

# Essays

## Litigating as Law Students: An Inside Look at *Haitian Centers Council*

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On June 8, 1993, a federal district court declared the world's first HIV detention camp illegal and ordered the release of the Haitian refugees who were confined there. The United States government had created the camp at the U.S. Naval Base in Guantánamo Bay, Cuba, and had detained approximately three hundred Haitian refugees there for eighteen months. Ironically, the day the last refugees were released from the camp, the Supreme Court, over Justice Blackmun's lone dissent, upheld the government's policy of summary repatriation (*refoulement*) of Haitian asylum seekers who are interdicted on the high seas. These two court decisions marked the end of a

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<sup>†</sup> J.D. Candidates, Yale Law School. While it is impossible to individually acknowledge all of those who gave their time, support, and energy to this case, we are especially grateful to Professor Harold Hongju Koh who has been our mentor and inspiration throughout the case and the writing of this Essay, and to our co-counsel—Ignatius Bau, Lucas Guttentag, Jennifer Klein, Judy Rabinovitz, Michael Ratner, Robert Rubin, Susan Sawyer, Suzanne Shende, and Joe Tringali. We also acknowledge the over one hundred past and present Yale Law students who worked on behalf of the Haitians, in particular: Melinda Amiotte, Michelle Anderson, Ethan Balogh, Michael Barr, Graham Boyd, Raymond Brescia, Wade Chow, Anthony Cichello, Rodger Citron, Sarah Cleveland, Christopher Coons, Lisa Daugaard, Margareth Etienne, Eric Falkenstein, Mercer Givhan, Carl Goldfarb, Adam Gutride, Thomas Hammack, Laurie Hoefer, Anthony K. Jones, Serge Learsy, Christy López, Christine Martin-Nicholson, Feisal Naqvi, Catherine Powell, L. Song Richardson, Stephen Roos, Jonathan Ross, Veronique Sanchez, Margo Schlanger, Paul Sonn, Jeannie Su, W. Todd Thomas, Cecillia Wang, Jessica Weisel, Jonathan Weissglass, and Michael Wishnie. We give special thanks to Ronald Aubourg, our trusted interpreter and friend, and to Professors Robert Solomon and Kathleen Sullivan for their comments on earlier drafts of this Essay. Finally, we thank Dean Guido Calabresi, the Jerome N. Frank Legal Services Organization, and the Yale Law School for their generous financial support throughout the litigation.

case<sup>1</sup> initiated and litigated by students in the Lowenstein International Human Rights Law Clinic at Yale Law School.<sup>2</sup> The case was brought under the supervision of Professor Harold Hongju Koh from Yale Law School and Michael Ratner from the Center for Constitutional Rights, joined by Lucas Guttentag from the Immigrants' Rights Project of the American Civil Liberties Union, Robert Rubin from the National Refugee Rights Project of the San Francisco Lawyers' Committee for Human Rights, and Joe Tringali from the New York firm of Simpson Thacher & Bartlett.

Throughout the case, our legal team knew we<sup>3</sup> were fighting an uphill battle to persuade both the courts and the general public that the U.S. policy toward Haitian refugees was illegal as well as immoral. In court, we confronted the judiciary's historical deference to executive power and hostility toward aliens. In public, we fought the perception that Haitian immigrants, even bona fide refugees, threaten our society with poverty and AIDS and therefore should be treated differently from other refugees. During the almost eighteen months of litigation, our strategy shifted according to the relative strengths of our position in legal and extralegal fora. What began as a concentrated legal effort soon expanded to include the media, Congress, grassroots organizations, and celebrities. The litigation became only one part of a popular protest against the U.S. government's creation of the HIV detention camp and its summary repatriation of asylum seekers. Ultimately, however, our efforts on behalf of both the Haitians detained on Guantánamo and those seeking to flee Haiti ended in the courts, where they had begun. The

