See Long Island Lighting Co. v. Cuomo, 888 F.2d 230, 232-234 (2d Cir. 1989). The Supreme Court is now considering this issue in Izumi Seimitsu Kogyo v. U.S. Philips Corp., No. 92-1123 (oral argument scheduled Oct. 12, 1993).

claims, there is no doubt that we would dispute the reasonableness of the number of compensable hours that were spent on this litigation, the number of attorneys, law students and paralegals that were assigned to the matter, and the extravagant expenditures for travel, food, telephone calls, postage, courier service and other items. Even so, however, we could not hope to trim the claimed fees, expenses and costs below the \$634,100 sum to which they have now agreed, following negotiations.

Even if we were able to persuade a neutral decisionmaker to allow fee compensation for only the six principal attorneys at the conceded 1992 average New York City hourly EAJA rate of \$121.38, the total for their combined 6,722.35 hours would be \$815,958.84. And plaintiffs would actually be entitled to higher rates, ranging from \$123.79 to \$124.84, for work done in 1993. Moreover, the \$815,958.84 sum provides no compensation at all for the additional 2,462.9 hours of time logged by other attorneys on the case, the 22,398.50 hours claimed by an assortment of law students and interns, the 963.50 hours documented by paralegals, and the 2,572.35 hours put in by clerks, librarians, interpreters, doctors, social workers and other professionals. As for the \$300,000 in litigation expenses and costs also claimed by plaintiffs, even a one-third reduction would still leave an additional \$200,000 to be paid.

Thus, it seems likely that a court, especially the district court in this case, would readily determine that an award well in excess of \$1 million -- and perhaps as much as \$2 million -- would be reasonable for this litigation. And if we were to litigate over fees and lose, the government would also be charged for the fees, expenses and costs incurred by plaintiffs in the fee litigation itself. Against that backdrop, a settlement of \$634,100, in tandem with a favorable substantive settlement that wipes the legal slate clean, looks like a very good deal for the government. Accordingly, we should act promptly to accept the offer and execute the settlement.

CONCLUSION

For the foregoing reasons, I recommend that you authorize settlement of this action within the terms specified in the attached memorandum.

Frank W. Hunger
Assistant Attorney General
Civil Division

MEMORANDUM FOR THE FILE

Re: Haitian Centers Council, Inc., et al. v.
Chris Sale, Acting Commissioner, INS, et al.,
No. 92-CV-1258 (E.D.N.Y.), on appeal,
No. 93-6216 (2d Cir.).

I hereby authorize that the above-referenced case may be settled on the following terms:

1. The parties shall stipulate that the defendants-appellants (hereinafter "the Government") have fully complied with all orders entered in this case and that plaintiffs are entitled to no further relief of any kind in this action.

2. The parties shall also stipulate to the withdrawal of the Government's appeal in No. 93-6216, without prejudice, subject to reinstatement by written notice to the Clerk of the Court, so that this settlement can be fully executed. This stipulated withdrawal shall be without costs and without attorney's fees to any party. [Costs and attorneys' fees will be paid under this agreement only as provided under Paragraph 5, infra.]

3. If the court of appeals approves the stipulated withdrawal, the parties will jointly move that the district court vacate the Interim Order of March 26, 1993, and the Memorandum and Order of June 8, 1993 (as clarified on July 9, 1993), including all of the declaratory and injunctive relief ordered by the district court, and dismiss this action in its entirety with prejudice -- except that the dismissal shall be without prejudice to potential future members of the certified class, i.e., "all Haitian citizens who * * * will be 'screened in'" and who "will be detained." In the event that further proceedings are conducted in the district court under Federal Rule of Civil Procedure 23(e), plaintiffs will take full responsibility for providing whatever notice may be required to the class members, except that one-half of any costs incurred in providing such notice shall be paid by the Government. The district court shall retain jurisdiction solely to the extent necessary, if any, to enforce the terms of this agreement. Upon full satisfaction of the

terms set forth in Paragraph 5, infra, all district court jurisdiction over this action shall be terminated.

4. If the district court grants in full the joint motion described in Paragraph 3, supra, the Government shall not reinstate its appeal in No. 93-6216, and the appeal shall thereafter be deemed withdrawn with prejudice. If the district court does not enter the order jointly requested by the parties, the Government shall reinstate its appeal.

5. Upon entry of the order jointly requested by the parties, as described in Paragraph 3, supra, the Government shall pay to plaintiffs the sum of \$634,100.00 in full satisfaction of all past, pending and potential future claims for attorneys' fees, expenses and costs arising out of this action. Payment of these fees, expenses and costs shall be contingent upon the district court's entry of such order.

WEBSTER L. HUBBELL
Associate Attorney General

DATE: _____

FWH:REK:MJS:RMLoeb
D.J. 39-52-561

(202) 514-4332

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Haitian Centers Council, Inc., et al. v.
Chris Sale, Acting Commissioner, INS, et al.,
No. 92-CV-1258 (E.D.N.Y. June 8, 1993)
(Johnson, J.).

TIME LIMITS

The district court entered a permanent injunction on June 8, 1993. A notice of appeal is due on August 9, 1993.

RECOMMENDATIONS

The Department of State recommends appeal (the memorandum in support of the recommendation will follow shortly).

The Immigration and Naturalization Service recommends appeal (the memorandum in support of the recommendation will follow shortly).

The Department of Defense recommends appeal.

The Department of Transportation recommends appeal on the First Amendment access issue (assuming that an appeal is otherwise being taken), and has no objection to an appeal on the remaining issues.

The United States Attorney's recommendation will follow shortly.

I recommend appeal.

QUESTIONS PRESENTED

I. Whether the judgment should be vacated as moot.

II. Whether the district court erred in holding that the government violated the First Amendment rights of the Haitian service organizations by denying them access to the Haitians being held in custody at the Naval Base on Guantanamo, Cuba.

III. Whether the district court erred in holding that the rescreening procedures and treatment of the detained Haitians violated their Fifth Amendment Due Process rights.

IV. Whether the court erred in holding that the Attorney General abused her discretion by not paroling the Haitians being held on Guantanamo into the United States.

V. Whether the Haitian plaintiffs' due process claims are barred by collateral estoppel.

STATEMENT

1. Executive Order 12324 required the interdiction of aliens attempting to enter this country illegally by sea. See 46 Fed. Reg. 48109 (1981). Pursuant to that Order, the United States entered into an agreement with the government of Haiti, permitting U.S. officials to interdict Haitian vessels suspected of transporting illegal immigrants and to return the interdicted migrants to Haiti. T.I.A.S. No. 10,241 (1981). The Executive Order provided, however, that "no person who is a refugee will be returned without his consent." *Id.*, §2(c)(3). The Order directed the Attorney General to "ensure the fair enforcement of our laws relating to immigration * * * and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.*, §3. The Immigration and Naturalization Service ("INS") carried out the responsibilities of the Attorney General of determining whether the interdictees may qualify as "refugees" under the Executive Order.

