Case Number: 2011-1039-F

FOIA MARKER

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Original OA/ID Number: 482				
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UNCLASSIFIED
NSC/RMO PROFILE

RECORD ID: 9408745
RECEIVED: 27 OCT 94 11

TO: PRESIDENT

FROM: LAKE
RASCO, C

DOC DATE: 03 JAN 95
SOURCE REF:

KEYWORDS: IMMIGRATION REFUGEES
HAITI

PERSONS:

SUBJECT: HIV - POSITIVE REFUGEES

ACTION: OBE / STATUS OF ORIGINAL UNKNOWN DUE DATE: 31 OCT 94 STATUS: C

STAFF OFFICER: CLARKE LOGREF: 9407490

FILES: PA NSCP: CODES:

D O C U M E N T D I S T R I B U T I O N

FOR ACTION	FOR CONCURRENCE	FOR INFO
		NSC CHRON

COMMENTS: _____

DISPATCHED BY _____ DATE _____ BY HAND W/ATTCH

OPENED BY: NSJEB CLOSED BY: NSDRS DOC 4 OF 4

UNCLASSIFIED

ACTION DATA SUMMARY REPORT

DOC	ACTION OFFICER	CAO	ASSIGNED	ACTION REQUIRED
001	BERGER	Z	94102714	FWD TO PRESIDENT FOR INFORMATION
001	CLARKE	Z	94102721	FOR REDO
002	BERGER	Z	94112120	FWD TO PRESIDENT FOR DECISION
002	SCHWARTZ	Z	94120215	FOR REDO
003	LAKE	Z	94122715	FWD TO PRESIDENT FOR INFORMATION
004	PRESIDENT	Z	95010316	FOR INFORMATION
004		X	95032815	OBE / STATUS OF ORIGINAL UNKNOWN

DISPATCH DATA SUMMARY REPORT

DOC	DATE	DISPATCH FOR ACTION	DISPATCH FOR INFO
004	950103		VICE PRESIDENT
004	950103		WH CHIEF OF STAFF

National Security Council
The White House

PROOFED BY: _____ *LOG #* 8745

URGENT NOT PROOFED: _____ *SYSTEM* *PRS* *NSC* *INT*

BYPASSED WW DESK: _____ *DOCLOG* _____ *A/O* _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
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Dohse			
Sens			
Soderberg			
Berger			
Lake			
Situation Room			
West Wing Desk		18h 3/20	A, N
NSC Secretariat			

A = Action	I = Information	D = Dispatch	R = Retain	N = No Further Action

cc: _____ _____

COMMENTS:

Exec Sec Office has diskette _____

National Security Council
The White House

Recd 12/23 9am

PROOFED BY: _____ LOG # 8745 Redo 3

URGENT NOT PROOFED: _____ SYSTEM (PRS) NSC INT

BYPASSED WW DESK: _____ DOCLOG DPS A/O _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
Reed			
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Soderberg			
Berger	16		
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Situation Room			
West Wing Desk	18	MBN 12/29	D Rusco
NSC Secretariat	19	1/3/95	D PODESTA

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc: _____ _____

COMMENTS: SB - redraw per request.

12/29

Exec Sec Office has diskette

rec'd 12/22 11:30am

National Security Council
The White House

PROOFED BY: _____ LOG # 8745 Redo #2

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	SEQUENCE TO	HAS SEEN	DISPOSITION
Reed			
Sens	10	ADS	
Itoh	11		
Soderberg			
Berger	12		to Eric
Lake			
Situation Room			
West Wing Desk	13		
NSC Secretariat			
Schwartz	14		FEA

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc: _____ _____

COMMENTS:

Exec Sec Office has diskette LMD

Eric

We need to redo this quickly to put in context of general decision on Haitians / 6 'tms. Let's add #s & 2 and turn around quickly

R

National Security Council
The White House

PROOFED BY: _____ LOG # 8745 Pedo

URGENT NOT PROOFED: _____ SYSTEM (PRS) NSC INT

BYPASSED WW DESK: _____ DOCLOG DPS A/O _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
Reed	05	JTR	
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Soderberg	06	NS	
Berger	07		
Lake			
Situation Room			
West Wing Desk	8		
NSC Secretariat			
Schwartz	9		FFA

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc: _____ _____

COMMENTS:

Exec Sec Office has diskette _____

W

→ NW

SRB, _____

What is the status of this memo?