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1. The litigation began as one case with two temporary restraining orders, but was later bifurcated. See *infra* note 54. The "Guantánamo case," as we call it, concluded in a trial, which resulted in the release of all Haitian refugees remaining on Guantánamo. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992) (temporary restraining order granted); Preliminary Injunction Order, No. 92-1258 (E.D.N.Y. granted Apr. 6, 1992), *stayed*, 112 S. Ct. 1714 (1992), *aff'd*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). The Supreme Court vacated the Second Circuit's preliminary injunction after the district court issued a final order releasing the Guantánamo Haitians, 823 F. Supp. 1028 (E.D.N.Y. 1993), and the parties entered a settlement agreement that included the vacatur of the Second Circuit's preliminary injunction. What we call the "Non-Return" case ended with an adverse ruling by the Supreme Court. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-1258, 1992 U.S. Dist. LEXIS 8452 (E.D.N.Y. June 5, 1992) (TRO denied), *rev'd*, 969 F.2d 1350 (2d Cir. 1992), *stayed*, 113 S. Ct. 3 (1992), *rev'd sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

2. The Lowenstein Clinic was founded by several Yale Law School students and Professor Harold Hongju Koh in 1991 to further the use of U.S. courts as a forum for challenging international human rights abuses. The Clinic grew out of the Lowenstein International Human Rights Project, a student organization that provides training in human rights lawyering. Both were named for Allard K. Lowenstein, a political activist and Yale Law graduate. From its inception, the Clinic collaborated directly with the Center for Constitutional Rights (CCR) in New York. CCR has resurrected the Alien Tort Claims Act, 28 U.S.C. § 1350, by successfully litigating *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which interpreted § 1350 to enable victims of human rights abuses from foreign countries to sue their persecutors in U.S. courts. Traditionally, the Clinic brought only Alien Tort Claims suits.

3. The three authors of this Essay all participated on the legal team as law students. This Essay uses the word "we" to refer either to the legal team of attorneys and students, or specifically to the student team, depending on the context. However, it does not refer to the three authors alone. All of the work on the case was performed as a team, and the story of the litigation is properly understood as a story of teamwork.

U.S. District Court for the Eastern District of New York ordered the release of the detained refugees (the "Guantánamo case") and the United States Supreme Court upheld the government's policy of summary repatriation (the "Non-Return case").

Students were intimately involved in every aspect of the litigation, from filing the first request for a Temporary Restraining Order (TRO) in March 1992, to spearheading the media campaign in November 1992, to reformulating legal claims at trial in March 1993. Part I of this Essay reviews how the litigation, *Haitian Centers Council v. Sale*, unfolded. By recording the story of the U.S. government's unprecedented treatment of refugees, we hope to expose and memorialize this shameful episode in U.S. history. Part II presents a more detailed picture of the litigation, focusing on the students' role on the legal team. By describing the work that students did on the case, we hope to illustrate the rewards and struggles involved in clinical impact litigation for students as well as for practitioners and legal educators.

## I. THE EVOLUTION OF THE LITIGATION

When Haiti's military violently overthrew the democratically elected government of President Jean-Bertrand Aristide on September 30, 1991, it returned Haiti to brutal military rule. The military arbitrarily detained, routinely tortured, and summarily executed thousands of Haitians who had supported Aristide;<sup>4</sup> tens of thousands of Haitians were forced to flee their country by boat. Despite the Haitians' obvious plight, the U.S. Immigration and Naturalization Service (INS) subjected fleeing Haitians to an asylum application procedure different from the procedure for refugees of any other nationality.

Under the standard procedures mandated by the Immigration and Nationality Act (INA), all refugees who reach the United States have the right to apply for political asylum.<sup>5</sup> Asylum seekers in the United States are guaranteed the rights, among others, to have the assistance of counsel during the application process, to present witnesses, and to appeal adverse asylum determinations.<sup>6</sup> For Haitian asylum seekers, however, the United States had added an intermediate procedure to determine who would be allowed to apply for political asylum in the United States. In 1981, asserting that most of the Haitians were economic migrants attempting to enter the United States, rather than political refugees wanting only to escape Haiti, the United States entered into an agreement with Haiti authorizing the United States Coast Guard to stop

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4. See AMNESTY INTERNATIONAL, *HAITI: THE HUMAN RIGHTS TRAGEDY* (1992); AMERICAS WATCH ET AL., *RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE COUP* (1991).