Beginning in 1981, the INS processed interdicted Haitians by conducting an initial "screening" interview, the purpose of which was to determine whether the alien has a credible fear of persecution if returned to Haiti, and may therefore qualify for "refugee" status. See 8 U.S.C. §1101(a)(42) (1980) (defining the term "refugee"). This screening procedure was generally carried out aboard Coast Guard cutters. Persons found not to possess a "credible fear of return" were "screened out" at this stage and repatriated to Haiti without further proceedings. Persons who were found to possess a "credible fear of return" were "screened in" and generally brought to the United States under the Attorney General's parole power, so that they could pursue formal asylum requests pursuant to §208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1158. See Haitians Centers Council, Inc. v. McNary, 969 F.2d 1326, 1330-1131 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, No. 92-528 (S. Ct. June 28, 1993) (HCC I). Since October 1991, the INS has "screened in" more than 10,500 Haitians and brought them to the United States. District Court Order dated June 8, 1993 ("D. Ct.") at 12.

2. During the period from November 1991 through February 1992, the INS conducted the "credible fear" screening of interdicted Haitians at the U.S. Naval base at Guantanamo, Cuba. Use of the Naval Base was necessitated by the massive influx of thousands of migrants following the military coup on Haiti and complications engendered by preliminary injunctive relief in the

Haitian Refugee Center, Inc. v. Baker ("HRC") litigation, which temporarily barred the repatriation of "screened-out" Haitians. See HCC I, 929 F.2d at 1330-1331 (detailing the HRC litigation). Between November 1991 and July 1992, approximately 36,000 Haitians were processed through Guantanamo. D. Ct. 16 n.5.

4. Soon after the INS operations at Guantanamo began, the State Department sought out third countries in which the Haitians could be relocated. Two countries, Belize and Honduras, offered to provide limited assistance, but insisted that the migrants first be tested for the Human Immunodeficiency Virus ("HIV"), the virus associated with Acquired Immunodeficiency Syndrome ("AIDS"). D. Ct. 12. The United States acceded to these requests, and tested some of the Haitians, disclosing the presence of the virus in a number of the migrants.

Under 8 U.S.C. §1182(a)(1), aliens are excluded from admission into the United States if they have a communicable disease of public health significance. The Public Health Service has in the past considered the HIV to be such a communicable disease. More recently, Congress enacted an express requirement that HIV be treated as a communicable disease of public health significance under §1182(a)(1); see Pub. L. 103-43, §2011(a) (June 14, 1993). Based upon the statutory exclusion from admission, INS decided not to immediately bring the HIV-infected Haitians to the United States solely on the basis of the initial screening result. Notwithstanding the medical exclusion, the Attorney General has the authority to "parole into the United States temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States * * *." 8 U.S.C. §1182(d)(5)(A). To determine whether use of the parole power was appropriate in particular cases, INS decided to conduct more thorough second "rescreening" interviews to assess the medically-excludable aliens' claims to refugee status. INS intended the conduct of these second interviews to be generally analogous to those conducted in the United States, but without counsel or any of the formal rules applicable to asylum proceedings under 8 U.S.C. §1158.

5. In March 1992, plaintiffs -- several Haitian service organizations, a Haitian who had been "screened out," several Haitians who had been "screened in" and detained on Guantanamo, and several of their immediate relatives -- filed the present class action in the United States District Court for the Eastern District of New York. Plaintiffs claimed that the interdiction program was illegal and that the government's refusal to allow Haitian service organizations to have access to Haitians on board Coast Guard cutters and at Guantanamo Bay violated the First Amendment and the aliens' Fifth Amendment due process rights. See D. Ct. 4-5; HCC I, 969 F.2d at 1331-1332.

On April 6, 1992, the district court entered a preliminary injunction, holding that: 1) the plaintiffs who had been screened out, and the class of those similarly situated, could not sue because they were bound by the previous adverse ruling in the HRC case; 2) the denial of access appeared to be a content-based speech restriction in violation of the First Amendment; and 3) that the Fifth Amendment applied to the Haitians being held on Guantanamo. The district court ordered the government to allow access by the Haitian service organizations, and barred the government from repatriating, interviewing or "rescreening" any Haitian who had been screened-in until he or she was given an opportunity to consult with counsel.

We appealed the preliminary injunction to the Second Circuit. In June 1992, the court of appeals issued a decision vacating the portion of the district court's ruling requiring the government to provide access to attorneys on Guantanamo, but affirmed the rest of the order. See HCC I. We filed a petition for certiorari from the court of appeals' decision.

6. While the Second Circuit appeal was pending, there was a major change in the government's interdiction policy. The prior policy of interdicting Haitians and screening them at sea was encouraging more and more Haitians to take to the seas, often in dangerous or unseaworthy vessels, in order to emigrate to the United States. To stop this dangerous situation, on May 23, 1992, the President issued a new Executive Order, permitting the Coast Guard to return Haitians interdicted beyond the territorial waters of the United States without any screening. See 57 Fed. Reg. 23,133 (1992). Currently, under this new policy, the processing of refugee claims is being handled in Haiti at the U.S. Embassy.

Plaintiffs asked the district court to enjoin the new policy, arguing that it violated the INA, Article 33 of the U.N. Convention relating to the Status of Refugees, and the 1981 U.S.-Haiti Executive Agreement. The district court denied plaintiffs' request for a preliminary injunction, and plaintiffs immediately appealed to the Second Circuit. The court of appeals reversed the district court, see HCC v. McNary, 969 F.2d 1350 (2d Cir. 1992) ("HCC II"), and on remand the district court entered an injunction barring implementation of the new policy. The Supreme Court then granted our motion for a stay of the injunction, and, subsequently, granted our petition for certiorari to decide the lawfulness of the new policy.

7. Notwithstanding the pending certiorari petition in HCC I and the grant of certiorari in HCC II, the district court proceeded to trial on plaintiffs' claims (except those claims regarding the new Executive Order). See D. Ct. 7-9. Among the issues raised by plaintiffs' amended complaint addressed at trial were: 1) whether Haitian service organizations' First Amendment rights were violated by denying them access to the Haitians

detained on Guantanamo; 2) whether the denial of access violated the detained Haitians' First and Fifth Amendment rights to obtain and communicate with counsel; 3) whether the medical conditions, indefinite detention and punishment of the detained Haitians violate their Fifth Amendment due process rights; 4) whether the rescreening of the detainees was in violation of the law; and 5) whether the Attorney General was acting arbitrarily and capriciously by continuing to detain the HIV-infected Haitians.

On June 8, 1993, the district court issued a decision and permanent injunction.

a. As an initial matter, the court certified the class of:

All Haitian citizens who have been or will be 'screened-in' -- including those who have been or may be subject to or who have resisted additional screening procedures -- who are now, will be or have been detained on Guantanamo Naval Base, or any other territory subject to United States jurisdiction or Coast Guard cutters.