Let's get Carol Rascoe's views

→ ERIC SCHWARTZ for action

rec'd 10/27

SM

National Security Council
The White House

PROOFED BY: _____ LOG # 8745

URGENT NOT PROOFED: _____ SYSTEM (PRS) NSC INT

BYPASSED WW DESK: _____ DOCLOG NA A/O _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
Reed			
Sens	1	ADS	
Itoh			
Soderberg			
Berger	2		
Lake			
Situation Room			
West Wing Desk	3		
NSC Secretariat			
Clarke	4		FFA

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc: _____ _____

COMMENTS:

PLEASE RETURN THIS ROUTE CHIT AND SRB NOTE WITH REDO.

Exec Sec Office has diskette _____

TIME OF TRANSMISSION

TIME OF RECEIPT

95 JAN 3 P8:19

WHITE HOUSE SITUATION ROOM

PRECEDENCE: IMMEDIATE
~~PRIORITY~~
ROUTINE

RELEASOR: _____

DTG: _____

MESSAGE NO.: _____ **CLASSIFICATION:** unclassified **TOTAL :** 5
PAGES INCLUDING COVERS

FROM : Sharon Wagner (NAME) 6 2702 (PHONE NUMBER) GrFl-WW (ROOM NO.)

MESSAGE DESCRIPTION: _____

TO (AGENCY)	DELIVER TO	DEPT/ROOM NO.	PHONE NUMBER
Arkansas	Stephen Goodin	(FOR THE PRESIDENT - INFORMATION)	
"	Bruce Lindsey - FYI		

REMARKS:

Stephen: Per John, this is not urgent. The President may want to read it on the return flight.

Lake/Rasco memo on HIV-positive Refugees

THE WHITE HOUSE

WASHINGTON

January 3, 1995

INFORMATION

95 JAN 3 P4:01

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE
CAROL RASCO

SUBJECT: HIV-positive Refugees

We wanted to inform you of current plans for dealing with a sensitive and difficult issue: HIV-positive Haitians who were granted refugee status prior to the intervention but who have remained at Guantanamo Bay and in Haiti.

We also address two Haitian migration issues that relate to our decision on the HIV-positive Haitians: 1) disposition of Haitians currently in safe haven at Guantanamo and 2) disposition of Haitians who were approved for refugee status during the period of military rule but were not able to leave before the intervention.

Plans for Haitians Still in Safe Haven at Guantanamo

The large majority of the Haitians who chose safe haven at Guantanamo have returned voluntarily. There are, however, about 4100 who remain and whose disposition is unresolved. Over the next several days, we will make a final attempt to encourage them to return voluntarily and will inform them they are eligible for a reintegration grant and a short-term jobs program upon return. Those who continue to refuse to return will be repatriated involuntarily.

To meet concerns regarding fairness (and to maintain good relations with UNHCR), we will review the cases of individuals at Guantanamo who express continued fears of return. In view of changed conditions in Haiti, however, we expect few if any to meet the refugee definition and to remain at Guantanamo.

Movement of Previously Approved Refugees After 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

CC: Vice President
Chief of Staff

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 subject to administrative processing requirements. Many took measures -- e.g., selling their belongings, quitting their jobs -- in reliance on our statement about U.S. resettlement.

HIV-positive Haitian Refugees and the Medical Exclusion

This decision still leaves within Haiti about 100 HIV-positive Haitians who were approved for refugee status in the in-country program prior to the intervention. In addition, there are 26 HIV-positive Haitians at Guantanamo who were approved for refugee status at our processing ship in Jamaica. The 26 were approved before we ended refugee admission interviews of boat people and began the safe haven policy. However, they were not permitted entry when the 550 other Jamaica-approved refugees were accepted for admission into the U.S.

These two groups of HIV-positive Haitians -- in Haiti and at Guantanamo -- have been barred due to a medical exclusion in the Immigration and Nationality Act.

Waiver of the Exclusion

In the case of refugees, this exclusion may be waived for humanitarian, public interest or family unification reasons. However, a 1988 INS policy directive requires HIV-positive refugees 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

The INS policy directive's sponsorship requirement is discriminatory, as refugees, by virtue of their status, are by legislation exempt from "public charge" requirements imposed on other immigrants. 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 this defacto public charge requirement for HIV-positive refugees.