5. Immigration and Nationality Act of 1952 §§ 208, 243(h), 8 U.S.C. §§ 1158, 1253(h) (1988).

6. INA § 208 (implemented by 8 C.F.R. §§ 208.9(b), 208.18(b) 1993); INA § 243(h) (implemented by 8 C.F.R. §§ 236.2(a), 236.7 (1993)).

and board Haitian vessels and to return suspected "economic migrants."<sup>7</sup> In the text of the 1981 U.S.-Haiti Agreement, the President of the United States explicitly recognized the United States' duty under international law not to return bona fide refugees.<sup>8</sup> To carry out that duty, INS personnel were stationed on Coast Guard cutters to screen interdicted Haitians to determine whether they had a "credible fear" of persecution, a newly created standard. Only if they were "screened in" under this standard were Haitians brought to the United States and allowed to apply for political asylum. In their asylum applications, their claims were then held to the stricter "well-founded fear of persecution" standard, which is used for all asylum adjudications in the United States.<sup>9</sup> Those Haitians who were "screened out" were repatriated without opportunity for appeal.

When the Haitian military overthrew President Aristide's government in 1991, the United States initially condemned the military coup<sup>10</sup> and suspended repatriations, holding all those screened out on Coast Guard cutters. On November 18, 1991, however, the United States resumed repatriations.<sup>11</sup> The following day, the Haitian Refugee Center (HRC), an advocacy group based in Miami, filed suit, later captioned *Haitian Refugee Center v. Baker*,<sup>12</sup> to stop the U.S. government from repatriating screened-out Haitians. The complaint alleged that the cursory screening interviews, often only five minutes long and conducted aboard Coast Guard cutters by INS personnel unfamiliar with the political situation in Haiti, resulted in the repatriation of bona fide refugees. These interviews resulted in the return of refugees to their

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7. Agreement Effectuated by Exchange of Notes, Sept. 23, 1981, 33 U.S.T. 3559 [hereinafter 1981 U.S.-Haiti Agreement].

8. *Id.* at 3559-60 (United States is bound by "international obligations mandated in the Protocol Relating to the Status of Refugees" and "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status"). This agreement was implemented via an Executive Order. Exec. Order 12,324, 46 Fed. Reg. 48 (1981), at § 2(c)(3) ("no person who is a refugee will be returned [to his country of persecution] without his consent."). President Aristide notified President Clinton on April 4, 1994 that he was exercising his option to terminate the Agreement effective in six months. See *Aristide Ends U.S.-Haiti Pact on Refugees*, L.A. TIMES, Apr. 7, 1994, at A15; John M. Goshko, *Aristide Renounces Treaty Allowing Return of Haitians*, WASH. POST, Apr. 7, 1994, at A16. On April 21, 1994, President Aristide denounced the Clinton Administration's policy of summary repatriation as racist. That same day, six members of Congress were arrested for staging a sit-in in front of the White House to protest President Clinton's Haitian policy. See Steven Greenhouse, *Aristide Condemns Clinton's Haiti Policy as Racist*, N.Y. TIMES, Apr. 22, 1994, at A1.

9. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

10. See President George H.W. Bush, Statement (Oct. 1, 1991), in DEP'T ST. DISPATCH, Oct. 7, 1991 ("We condemn those who have attacked the legally constituted, democratically elected government of Haiti and call for an immediate halt to violence . . . We will be working closely with the OAS to bring [about restoration of democracy in Haiti]."); Secretary James A. Baker, Address Before the Organization of American States (OAS) (Oct. 2, 1991), in DEP'T ST. DISPATCH, Oct. 7, 1991 ("Jean-Bertrand Aristide is the democratically elected President of Haiti. He and his government have and deserve our support.").

11. Barbara Crossette, *135 Feared Lost as Haitian Boat Sinks Off Cuba*, N.Y. TIMES, Nov. 22, 1991, at A1.

12. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552 (S.D. Fla.), *rev'd and remanded in part*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). After the Eleventh Circuit remanded the case, the district court entered a second injunction in an unreported opinion, which was reversed at 953 F.2d 1498 (11th Cir. 1991).

persecutors in violation of the U.S. government's duty under section 243(h) of the INA<sup>13</sup> and Article 33 of the Convention Relating to the Status of Refugees,<sup>14</sup> as reenforced by the 1981 U.S.-Haiti Agreement.<sup>15</sup> HRC further argued that the screening process violated INS Guidelines<sup>16</sup> and that the lack of judicial review violated the Administrative Procedure Act (APA).<sup>17</sup> HRC also claimed that the screening procedure violated interdicted Haitians' rights under the Due Process Clause of the Fifth Amendment and HRC's right of access to potential clients under the First Amendment.