The court held that this class of screened-in Haitians was not barred by the outcome of the HRC case from maintaining this action. The court explained that the HRC case involved different parties (screened-out Haitians), different claims, and different circumstances. D. Ct. 24-25.

b. The court ruled the government violated the service organizations' First Amendment rights by denying them access to the Haitians held on Guantanamo. The court held that the organizations had been denied access because "of the viewpoint of the message they seek to convey." The court said that such discrimination "against disfavored viewpoints strikes at the heart of the First Amendment." D. Ct. 27. The court distinguished the case Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374 (2d Cir. 1990), which held there was no right of access to an alien in custody, on the grounds that (1) here the Haitians had already hired the organizations to represent them, (2) the access was sought without government expense, and (3) numerous other people, other than the Haitian service group lawyers, have been allowed to visit and advise the detained Haitians. D. Ct. 27. Accordingly, the court "permanently enjoined [the government] from denying Haitian Service Organizations immediate access at Guantanamo, on Coast Guard Cutters, or at any place subject to U.S. jurisdiction to any member of the class of Screened In Plaintiffs * * *, subject to reasonable time, place and manner limitations * * *. D. Ct. 52.

c. Next, the district court held that the Fifth Amendment Due Process clause applies to the Haitians being held on Guantanamo because they are being detained by the United States

government on territory controlled by the United States. D. Ct. 28-31. The court further held that the screened-in Haitians have a protected liberty interest in not being wrongly repatriated, and that this liberty interest cannot be denied without adequate due process. D. Ct. 31. The court held that this due process right required the government to provide the screened-in Haitians all of the process that is available to an asylum applicant in the United States, including the right to counsel, notice, and administrative and judicial review. D. Ct. 32-34.

The court also held that the plaintiffs' Due Process rights include the right to "reasonable medical care." D. Ct. 34. The court said that, at a minimum, the Due Process clause forbids the government from being "deliberately indifferent" to the medical needs of non-convicted detainees. D. Ct. 35. The court found that the refusal to evacuate those individuals with T-cell counts of or below 200 (classified as having "full-blown AIDS," D. Ct. 18 n.6), despite inadequate facilities to treat such people on Guantanamo, evidenced deliberate indifference. D. Ct. 36.

The court further held that the "administrative segregation," used at Guantanamo to punish detainees, violates the detainees' Due Process rights because there is no written notice of charges, no hearing or right to call witnesses, and no impartial decisionmaker.

The court then held that plaintiffs have a protected liberty interest in not being indefinitely detained. The court said that plaintiffs' continued detention was the result of the government's action, not the aliens' own choices. D. Ct. 38. The court noted that there had been no indication by the INS when a final parole decision would be made or what would happen to those who were denied parole but nonetheless demonstrated a well-founded fear of persecution if returned to Haiti. The court found that the government had failed to "demonstrate to this Court's satisfaction that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers." D. Ct. 39. The court concluded that, the "Haitians' plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court." Id.

Based upon all of these Due Process holdings, the court permanently enjoined the "well-founded-fear" rescreening, disciplinary proceedings, medical care conditions, and indefinite detention, and ordered that the screened-in plaintiffs "be immediately released (to anywhere but Haiti) from such processing, proceedings, detention, medical care and camp conditions." D. Ct. 51.

d. Citing government admissions that the rescreening interviews were not authorized by either the refugee determination or asylum determination provisions of the INA (§207 and §208), the court held that the rescreening was in excess of

statutory authority. D. Ct. 41-44. The court explained that the Attorney General's parole authority to temporarily admit otherwise excludable aliens "does not authorize establishment of a system contrary to Congress' intent and intentionally targeted at persons who would be eligible to participate in the asylum process [established by Congress] but for the fact that the government interdicted them." D. Ct. 44. The court added that the parole power cannot be used to deny the plaintiffs their statutory rights under §207 and §208 of the INA. Id.

e. Finally, the court addressed the Attorney General's failure to exercise her parole power to release plaintiffs from detention. D. Ct. 44-50. The court explained that, although the Attorney General has broad discretion in exercising her parole power, her discretion is limited and may not depart from established policies without a rational explanation. Further, the court held the Attorney General's parole decisions are subject to review under the Administrative Procedure Act.

Here, the court found that the Attorney General abused her discretion on three grounds:

First, the court found that the failure to parole plaintiffs amounted to invidious discrimination. The court pointed out that the bar on admission of aliens with communicable diseases had not been strictly enforced in the past. The court stated that the ban against HIV admission has only been applied to these Haitians.

Second, the court found that the refusal to parole these plaintiffs presented an unjustified deviation from past parole policy. The court cited the parole regulation, 8 C.F.R. 212.5, which lists factors to be taken into account in determining whether parole would be in the public interest. The court noted that the regulation allows parole for emergent reasons and for serious medical conditions. Ct. 46-47. The court ruled that failing to parole these plaintiffs based on their medical conditions under this regulation was an abuse of discretion.

Third, the court held that the denial of parole based upon the HIV status of plaintiffs was an improper consideration. The court held that the statutory bar against admission of HIV-infected aliens does not mandate exclusion in all cases, and does not bar or impair the Attorney General's parole power (because parole is not "admission" into the United States). The court further found that the entry of plaintiffs to the United States would be "unlikely to affect to spread of AIDS in this country," and that their medical condition could not be used to justify their continued "imprisonment" on Guantanamo. D. Ct. 49.

Based upon these findings, the court ordered "that the Attorney General's exercise of the statutory parole power under INA § 215(d)(5) to deny Screened In Plaintiffs parole out of detention be permanently enjoined, held unlawful and set aside pursuant to the Administrative Procedure Act." D. Ct. 51.

8. Shortly after the district court's decision, the Haitians on Guantanamo were brought to the United States pursuant to the district court's order.

9. Thereafter, on June 21, 1993, the Supreme Court issued its decision upholding the lawfulness of repatriating Haitians interdicted on the high seas. See Sale v. HCC, No. 92-344 (S. Ct. June 21, 1993).

10. After the district court entered its permanent injunction, we informed the Court that, in light of the permanent injunction, the petition for certiorari in HCC I from the preliminary injunction was now moot. We explained that the proper disposition now was to grant certiorari, and vacate the Second Circuit's HCC I judgment as moot. On June 28, 1993, the Court followed our suggestion, granting our HCC I certiorari petition and vacating the Second Circuit's judgment as moot. See Sale v. HCC, No. 92-528 (S. Ct. June 28, 1993).

DISCUSSION

I. THE PROSPECTIVE IMPLICATIONS OF THE DISTRICT COURT'S RULING.

The district court's opinion establishes several troublesome precedents -- i.e., extending due process rights (including the right to counsel) and the right to seek review of parole decisions to aliens outside of the United States, and holding that counsel and service organizations have a First Amendment right to have access to aliens lawfully detained outside of the United States. However, the precedential value of this district court opinion may not, by itself, require an appeal, since we remain free to argue against the court's legal rulings in any future cases (not involving the same class) -- even in the same district. Nonetheless, this lengthy opinion is one of the few recent precedents on several important legal issues, and we could fully expect it to be used against us in future cases (cases which are likely to arise in an emergency context). Still, the most pressing consideration is not necessarily the adverse precedent, but the actual continuing impact of the district court's ruling.