INS estimates that, out of more than 100,000 refugees worldwide who enter the U.S. each year, this change would result in entry of less than 100 HIV-positive refugees annually. (These are people who meet our pre-selection criteria overseas, are interviewed and approved, and then are medically tested and discovered to have the HIV virus.)

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.

Maintaining the INS Policy Directive and Disposition of HIV-Positive Haitians

We have thus suggested that Justice/INS defer considering a change in its policy directive. Justice understands our position on this issue. However, we still need to deal with the two groups of HIV-positive Haitians and similar refugees in other parts of the world.

The INS has now received guarantees of private sponsorship for the 26 Haitians at Guantanamo, thus bringing them into conformity with the requirements of the policy directive and its defacto public charge requirement. They will, therefore, be permitted to enter the U.S.

INS will also be informing the 100 others in Haiti -- who thus far have not been able to obtain private sponsorships -- that they will be given a limited time to obtain such sponsorships. Absent exceptional circumstances, their approval for entry will be withdrawn after this time period if they do not obtain sponsorships. (Frankly, INS officials are doubtful that those among this group of 100 -- who have been somewhat less visible than the HIV-positive Haitians at Guantanamo -- will be able to obtain sponsorships.)

Finally, in the absence of a change in the policy directive, the Attorney General is prepared to provide, in exceptional circumstances, an exemption from the defacto public charge requirement for approved HIV-positive refugees in other parts of the world. Such a circumstance would, for example, 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 the U.S. Government.

Discussion

In view of the changed circumstances in Haiti, it is reasonable to question the need to permit entry for any of these groups of Haitians. On balance, however, we believe that the current course of action is appropriate for a number of reasons.

A blanket decision to bar entry of all HIV-positive Haitians -- even those who meet the existing waiver requirements -- would conflict with our decision to permit entry of the other (non-HIV) Haitians approved for refugee status prior to the intervention. We would be accused of heightening the already discriminatory treatment against HIV-positive refugees, as the factors that informed our decision on entry for the non-HIV Haitian refugees are just as relevant for those who are HIV-positive.

Attempting to return the 26 Haitians at Guantanamo would present additional problems. To ensure basic fairness, the UNHCR and others would press us to re-evaluate their already approved refugee cases if we sought to return them to Haiti. Such re-evaluation, as well as any attempt to return some or all of the Haitians, would almost certainly come under a court challenge similar to that which we faced last year (and which resulted in the admission of some 200 HIV-positive refugees).

For each of these reasons, Justice and State will begin quietly to implement the above-described effort over the next several weeks.

THE WHITE HOUSE

WASHINGTON

January 3, 1995

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE
CAROL RASCO

SUBJECT: HIV-positive Refugees

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Chief of Staff

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Discussion

In view of the changed circumstances in Haiti, it is reasonable to question the need to permit entry for any of these groups of Haitians. On balance, however, we believe that the current course of action is appropriate for a number of reasons.

A blanket decision to bar entry of all HIV-positive Haitians -- even those who meet the existing waiver requirements -- would conflict with our decision to permit entry of the other (non-HIV) Haitians approved for refugee status prior to the intervention. We would be accused of heightening the already discriminatory treatment against HIV-positive refugees, as the factors that informed our decision on entry for the non-HIV Haitian refugees are just as relevant for those who are HIV-positive.

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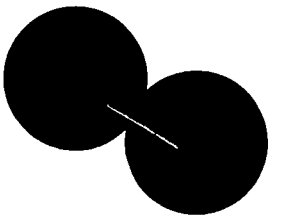
For each of these reasons, Justice and State will begin quietly to implement the above-described effort over the next several weeks.

8745REDO2

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

December 22, 1994



ACTION

MEMORANDUM FOR ANTHONY LAKE

THROUGH: R. RAND BEERS

FROM: ERIC SCHWARTZ

SUBJECT: HIV-Positive Refugees

Per your instruction, I have added to the subject memorandum a short discussion of our plans for the Haitians remaining at Guantanamo.

As indicated in my previous cover note to you, the attached memorandum results from a White House meeting with Leon Panetta last month. Nancy was the senior NSC official at the meeting, which took place while you were in Jakarta.