Although we have complied with the court's order by bringing in all of those Haitians on Guantanamo to the United States, the court's ruling still raises several problems for future handling of interdicted Haitians. The plaintiff-class of "screened-in Haitians" is open-ended, and to the extent that, now or in the

future, the Administration wishes to return to some form of screening for refugees before returning interdicted Haitians,¹ the court's legal rulings would be binding upon us. Indeed, the district court's decision, if left standing, could possibly interfere with the application of the Administration's proposed summary exclusion legislation to future interdicted Haitians. The decision confers extensive procedural rights to future interdicted Haitians which are not afforded under the proposed legislation.

There are three significant prospective constraints imposed by the district court's decision:

A. The court ordered the government to allow counsel and organizations access to the screened-in Haitians, even upon Coast Guard cutters. Thus, under the court's order, if we begin screening again, we will have to be ready to provide counsel access to the screened-in Haitians -- albeit subject to reasonable time, place and manner restrictions. It is possible that plaintiffs will try to construe the court's order to allow access before the screening (because the plaintiff-class includes those who will be screened in). However, even without extending the ruling to include access to Haitians before screening, this part of the court's decision could be considered to be an unacceptable imposition upon the military and Coast Guard. Obviously, access before screening would pose a far more significant intrusion and could also threaten to taint the screening process.

B. Once we "screen in" any Haitians in the future, the court order requires the government to provide them with the full panoply of procedural and appeal rights that apply to asylum determinations made in the United States. These procedural rights may be inconsistent with the recently proposed summary exclusion legislation. Absent the proposed legislation, however, this ruling may only have minimal prospective effect. Our general policy over the last decade has been to bring the screened-in Haitians to the United States, where they receive all of those rights required by the district court in any event. The only constraint imposed on our actions is limited to screened-in Haitians who we do not bring to the United States. In the past that has primarily involved individuals who are statutorily excluded from admission under the INA (e.g., the medically excludable HIV-Haitians).

¹ Even if the democratically elected regime is peacefully returned to power in Haiti, there is still a reasonable expectation that the Administration may want to return to some form of screening, which was successfully used for almost a decade.

As to the excludable individuals, the prior Administration's policy was to use less formal rescreening interviews so that the Attorney General may assess, on a case-by-case basis, whether she should exercise her parole power to bring them into the United States. This less formal process is now precluded by the district court's decision. Our options under the district court's order would appear to be to provide full procedural and appeal rights outside of the United States, or to simply bring all screened-in Haitians into the United States for processing.

C. The district court's order required us to parole in those Haitians with the HIV being held in Guantanamo. The court also held that holding them in detention for an indefinite time period violated their Due Process rights. These rulings could have on-going effect. It is possible, if not probable, that if we return to screening, we will again be faced with a number of screened-in Haitians who are medically, or otherwise, statutorily excludable. In such instances, the INS may want to detain these individuals outside of the United States, at least until the Attorney General can make an informed parole decision. However, plaintiffs could argue that the district court's decision mandates that these individuals be paroled into the United States. Indeed, with respect to any Haitians detained outside of the United States solely because of their HIV status, such an argument would be quite compelling.

Thus, despite our compliance with the district court's order, by bringing the Haitians on Guantanamo to the United States, and our recent Supreme Court victory, the district court's order still impairs the Administration's ability to screen interdicted Haitians in the future to determine whether they have credible refugee claims. Indeed, the existence of this order, coupled with our victory in the Supreme Court, has the ironic effect of making the rigid policy of summary repatriation largely immune to judicial challenge, while leaving any more flexible policy vulnerable to review.

The Administration requires the flexibility to deal with any and all future contingencies that may occur in Haiti, and should have the option to utilize a less harsh policy than summary repatriation in future crises. For more than a decade, screening has been deemed a necessary and effective method of dealing with interdicted Haitians, and this Administration should have the latitude to return to such a policy, if and when it chooses, without the constraints of this district court decision. Moreover, the constraints imposed by the district court could contribute to the continuation of the policy of summarily repatriating individuals who may have wholly valid refugee claims. While this policy is lawful, and in some instances may be necessary (e.g., to stem the tide of a mass emigration), it certainly should not be forced upon the Administration. Accordingly, these

constraints on screening imposed by the district court are sufficient to warrant an appeal in the present case.

However, it is important to realize that an appeal is not without risk. The Second Circuit already rejected many of our arguments when we appealed the preliminary injunction in this very case. Even though that prior appellate decision does not control here, and has been formally vacated as moot, it is a substantial indicator that we should not overestimate our chances on appeal. If we fail to secure reversal on all or part of the district court order on appeal, we will not obtain the desired practical result (to be freed of the constraints placed on the government by the district court's ruling) and may in fact harm our situation by creating an adverse court of appeals precedent, with only a limited chance of obtaining Supreme Court review.² Nevertheless, given the intrusiveness of the district court's order, the importance of these issues, and the strength of our arguments (discussed below),³ I still believe that an appeal is warranted.

II. APPEAL ISSUES.

A. Mootness And Vacating The Judgment.

We have a good argument that the judgment here should be vacated as moot. However, to do so, we will have to invoke the "prudential mootness" doctrine.

1. We should argue that the court's judgment, as far as it extends to the Haitians who were held on Guantanamo and the service organizations' right to access to Guantanamo, is now moot. Under the compulsion of the district court's injunctive order, we brought all of the Haitians on Guantanamo to the United States. Thus, now, the issues addressed by the district court -- the right to counsel to have access to the Haitians on Guantanamo, and those Haitians' rights to due process and to be paroled into the United States -- are all moot as to these Haitians because they are now physically present in the United States without any restriction on these rights. There simply is no on-going Article III case or controversy between these plaintiffs and the United States. See Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

² Given that the crisis regarding the Haitian refugees has diminished, and the fact that we have already complied with the district court's order as to the Haitians on Guantanamo, the Supreme Court could very well deny a petition for certiorari.

³ Even if the court of appeals upholds all or part of the district court's rulings, there is at least some practical benefit in knowing what the law is in that circuit.

The court of appeals may be attracted to this type of a mootness argument. Many of the issues here are inherently tied to the unique circumstances and conditions that existed at Guantanamo. For example, the question of whether there was viewpoint discrimination in the access restrictions on Guantanamo simply has no future application. The camps used to house the Haitians on Guantanamo have been closed, and there are no plans to use that military base for those purposes in the future. Moreover, even if there were future detentions of interdicted Haitians, it is wholly speculative what our access policy would be. To the extent that any of these issues do arise again in the future, there is no reason to believe that it would evade review. Thus, there is no constitutional controversy anymore regarding the Haitians who were on Guantanamo, or the right of the service organizations to gain access to Guantanamo in order to counsel the Haitians, and there is strong pragmatic inclination to simply end this case now by declaring the controversy moot.

If the court of appeals holds that the matter is moot, it should vacate the underlying ruling. See New York City Employees' Retirement System v. Dole Food Co., 969 F.2d 1430 (2d Cir. 1992). Cf., Reich v. Contractors Welding of Western N.Y., Inc., slip op., No. 92-4181 (2d Cir. June 24, 1993) (demonstrating the Second Circuit's strong position in favor of vacating an order on appeal that has become moot). There are cases holding that vacation is not proper when an appellant's own compliance moots the dispute. Indeed, our amicus brief recently filed in Izumo Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., No. 92-1123 (S. Ct.), seems to support those cases. See Izumo amicus brief at p. 13 n.12. However, the Second Circuit appears to be willing to vacate under such circumstances. See New York City Employees' Retirement System, 969 F.2d at 1434-1435 (vacating the district court's order where the defendant's compliance with the injunction mooted the controversy). We can also argue that it was not our compliance with the injunction that mooted the case but, rather, the improved political situation in Haiti and the Supreme Court's decision of June 21, 1993, sustaining the lawfulness of the government's current policy of summarily repatriating all interdicted Haitians without any screening. Without these occurrences, we would likely still be screening interdicted Haitians.

2. The main problem with any mootness argument raised here is that the district court's order clearly still prospectively governs how we treat future screened-in Haitians. Even though the Administration may lawfully return the Haitians interdicted in the future without any screening, there is a strong possibility that the Administration will return to screening in the future. Hence, as a constitutional matter, it is hard to argue that the whole dispute here is truly moot. See New York City Employees' Retirement System v. Dole Food Co., 969 F.2d at 1434 (compliance with an injunctive order will not moot the case if some part of the controversy remains).

Nevertheless, we can argue that even the prospective portion of the judgment should be vacated under the "prudential mootness" doctrine. The D.C. Circuit has held that when a court exercises its equitable discretion in fashioning prospective declaratory or injunctive relief in a case that is not technically moot under Article III, but where the prospective controversy is attenuated, "considerations of prudence and comity for coordinate branches of government" may "counsel the court to stay its hand, and withhold relief it has the power to grant." Chamber of Commerce v. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980). See also City of New York v. Baker, 878 F.2d 507, 509-510 (D.C. Cir. 1989); Alton & Southern Ry. Co. v. Int'l Assoc. of Machinists & Aerospace Workers, 463 F.2d 872, 877-882 (D.C. Cir. 1972). The D.C. Circuit has further held that it is appropriate to invoke "prudential mootness" where there is uncertainty as to whether the prospective relief will actually benefit the party alleging injury, or where the case involves premature adjudication of constitutional issues. See Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1001, 1019-1020 (D.C. Cir. 1991). These same types of factors are employed by other courts, including the Supreme Court, without the title of "prudential mootness," in assessing whether a court abused its discretion in issuing prospective injunctive or declaratory relief. See e.g., United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). The result of such concerns can be the vacating of the district court's judgment (or at least the prospective portion of the judgment). See City of New York v. Baker, 878 F.2d at 510; Alton & Southern Ry. Co., 463 F.2d at 882.

All of these "prudential mootness"/abuse of discretion factors would appear to support the vacation of the prospective rulings here:

a) The prospective controversy here is plainly speculative and attenuated. We are not screening interdicted Haitians at the present time, and there is no current plan to return to screening. Even if we do return to a policy of screening, it may take on a completely different form and carry different implications for the interdicted Haitians. Furthermore, as discussed above, it is wholly speculative to assume that if Haitians are detained, there will be viewpoint discrimination in the access restrictions. Moreover, the "liberty interests," based upon the legitimate expectation of being brought to the United States after being screened in, which was relied upon the district court in extending due process rights, is simply inapplicable if the screening process is different or serves a different role in the future. Finally, the question of whether prospective parole decisions, regarding Haitians who may be interdicted and detained in the future, will be an abuse of discretion is baseless conjecture.

b) Comity to the coordinate branches regarding the handling of future interdiction and detainment of aliens is mandated by well-established precedent. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Shaughnessy v. United State ex rel. Mezei, 345 U.S. 206, 210 (1953); Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Here, the district court's prospective order interferes in our handling of sensitive foreign affairs and immigration matters. As a prudential matter, a court should be reluctant to pass judgment and enter permanent injunctive orders based upon this speculative and uncertain context. Cf., Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985).

c) The prospective relief awarded may actually make potential future class members worse off because it deters us from screening at all.

d) The court's prospective rulings prematurely adjudicate important constitutional and statutory issues based upon speculative future events and conditions.

Based upon these factors, we should argue that the prospective relief granted here should also be vacated, or, in the alternative that extending the judgment prospectively was an abuse of discretion.⁴

3. It might be argued that there is some risk in running this mootness argument. For example, it is possible, but in our view highly unlikely, that the court could hold that our appeal is moot, but still not vacate the judgment below. However, I still recommend pressing the argument on appeal.

First, the mootness argument is our one and only sweeping argument that could, by itself, completely free us from this adverse district court decision. Our merits arguments are strong on some issues, but uncertain on others. The mootness argument provides a threshold position that would relieve the court of appeals from even having to reach these sensitive merits issues. At bottom, the argument bolsters our chances of ultimately prevailing here and should be made.

⁴ It is, however, not enough simply to vacate the prospective relief. Either the entire judgment must be vacated or, at least, the judgment extending prospective relief (e.g. the prospective access to coast guard cutters). Otherwise, the service organizations and the future screened-in Haitians could argue that we are precluded by collateral estoppel from relitigating these issues against them.

Second, the court will expect the parties to address the question of mootness. Unless we are willing to argue that the restoration of the conditions on Guantanamo is likely (which no one is advertng), the court, sua sponte, may very well consider the case at least partially moot. It is better to take the offensive on the issue and strongly seek to link mootness with vacation rather than to run the risk of the court simply dismissing portions of our appeal as moot. The issue of vacation is complex; either we brief it thoroughly and aggressively, or we run a serious risk.

B. First Amendment.

The district court's First Amendment access holding may be difficult to successfully attack on appeal. In our previous briefs on appeal from the preliminary injunction, we attacked the First Amendment ruling on the ground that it was extraordinary to hold that someone has a right to enter a U.S. military base on foreign soil for the purpose of speaking with lawfully detained aliens. We argued that a military base is a non-public forum, and that the government was, therefore, permitted to restrict access to the base. Further, we claimed that the access restrictions at Guantanamo were rational and not based on the speaker's viewpoint. We explained that the other persons who had been given access were permitted on the basis of the distinct purposes of such access, and not on the basis of their viewpoint.

Our present appeal would be more demanding. When issuing the permanent injunction, the district court made a specific factual finding that access was being denied at Guantanamo based upon the speaker's viewpoint. The court found that the government allowed access to the Haitians by many others and that the Haitians were being given legal advice (often incorrect advice) by government officials (military, INS and even military doctors) and others, but that the government did not allow access by their lawyers because of their viewpoint. See D. Ct. 14, 26-27.