Leon tasked us with preparing a memorandum based on the conclusions of the meeting. Because the recommended course of action involved Justice and INS legal authorities, we first requested their views on how to implement the agreed-upon plan. We have now received those views, which are incorporated in the attached information memorandum to the President.

In essence, the conclusions of the Panetta meeting were as follows:

1. That we would not at this point recommend a change in an INS policy directive that imposes a defacto public charge requirement on HIV-positive refugees.

2. That we would nonetheless seek entry of the Guantanamo HIV-positive refugees. The AG would use special authority to exempt these refugees from the INS policy directive's public charge requirement.

3. That in the absence of a change in the INS policy directive, the AG would provide exemptions to the policy directive for other HIV-positive refugees in exceptional circumstances.

Since the Panetta meeting there have been two developments that were not anticipated last month but are reflected in the attached

memo. INS now believes that the Guantanamo Haitians have bonafide offers of private sponsorship, eliminating the need for special exemptions for their entry (item #2 above). Moreover, INS now intends to announce to approved HIV-positive refugees in Haiti that they have a limited time to obtain private sponsors. Absent exceptional circumstances, their approval for entry will be withdrawn when this period ends.

Concurrences: James Baker, Stephen Warnath (DPC)

RECOMMENDATION

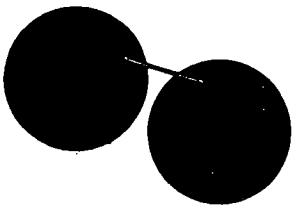
That you sign the attached memorandum to the President at Tab I.

Attachment
Tab I Memo for the President

8745REDO

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

November 14, 1994



ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: RICHARD CLARKE ES for

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

TO SB -
I'd recommend
we add Carol to memo
to POTUS.

ms

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 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. 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. In that case, 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 _____

about 10/30

Randy/Dick:

After discussing with Randy, I cut this down to ~~five~~ 6 pages. It is really a memorandum on three separate issues.

I hope we come out in the right place on it.

Eric

OBE'D -

Never sent

forward.

1745

NORTHWEST WORLD CLUBS

PHOTOCOPY PRESERVATION

Facsimile Cover Sheet

Please deliver the following to:

Name Marcia Norman

Company NSC

Phone # 202 456 9351

FAX # 202 456 9360

Number of pages 6 (including this one)

From:

Name Eric Schwartz

Company NSC

Phone #

FAX #

Date

Description of contents: Marcia - please make these corrections before giving the memo to Randy.

Remarks: Eric

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; others had not yet completed post-approval processing procedures.

Memorandum to the President

Refugee Issues

There are three refugee-related issues on which we seek your guidance.

I. **What to do with Haitians approved for U.S. resettlement prior to the intervention but not yet resettled in the United States.**

Approved refugees who remained in Haiti at the time of the intervention: 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 ~~and suspended consideration of those cases that were still active but not yet decided~~. 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.

The State Department has continued to permit U.S. entry for these Haitians and this course of action has been approved by the interagency working group on Haiti. There are now about 1000 approved Haitians who remain in Haiti and State intends to resettle these Haitians in the United States over the next several weeks.

Understanding that country conditions in Haiti have changed dramatically since the intervention, the interagency working group nevertheless approved this course of action for several 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.

- 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.

Immigration and Naturalization Service (INS)

They had also received from the [redacted] detailed information on [redacted] procedures for departure to the United States.

- 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). There would likely be critical press reporting (about broken promises), and the press might search for instances of repression against an approved refugee who was denied entry.

Alternatives to ~~this~~ course of action: The principal justification against resettling all ~~of~~ the remaining approved refugees is that we have restored democracy in Haiti and the regime that caused so many to flee no longer exists.

There are two alternatives to the current course of action:

1) provide ~~individual~~ case-by-case reappraisal of previously approved cases to determine whether the claimant retains a compelling reason to be resettled in the United States; or

2) make a blanket decision that none of the previously approved cases will be permitted into the United States.

The principal downside to the first course of action is bureaucratic: it would require reinterviews of about 1000 claimants, result in the redeployment to Haiti of INS and State processing personnel and probably extend refugee program activities for some months. Some would also characterize our reappraisal as niggardly in view of our prior commitments to these people. Finally, President Aristide might object to the seeming continuation of processing activities.