The courts have recognized that military bases are traditionally non-public forums, and the courts have been very protective of the government's right to restrict access and speech on a military base. See e.g., Greer v. Spock, 424 U.S. 828 (1976). Further, the courts have also refused to extend to lawyers the First Amendment right to have access or counsel aliens being lawfully detained by the government. See Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374, 1380-1382 (D.C. Cir. 1990). Indeed, in the HRC litigation, the Eleventh Circuit held that the members of the Haitian Refugee Center had no First Amendment right to enter Guantanamo to counsel Haitians being detained there. See HRC v. Baker, 953 F.2d 1498, 1511-1515 (11th Cir. 1992). However, the courts have never held that the government may discriminate among speakers based upon their viewpoints. See HRC, 953 F.2d at 1512 n.7 (noting that HRC had not made a claim of viewpoint discrimination). Even in a non-

public forum, the government cannot restrict speech based on the speaker's viewpoint. See Hamb's Chapel v. Center Moriches School Dist., No. 91-2024, slip op. at 8 (S. Ct. June 7, 1993).

Here, an appeal will be more difficult because of the finding of viewpoint discrimination. There is still a reasonable chance of at least successfully challenging the ruling as to access to Coast Guard cutters. There was absolutely no finding of discriminatory access to the cutters. Such a partial reversal would enhance our ability to freely screen Haitians on the cutters in the future, without undue burden. However, such a partial victory would still establish a very unfavorable court of appeals precedent -- upholding a First Amendment right to enter a military base on foreign soil to meet with aliens being lawfully detained there.

To achieve full reversal of the court's First Amendment ruling, we will also have to attack the viewpoint discrimination finding. That finding was based upon the perception that the government was letting numerous people see the detainees and that some of these people would provide them with legal advice from the government's perspective. However, this misconstrues the situation. Access was restricted against counsel because of the government's position that: 1) access should be limited to only those personnel performing essential services; and 2) that counsel services would interfere with the informal nature of the rescreening interviews. Numerous individuals with views highly favorable to the Haitians were allowed access. The access restriction turned on the service to be performed by the individual, not their viewpoint. It should make no difference that in fact some of the people who were allowed access may have discussed legal issues with the Haitians. The access was still not restricted based on the speakers' viewpoint or the particular content of what they might actually say.

Moreover, the district court's position -- that if aliens discuss legal issues with government officials, then the government must allow access by counsel -- is untenable. The processing of detained aliens by INS officials will quite frequently involve discussions of the legal consequences and events with the aliens. Under the district court's view, because of those discussions, almost every alien detained by the government outside of the United States would have the right to counsel. That proposition was squarely rejected in the Eleventh Circuit in HRC and the D.C. Circuit in Ukrainian-American Bar Ass'n.⁵

⁵ The district court attempted to distinguish the D.C. Circuit's Ukrainian decision on the grounds that in that case the counsel in question did not yet have a formal relationship with the alien and wanted access at the government's expense. However, these were not the factors underlying that decision.

(continued...)

Further, this reasoning, taken to its logical conclusion, would require the government to permit counsel to have access to an alien seeking refugee status at an embassy overseas if the embassy officials discuss the alien's legal status.

Thus, the district court's finding regarding viewpoint discrimination does not necessarily insulate it from appeal, and we still have reasonable arguments and good cause to contend that the First Amendment ruling in its entirety was in error.

C. Due Process.

The district court's Due Process holdings are subject to the same arguments we pressed in our prior appeal and in our certiorari petition. We cited numerous cases holding that even an excludable alien who is physically present within the United States -- let alone an alien who has not yet made it to our shores -- has no Due Process rights regarding his immigration status. See Landon v. Plasencia, 459 U.S. 21, 32 (1982); United States ex rel. Knauff v. Shaughnessy, 338 U.S. at 542; Mezei, 345 U.S. at 210; Jean v. Nelson, 727 F.2d at 964-968. See also Gisbert v. United States Attorney General, 988 F.2d 1437, 1442-1443 (5th Cir. 1993) (holding that a detained alien has no liberty interest in being paroled, and no Fifth Amendment right to procedural Due Process). These cases plainly undermine the district court's ruling here that screened-in aliens being held abroad have a Fifth Amendment liberty interest in being properly processed for entry into the United States.

The district court's remaining Due Process rulings address the conditions upon Guantanamo and the right to not be indefinitely detained without just cause. These rulings seem more likely to be deemed moot because they are keyed to the unique facts that existed upon Guantanamo with the lengthy detention of the HIV-positive Haitians. However, the extension of Due Process rights to aliens being detained abroad is a dangerous precedent. Thus, in addition to arguing that this part of the order is now moot, we should also attack the rulings on their merits. On the merits, we have two primary arguments:

- 1) There is a possible argument that aliens outside of the United States are not even allowed to sue the federal government in federal court. See Johnson v. Eisentrager, 339 U.S. 763, 777-778 (1950) ("The privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied

⁵ (...continued)

Rather, the D.C. Circuit simply held that the alien had no right to counsel and that counsel had no right to speak to the alien. Ukrainian-American Bar Ass'n, 893 F.2d 1377.

protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign."').⁶ However, there are numerous reported cases where aliens abroad were permitted to challenge governmental action. See Jean v. Nelson, 727 F.2d at 973 (citing cases). Indeed, the Supreme Court's decision in HCC II (Sale v. HCC) decided the merits of plaintiffs' claims, rather than hold, as we argued, that plaintiffs' claims were precluded from review in federal court. In our brief to the Supreme Court in HCC II, we argued that the only plausible basis for jurisdiction could be the Administrative Procedure Act, and that judicial review was precluded under that Act because the INA impliedly forecloses review. See Brief for Petitioners 13-18. Notwithstanding our argument, the Court proceeded to review the merits of our summary repatriation policy.⁷

2) Even if aliens outside of the United States can bring suit in federal court against federal officials, we should still contend that they cannot base their claims upon the Fifth Amendment. The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (discussing Johnson v. Eisentrager). The Court in Johnson v. Eisentrager observed that "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view." 339 U.S. at 784. More recently the Court, while acknowledging that "aliens receive constitutional protections when they have come within the territory of the United States and developed

⁶ Although the plaintiff in Johnson was an enemy alien, the Court's opinion makes clear that this fact was not determinative. The Court's prior decisions in Ex parte Quirin, 317 U.S. 1 (1942), and In re Yamashita, 327 U.S. 1 (1946), had permitted the filing of habeas corpus petitions by enemy aliens held within the United States and in the Philippines, an area then within the sovereign jurisdiction of the United States. The Johnson Court distinguished these cases on precisely this basis, see 339 U.S. at 779-80, demonstrating that it was Eisentrager's location outside of the United States -- not his status as an enemy alien -- that precluded him from obtaining access to our courts.

⁷ We note that the sweeping argument based upon Johnson -- that an alien abroad cannot sue at all in federal court -- was not made in our brief. Similarly, the argument was not raised in our certiorari petition in HCC I. We did, however, raise this argument before the district court here.

substantial connections with this country," United States v. Verdugo-Urquidez, 494 U.S. at 271, relied on Eisentrager in "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of 'the United States.'" Id. at 269.

In light of the fact that the Supreme Court reached the merits in HCC II, we do not recommend pressing the first of these arguments to challenge the district court's due process ruling. We do, however, believe that it important to raise the second argument. No doubt, the argument that aliens abroad cannot base their claim upon the Fifth Amendment is harsh, in that it leaves open the possibility of egregious abuse without redress in federal court. See D. Ct. 30 (noting that without Due Process protection government officials could, without redress, deliberately starve or beat the detained Haitians). However, extending Due Process rights to aliens abroad is a virtual Pandora's Box. Indeed, in this case and the HRC case, even the temporary extension of rights to the interdicted Haitians substantially impaired the Executive Branch's ability to deal with the Haitian crisis. Further, this district court ruling could be used in later cases to claim Due Process rights for aliens at United States embassies abroad, or other aliens being held at/or outside a point of entry.

D. Parole.

The Attorney General is authorized under 8 U.S.C. §1182, with limited exceptions, in her "discretion to parole into the United States temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest any aliens applying for admission into the United States." The courts have held that the Attorney General's parole decision are reviewable, but must be upheld as long as there is a "facially legitimate and bona fide reason" supporting the decision. See Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982). The Second Circuit has also held that in making a parole decision, the Attorney General's "discretion may not be exercised to discriminate invidiously against any particular race or group or to depart without rational explanation from established policies." Id., 684 F.2d at 212-213. However, the "burden of proving that [parole] discretion was not exercised or was exercised irrationally or in bad faith is a heavy one and rests at all times on the unadmitted aliens challenging denial of parole." Id. at 213.

Here, although there was no expressed reason for denying or delaying parole to the detained Haitians, the plain reason was that they were statutorily excludable aliens, under 8 U.S.C. §1182(a)(1)(A), because of their HIV status. See p. 3, supra. Despite the fact that the HIV positive Haitians are statutorily excluded from admission into the United States, the government's position is that the Attorney General still could use her parole

power to bring them into the United States (because §1182(5)(A) refers to "any alien")."

The parole regulations state in "determining whether or not aliens who have been or are detained in accordance with [8 C.F.R.] §235.3 (b) or (c) will be paroled out of detention, the district director should consider the following," and then the regulation proceeds to list several factors. The first factor is:

The parole of aliens who have serious medical conditions in which continued detention would not be appropriate would generally be justified by "emergent reasons."

8 C.F.R. 212.5(a)(1). Here, the district court held that the Attorney General had departed from this regulation by failing to parole in the Haitians with HIV. The court further held that the failure to parole them amounted to an unjustified deviation from past practice. This parole ruling should be challenged at both a broad and specific level.

1. Our broad argument addresses the serious concern raised by the district court's extending the "right" to review parole decisions to cases where the alien is physically outside of the United States. If Haitians being held at Guantanamo have the right to review the Attorney General's "failure" to parole them into the United States, then any alien abroad seeking asylum in the United States would equally appear to have such rights. While most parole matters involve aliens detained in the United States under 8 C.F.R. 235.3, the INS does on occasion grant "advance" parole to aliens coming to the United States. See 8 C.F.R. 212.5(e). See also 2 Immigration Law and Procedure, §64.02. The district court's reasoning here would allow an alien abroad the right to challenge the denial of an advance grant of parole. Further, the district court's ruling could even permit aliens seeking refugee status at an American embassy to challenge the denial of advance parole.

⁸ Once a medically excludable alien is paroled into the United States, he may seek an asylum hearing under 8 U.S.C. §1158. If he is granted asylum, he can thereafter seek to be officially "admitted" to United States under 8 U.S.C. §1159. However, because he is statutorily medically excludable, he cannot be granted "admission" unless the Attorney General grants a waiver under 8 U.S.C. §1159(c). See Gordon and Mailman, 2 Immigration Law and Procedure, §33.04[1][e][ii] (rev. ed. 1993). The admission can be important because without an official admission to the United States the refugee is subject to return if in the future the conditions supporting the refugee status change.

Moreover, if parole decisions regarding aliens abroad are reviewable, future parole decisions regarding Haitian interdicttees and others being processed for "advance" parole would have to be much more formal in nature. Although parole decisions are reviewed under the deferential "facially legitimate and bona fide reason" standard, courts have still required INS to support its parole decisions with an adequate record. See Marczak v. Greene, 971 F.2d 510, 517 (10th Cir. 1992). Indeed, the Tenth Circuit recently held that a district court may not only review the record to determine whether it supports the parole decision, but may hold its fact-finding hearing as part of the review. Id. at 518.

Our primary argument is that parole decisions regarding aliens outside of the United States are not reviewable in federal court.⁹ These extra-territorial parole decisions are very much akin to refugee determinations made as to aliens abroad -- e.g., at an American embassy. Such extraterritorial refugee determinations (i.e., a determination to conditionally admit an alien so that he may apply for refugee status, see 8 C.F.R. 207; 2 Immigration Law and Procedure, §34.01 [4]) have always been considered unreviewable in federal court. Cf., Yui Sing Chun v. Sava, 708 F.2d 869, 875 (2d Cir. 1983); Wan Shih Hsieh v. Kelly, 569 F.2d 1179, 1181 (2d Cir. 1978). See also Kleindienst, 408 U.S. at 766.

We should also argue that parole power does not extend to aliens abroad. The decision as to an interdicted Haitian who is paroled in by the Attorney General is properly characterized as a decision to bring the alien to a point of entry, where he will be paroled. The actual final, reviewable parole decision does not come into effect until the alien is physically present in the United States. The INS parole regulations support this view. Section 212.5(a), which sets out the standards for parole, is limited to detentions under section 235.3 (b) or (c), which both address the detention of aliens at a point of entry or where the

⁹ We could also contend, as discussed above (pp. 15-16, supra), that an alien abroad has no right to even sue federal officials in federal court. Even if that restriction were to be limited to immigration claims (see Jean v. Nelson, 727 F.2d 972-975 (distinguishing the non-immigration cases which permitted aliens abroad to invoke constitutional rights), seeking review of a parole decision would still clearly fall within the litigation prohibition. See Clark v. Smith, 967 F.2d 1329, 1331 (9th Cir. 1992) ("an alien's freedom from detention [by the grant of parole] is only a variation of the alien's claim of an interest in entering the country"); Jean v. Nelson, 727 F.2d at 963 (the decision whether to parole "an excludable alien is an integral part of the admission process"). However, as discussed above, we do not recommend pressing that argument on appeal.

alien is physically present in the United States. See 8 C.F.R. 212.5(a), 235.3 (b)-(c).

This argument is also supported by our victory in Sale v. HCC, No. 92-344, slip op. (S. Ct. June 21, 1993). In Sale, the Court relied heavily upon the presumption that "Acts of Congress do not ordinarily apply outside our borders." Slip op. at 17. Consistent with that presumption, we should argue that the Attorney General's statutory and regulatory parole powers only extend to aliens detained within the United States or at a point of entry. The only problem with this argument is that, in fact, as discussed above, the Attorney General does on occasion employ "advance parole" for aliens outside of the United States.¹⁰ We could still rely on the presumption, nonetheless, because INS considers advance parole to simply provide an alien the right to present himself at the border. The actual parole decision is not effectuated until the alien actually reaches the point of entry. See 2 Immigration Law and Procedure, §64.02[3] (the INS advance parole form (Form I-512) speak in terms of parole "upon arrival").