The principal downside to the second course of action is that it would be politically controversial and arguably unfair, as we will have made summary decisions about a class of people who had been determined, in an administrative proceeding, to warrant admission to the United States. UNHCR would argue that, given the uncertainty in some areas of Haiti, we would have to at least reevaluate the claims of those who we had previously judged were refugees.

II. What to do about HIV-positive refugees worldwide.

The question of continuing to resettle previously approved Haitian refugees is complicated by an INS proposal to modify a worldwide discriminatory restriction on entry of refugees who test positive for the HIV virus. All concerned agencies -- as well as the National Office of AIDS Policy -- strongly support the INS policy modification.

8 3

Discrimination against HIV-positive refugees: As a result of an amendment by Sen. Helms last year, 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 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.

INS now proposes to remove this second requirement, as our immigration law ~~generally~~ exempts refugees (by virtue of their status) from public charge requirements. ~~HHS along with 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 far more costly diseases enter the U.S. each year.

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.

Implications of the policy shift for HIV-positive Haitian refugees: There are about 29 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.

7-4

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.

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 [redacted] criticism.

III. The HIV-positive refugees at Guantanamo

Regardless of your decision on the first two issues of this memorandum, you may want to choose to permit entry for the 29 HIV-positive Haitians at Guantanamo who were approved for refugee status at our processing ship in Jamaica. This is because a decision to bar their entry may well 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.

While we believe we would ultimately prevail in a new round of litigation, a lawsuit would renew the controversy on this issue and we might well lose (as we did last year) at the initial stages.

DISCUSSION

As mentioned, all agencies support resettling those Haitians who were approved for refugee status prior to the intervention (issue 1). Moreover, all agencies support the INS proposed HIV policy modification (issue 2). If you agree with the interagency positions on these issues, then the 29 HIV-positive Haitian refugees at Guantanamo (issue 3) would also come into the U.S. ~~If not,~~ then you ~~would~~ will have to make a separate decision on whether to permit entry for the 29.

Ironically, a decision to be more restrictive on entry for previously approved refugees would lower the political costs of permitting the HIV waiver modification, as fewer HIV-positive

However, if you do not approve the interagency positions [redacted] on one or both of the first two issues,

refugees from Haiti would end up in the United States. [However, in view of the arguments about fairness and public/UN reaction, I would not recommend a blanket decision denying entry to all previously approved Haitians without any possibility of reappraisal.]

[NSC position?.]

OPTIONS

1. HAITIANS APPROVED FOR REFUGEE STATUS PRIOR TO THE INTERVENTION:

Permit them to enter the United States (Interagency-approved position).

Approve _____ Disapprove _____

Drop the ~~presumption~~ assumption of entry but permit case-by-case reappraisal.

Approve _____ Disapprove _____

Make a blanket determination that no approved Haitian will enter the United States [NSC does not recommend].

Approve _____ Disapprove _____

2. INS PLAN TO MODIFY THE WAIVER REQUIREMENT FOR HIV

Permit INS to go forward with the waiver modification (Interagency approved position).

Approve _____ Disapprove _____

3. THE 29 HIV-POSITIVE REFUGEES AT GUANTANAMO

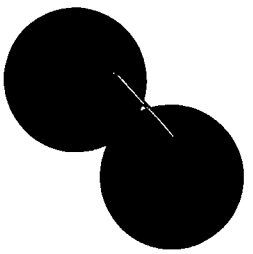
Regardless of the decision on options 1 and 2, permit entry for the 29 HIV-positive Haitians approved for refugee status in Jamaica.

Approve _____ Disapprove _____

8745REDO

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

October 31, 1994



ACTION

MEMORANDUM FOR SAMUEL R. BERGER

FROM: RICHARD A. CLARKE

SUBJECT: Processing Haitians Approved for Refugee Status Before the Intervention

I have attached a decision memorandum to the President on the subject issue.

On one subissue, I have provided a suggested NSC view in brackets. Otherwise, I have refrained from depicting an NSC view on the three issues presented in the memo.

RECOMMENDATION

That you sign the memorandum to the President at Tab I.

Attachments
Tab I Memo for the President
Tab II Copy of Prior Memo on HIV-Positive Refugees 7490

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL R. BERGER

SUBJECT: Refugee Issues

There are three refugee-related issues on which we seek your guidance.

I. What to do with Haitians approved for U.S. resettlement prior to the intervention but not yet resettled in the United States.

Approved refugees who remained in Haiti at the time of the intervention: 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-approved processing procedures.

The State Department has continued to permit U.S. entry for these Haitians and this course of action has been approved by the interagency working group on Haiti. There are now about 1000 approved Haitians who remain in Haiti and State intends to resettle these Haitians in the United States over the next several weeks.

Understanding that country conditions in Haiti have changed dramatically since the intervention, the interagency working group nevertheless approved this course of action for several 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

CC: Vice President
Chief of Staff

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). There would likely be critical press reporting (about broken promises), and the press might search for instances of repression against an approved refugee who was denied entry.

Alternatives to the present course of action: The principal justification against resettling all the remaining approved refugees is that we have restored democracy in Haiti and the regime that caused so many to flee no longer exists.

There are two alternatives to the current course of action:

1) provide case-by-case reappraisal of previously approved cases to determine whether the claimant retains a compelling reason to be resettled in the United States; or

2) make a blanket decision that none of the previously approved cases will be permitted into the United States.

The principal downside to the first course of action is bureaucratic: it would require re-interviews of about 1000 claimants, result in the redeployment to Haiti of INS and State processing personnel and probably extend refugee program activities for some months. Some would also characterize our reappraisal as niggardly in view of our prior commitments to these people. Finally, President Aristide might object to the seeming continuation of processing activities.

The principal downside to the second course of action is that it would be politically controversial and arguably unfair, as we will have made summary decisions about a class of people who had been determined, in an administrative proceeding, to warrant admission to the United States. UNHCR would probably argue that,

given the political uncertainty (and continued abuses by local attachés) in some areas of Haiti, we would have to at least reevaluate the claims of those who we had previously judged were refugees.

II. What to do about HIV-positive refugees worldwide.

The question of continuing to resettle previously approved Haitian refugees is complicated by an INS proposal to modify a worldwide discriminatory restriction on entry of refugees who test positive for the HIV virus. All concerned agencies -- State, Justice and HHS -- as well as the National Office of AIDs Policy -- strongly support the proposed INS policy modification.

Discrimination against HIV-positive refugees: As a result of an amendment by Sen. Helms last year, 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 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.

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 far more costly diseases enter the U.S. each year.

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.

Implications of the policy shift for HIV-positive Haitian refugees: There are about 29 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.

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.

III. The HIV-positive refugees at Guantanamo

Regardless of your decision on the first two issues of this memorandum, you may want to choose to permit entry for the 29 HIV-positive Haitians at Guantanamo who were approved for refugee status at our processing ship in Jamaica. This is because a decision to bar their entry may well 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.

While we believe we would ultimately prevail in a new round of litigation, a lawsuit would renew the controversy on this issue and we might well lose (as we did last year) at the initial stages.

DISCUSSION

As mentioned, all agencies support resettling those Haitians who were approved for refugee status prior to the intervention (issue 1). Moreover, all agencies support the INS proposed HIV policy modification (issue 2). If you agree with the interagency positions on these issues, then the 29 HIV-positive Haitian refugees at Guantanamo (issue 3) would also come into the U.S. However, if you do not approve the interagency position on one or both of the first two issues, then you will have to make a separate decision on whether to permit entry for the 29.

Ironically, a decision to be more restrictive on entry for previously approved refugees would lower the political costs of permitting the HIV waiver modification, as fewer HIV-positive refugees from Haiti would end up in the United States. [However, in view of the arguments about fairness and public/UN reaction, I would not recommend a blanket decision denying entry to all previously approved Haitians without any possibility of reappraisal.]

[NSC position?.]

OPTIONS

1. HAITIANS APPROVED FOR REFUGEE STATUS PRIOR TO THE INTERVENTION:

Permit them to enter the United States (interagency-approved position).

Approve _____ Disapprove _____

Drop the assumption of entry for all previously approved cases, but permit case-by-case reappraisal.

Approve _____ Disapprove _____

Make a blanket determination that no previously approved Haitian will enter the United States [NSC does not recommend].

Approve _____ Disapprove _____

2. INS PLAN TO MODIFY THE WAIVER REQUIREMENT FOR HIV

Permit INS to go forward with the waiver modification (interagency approved position).

Approve _____ Disapprove _____

3. THE 29 HIV-POSITIVE REFUGEES AT GUANTANAMO

Regardless of the decision on options 1 and 2, permit entry for the 29 HIV-positive Haitians approved for refugee status at our processing ship in Jamaica.