2. In addition to our broad argument regarding the review of extra-territorial parole decisions, we should also challenge the specific findings and holdings here supporting the district court's parole ruling.

a. There is a forceful argument that the district court erred in issuing a class-wide parole ruling. Parole is a discretionary decision by the Attorney General and is never mandated under any particular facts. See Gisbert, 988 F.2d at 1443. The regulatory parole standards relied upon by the district court are not an exhaustive list of factors to be considered. See Marczak, 971 F.2d at 515. At bottom, the parole decision are made on an individualized basis. See Jean v. Nelson, 472 U.S. 846, 857 (1985); Marczak, 971 F.2d at 515 (holding that the determinations must be individualized). Thus, review of a parole decision should ordinarily be made on an individualized, as opposed to a class, basis. Cf., Jean v. Nelson, 727 F.2d at 979 (suggesting that the district court reconsider the propriety of class treatment in review of the Attorney General's parole discretion).

Here, the facts supporting each detained Haitian's claim to parole were different. The strength of the refugee claims, the U.S. familial connections, and the medical conditions of each varied considerably. Taking into account these individual facts, the Attorney General did voluntarily parole in a number of the

¹⁰ While advance parole is sometimes used as to aliens outside of the United States, it is much more frequently granted to aliens in the United States who are going abroad and want an assurance of being paroled in when they return.

detainees on humanitarian grounds (mostly pregnant women). In this context, where parole decisions are made on an individualized basis, there simply is no basis for ordering class-wide relief.

b. Moreover, there was never any formal denial of parole or a formal statement of reasons why individuals were not being granted parole. The district court here should have, at most, ordered the Attorney General to formally exercise her discretion and develop an adequate record.

c. We should also attack the court's finding that parole was compelled under the regulation (quoted above, p. 17) regarding aliens with serious medical conditions. First, this regulation does not compel the parole of persons with serious medical conditions. Second, and more importantly, it is absurd to read this regulation to require the parole of statutorily medically excludable aliens. Under the district court's construction, most, if not all, of those aliens excluded from admission, under 8 U.S.C. §1182(a)(1), because they have a communicable disease of public health significance, would also qualify for parole into the United States under the regulation's "serious medical condition" standard. It is a bizarre construction of the regulation to read it to require the physical admission of those statutorily excluded from admission by Congress, based upon the very reason they are statutorily excluded.

d. Under the Second Circuit's precedent in Bertrand v. Sava, 684 F.2d at 212-213, the Attorney General's parole decisions must be upheld if there is a legitimate and bona fide basis. Here, the fact that these individuals are statutorily excluded from admission certainly is a legitimate and bona fide reason for not bringing them into the United States in the first instance. While the Attorney General still may have the power to parole a medically excludable aliens into the United States, it is appropriate, out of deference to Congress, to at least ensure that there are compelling reasons supporting the parole. Thus, we should argue that there was a legitimate basis here for denying or delaying the grant of parole.

e. Further, we should argue that it was wholly proper for the Attorney General to "rescreen" the individuals to determine whether parole was warranted. The district court was correct in stating that the rescreening was not a procedure provided for by statute. However, the statute does not define how the Attorney General shall exercise her parole powers. See 8 U.S.C. §1182(d)(5)(A); 2 Immigration Law and Procedure, §64.02[1]-[2]. As discussed above, the parole decisions are to be made on an individualized basis, and it certainly makes sense for the individualized decision to be an informed one. There is no statutory limit on the numbers of time the Attorney General (acting through her agents) can "screen" or interview the parole candidate before arriving at a determination.

The district court's bar on the conduct of "rescreening" interviews is not only clearly incorrect, it also creates an unfavorable precedent. Currently, we are facing a new interdiction situation with Chinese aliens. The Administration may wish to screen the interdicted Chinese by distributing questionnaires to assist in determining whether any might qualify as refugees. This district court ruling could easily be invoked by those Chinese who are "screened-in" to bar any "rescreening" before the Attorney General exercises her parole power.

f. The district court also clearly erred in finding that the government only barred these HIV Haitians from admission and did not enforce the bar elsewhere. The evidence presented below clearly demonstrated that all refugees applying for admission are tested for HIV. See Transcript 517-518. Further, as a matter of law, when an alien is applying for refugee status abroad, he cannot be approved until he is given a full medical examination. See 8 C.F.R. 207.2(c); 2 Immigration Law and Procedure, §34.01[4][c][iv]. If the applicant is found to be HIV positive, then he cannot be approved unless he receives a waiver of the statutory exclusion. See 8 C.F.R. 207.3(b). Thus, the court was clearly incorrect in holding that the statutory exclusion against HIV aliens is only being enforced against Haitians.

E. Collateral Estoppel.

Finally, one of the primary arguments raised in our prior appeal from the preliminary injunction, and in our certiorari petition, was that the Haitian plaintiffs were collaterally estopped from arguing that they have either First Amendment or Due Process rights to allow them access to counsel, in light of the adverse disposition of those issues in the HRC litigation. We argued that the HRC class included all interdicted Haitians (including the Haitian plaintiffs here), and that because these issues were raised in the HRC case and rejected, the Haitian plaintiffs could not relitigate the issues here.

The collateral estoppel argument would not help us on either the First Amendment or parole rulings. That is because HCC and the other service organizations were not parties to the HRC litigation and hence cannot be bound to the HRC First Amendment ruling, and the parole issue was not raised or litigated in the HRC case.

Moreover, the argument has little chance of success given its reception in the prior rounds of this litigation. Not only did the Second Circuit reject our collateral estoppel argument in the now vacated HCC I, 969 F.2d at 1334-1338, it also rejected it in HCC II, 969 F.2d at 1354-1357. On certiorari from the HCC II decision, we raised collateral estoppel as one of our primary arguments in favor of reversal. See Brief for Petitioners, pp. 18-27. While the Supreme Court ruled in our favor on the merits -- holding that the government may lawfully repatriate aliens

interdicted on the high seas without screening them for refugee status -- the Court completely ignored our collateral estoppel argument. In its thirty-two page opinion, the Court never even mentions our argument, despite its prominence in our briefs. In that context, it is possible to construe the Court's ruling as implicitly rejecting our collateral estoppel argument (because, ordinarily, a court will reach issue preclusion issues first before reaching the merits of the case).

Even though we could raise collateral estoppel again in this appeal, we should not devote too much attention to this argument. Having lost twice on the issue already in the Second Circuit and having received a possibly implicit rejection of our argument in the Supreme Court, the prospect that a new panel of the Second Circuit will now embrace our argument would be hoping for too much. Thus, we suggest merely raising the issue to preserve it in case of a need for further review.

CONCLUSION

For the foregoing reasons, I recommend appeal.

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