Approve _____ Disapprove _____

THE WHITE HOUSE
WASHINGTON

Dick -

I still have a ~~probe~~ problem with this. Not sure how we can justify proposition that these people now *are* political refugees (i.e. they *have* a well-founded fear...) when we have democratically elected govmt in place at great cost and rush to U.S. I didn't think refuge status was available to people who fear *non-govmt* violence.

Suggest you do decision memo for Pres on both these issues. (HIV follows position on issue one). State both sides. Leave # blank for NSC recommendation. Does DOJ have position? Other agencies?

—

CB

8745

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

October 27, 1994

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

FROM: RICHARD A. CLARKE

SUBJECT: Processing Haitians Approved for Refugee Status Before the Intervention

In the context of a memorandum on HIV-positive refugees, you and Tony questioned why we are continuing to resettle already-approved refugees from our in-country processing program in Haiti.

I wanted to describe for you in greater detail the ExCom decision on this issue. If you concur with the ExCom proposed course of action, I suggest we prepare a memorandum on this issue to other White House staff who may have an interest. If you do not approve, then we should discuss further, as there are a range of issues that you would then need to consider before determining a different course of action.

I. Refugees approved for U.S. resettlement prior to the intervention but not yet resettled.

Refugees who remained in Haiti at the time of the intervention: Just prior to the intervention, we stopped accepting new cases for refugee status and suspended consideration of those cases that were still active but not yet decided. However, there were some 1500 already-approved refugees who had not yet left Haiti.

Decision of the ExCom on this issue: The State Department would like to continue to move the 1000 or so refugees who remain and the ExCom agreed with the State position. State makes the following points:

- We told these people they would be permitted to come 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 already-approved refugees after a change in country conditions.

- Moving approved refugees has not proven controversial. 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). There would likely be critical press reporting (about broken promises), and the press might search for instances of repression against an approved refugee who was denied entry.

In fact, conditions for persons previously declared *bonafide refugees* may not be completely safe in all cases, and we do not want to risk reprisal against someone we have previously told could come to the U.S. As I have reported to you, there is continued repression in parts of Haiti, with attachés taking their weapons to Deschapelles, La Chapelle, Desdunes, St. Michel de L'Attalaye and St. Marc.

II. What to do about HIV-positive refugees.

To be sure, the issue is complicated by the planned INS worldwide policy modification regarding HIV-positive refugees as described in the previous memo Eric sent to you (Attachment I).

Summary of INS modification of policy directive on HIV: As you recall, the Immigration and Naturalization Service (INS) intends to modify a discriminatory restriction on entry of refugees worldwide who test positive for the HIV virus. All concerned agencies -- State, HHS and Justice -- as well as the National Office of AIDS Policy support the INS policy modification. The change, while maintaining a range of special requirements for entry of HIV positive refugees, would eliminate a "public charge" requirement imposed by policy directive in 1988 on HIV-positive refugees. INS notes that refugees, by virtue of their status, are exempt from such requirements and that this policy directive was therefore discriminatory.

HIV-positive Haitian refugees: There are about 29 HIV-positive refugees at Guantanamo who went through the refugee adjudication process on our processing ship in Jamaica and were granted refugee status. Because they could not meet the public charge requirement, they remained in Guantanamo while the 600 other Jamaica-approved refugees entered the U.S. There are also about 88 HIV-positive approved refugee applicants within Haiti. Under the INS policy shift, these refugees would also be subject to a modified waiver requirement that still considers public health

concerns but, as mentioned, eliminates the public charge requirement. If their waiver applications are approved, they would be considered for entry in the same manner as the other approved refugees.

Under our refugee admissions program, these refugees would be assisted by non-governmental organizations on arrival and would be eligible for cash and medical assistance provided through the refugee admissions program, as well as other federal and state programs.

Attachment:

Tab I Prior Memorandum on HIV-Positive Refugees (7490)

7490

ADDITIONAL COMMENTS

1] SB TO TL Date:

I'm not sure why we should continue to bring Haitian 'political refugees' to U.S. Do we still believe they

2] ____ TO ____ Date:

have well founded fear of persecution? Hard for us to sustain mix of 15,000 troops there and Aristide home

3] ____ TO ____ Date:

Do they have a vested right to come to U.S. because they were refugees when processed? I'd send back

4] ____ TO ____ Date:

to Eric if you agree.

R

5] TL TO SB Date:

I agree.

R

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

October 14, 1994

ACTION

MEMORANDUM FOR ANTHONY LAKE

THROUGH: RICHARD A. CLARKE

FROM: ERIC SCHWARTZ

SUBJECT: HIV-Positive Refugees: INS Policy Change

I have attached a memorandum to the President on the subject issue.

I have drafted it as an information memorandum so that the decision on this sensitive issue remains with INS unless the President objects. As indicated below, I have coordinated with DPC staff.

Concurrences by: Jamie Baker, Steve Wagnath (DPC staff), Mort Halperin

RECOMMENDATION

That you sign the memoranda to the President at Tab I.

Attachments
Tab I Memorandum to the President

THE WHITE HOUSE

WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: ANTHONY LAKE
CAROL RASCO

SUBJECT: HIV-positive Refugees

Summary

The Immigration and Naturalization Service intends to modify a discriminatory restriction on entry of refugees who test positive for the HIV virus. All concerned agencies -- State, HHS and Justice -- as well as the National Office of AIDS Policy strongly support the INS policy modification. The shift is likely to result in entry of some HIV-positive Haitian refugees; however, none of these movements would take place before mid-November at the earliest.

I. Discrimination against HIV-positive refugees

As a result of an amendment by Sen. Helms last year, 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 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.

According to INS, the second part of this test -- while appropriate for non-refugee immigrants who are HIV-positive -- is not appropriate for HIV-positive refugees. This is because the second part of the test clearly imposes a "public charge requirement," to which refugees, by virtue of their status, are exempt under our law. State, HHS, Justice and INS point out that the public charge requirement in this INS directive unfairly

cc: Vice President
Chief of Staff

discriminates against HIV-positive refugees, as refugees with far more costly diseases enter the U.S. each year.

INS thus intends to alter its policy directive by removing the public charge requirement for HIV-positive refugees and remedying this inconsistency. The current public charge requirement for immigrant (i.e., non-refugee) waiver applicants would not be affected by this decision and would be maintained. INS also intends to maintain the first requirement in its policy directive on HIV-positive refugees, relating to public health and spread of the disease.

II. 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.

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

Current general policy toward approved refugees from Haiti: We have suspended acceptance of new applications under the in-country refugee processing program in Haiti. However, there are about 1000 Haitians in Haiti who were already approved for refugee status and entry to the United States and have made preparations to leave (such as selling their homes and belongings). These refugees -- many of whom have spent periods in hiding -- remained in Haiti because they were prevented by the military regime from traveling or because their final paperwork had not been completed.

Under current circumstances, in which there are still pockets of instability, we are processing the already-approved applicants for resettlement if they so desire, but are keeping this issue under review. After a State Department determination that conditions are sufficiently stable in Haiti, our plan is to move to case-by-case reevaluation of those approved applicants who have not yet left. Under case-by-case review, only those with

compelling humanitarian justifications will be permitted U.S. entry.

HIV-positive Haitian refugees: There are about 29 HIV-positive refugees at Guantanamo who went through the refugee adjudication process on our processing ship in Jamaica and were granted refugee status, but who could not meet the third waiver requirement. They remained in Guantanamo while the 600 other Jamaica-approved refugees entered the U.S. There are also about 88 HIV-positive approved refugee applicants within Haiti. Under the INS policy shift, these refugees will also be subject to the modified waiver requirement. If their waiver applications are approved, they will be considered for entry in the same manner as other approved refugees.

These refugees will be counseled and otherwise assisted by non-governmental resettlement organizations on arrival. They will also be eligible for financial and medical support provided by the refugee admissions program, by special federal legislation for Haitian and Cuban entrants and by other federal and state social service programs.

→ Schwartz for files

11/11 → Eric Schwartz See notes @

PRIVILEGED WORK PRODUCT

This is contingency instructions to lawyers involved in Cuban case as Haitian issues are joined. Please review my responses. Let's discuss briefly today. @

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.

agree

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.

OK R

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

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 strong 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? Yes

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~~ would, 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.

Agree

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.

Explore interagency + make recommendation.
Probably need President's approval.

Shouldn't this be part of 8745?

If so — ccs to me.

To Eric Schwartz

Eric

cc: Mickey George Bruce