The district court enjoined the government from repatriating screened-out Haitians.<sup>18</sup> The government responded by opening a "temporary" refugee camp on the U.S. Naval Base at Guantánamo Bay, Cuba, a camp which eventually housed more than 36,000 Haitian refugees over the next eighteen months.<sup>19</sup> On appeal, a panel of the Eleventh Circuit quickly dissolved the injunction on appeal.<sup>20</sup> Later on remand the district court granted a second injunction, but the Circuit reversed again,<sup>21</sup> thereby freeing the government to repatriate screened-out Haitians. HRC unsuccessfully petitioned the Supreme Court for certiorari.<sup>22</sup> In its brief opposing certiorari, the Solicitor General had assured the Supreme Court that any screened-in Haitians would be brought to

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13. 8 U.S.C. § 1253(h)(1) (1988) ("The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion.").

14. 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 *done* July 28, 1951. ("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 . . . political opinion.") [hereinafter Refugee Convention]. While the United States did not ratify the Refugee Convention, it later acceded to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6276, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968), which incorporated all of the substantive provisions of the Refugee Convention.

15. For text of agreement, see *supra* note 8.

16. INS Role and Guidelines for Interdiction at Sea, *quoted in* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d at 1501 ("The only function I.N.S. officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin . . .").

17. 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

18. *Baker*, 789 F. Supp. at 1552.

19. The INS conducted 36,596 screening interviews of Haitians on Guantánamo. This number does not reflect the actual number of people who passed through Guantánamo, because thousands of records were lost, and many people were rescreened. Sarah Ignatius, *Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps*, 7 GEO. IMMIGR. L.J. 119, 119 n.1 (1993). Furthermore, from what we learned from our clients on Guantánamo, children were not given separate screening interviews unless they were unaccompanied by an adult family member.

20. *Baker*, 949 F.2d at 1109.

21. *Baker*, 953 F.2d at 1498. The court ruled that judicial review under the APA was precluded, the INA did not apply extraterritorially, the executive order implementing the 1981 U.S.-Haiti Agreement did not create a private cause of action, the INS Guidelines did not grant substantive rights, and the First Amendment did not provide HRC with a right of access to interdicted Haitians.

22. *Baker*, 112 S. Ct. at 1245.

the United States to pursue political asylum claims.<sup>23</sup> Rather than bringing screened-in Haitians to the United States, however, the INS almost immediately began conducting second interviews of HIV-positive screened-in Haitians on Guantánamo and repatriating those who could not show a “well founded fear” of persecution.

#### A. *The Guantánamo Case*

In March 1992, several screened-in Haitian refugees facing their second interviews faxed Yale’s Lowenstein Clinic a request for counsel through a sympathetic contact. Three Haitian service organizations who wished to represent the refugees during their de facto asylum interviews had also retained us. On March 11, the Clinic requested that the INS grant access to Guantánamo to Haitian service organizations seeking to represent these Haitian refugees.<sup>24</sup> After the INS denied the request, the Clinic asked a federal district judge for a temporary restraining order enjoining the government from conducting second interviews without affording the Haitians a right to the assistance of legal counsel and from repatriating any detained Haitians.<sup>25</sup>

The refugees and service organizations raised seven claims: (1) advocates representing Haitian refugees have a First Amendment right of access to their clients; (2) Haitians had been denied their rights under the INA to obtain and communicate with attorneys in de facto asylum proceedings; (3) Haitians brought by force under the jurisdiction of the U.S. government had rights under the First Amendment and the Due Process Clause of the Fifth Amendment of the U.S. Constitution to obtain and communicate with counsel, and they had been denied those rights; (4) the way in which the U.S. government initiated the new policy of conducting de facto asylum interviews violated the rulemaking procedures mandated by the APA;<sup>26</sup> (5) the U.S. government’s conduct was arbitrary and capricious, in violation of the APA;<sup>27</sup> (6) the U.S. government has a duty under section 243(h) of the INA and Article 33 of the Refugee Convention not to return political refugees;<sup>28</sup> and

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23. Brief for the Respondents in Opposition to Certiorari at 3, *Baker* (No. 91-1292), reprinted in Joint Appendix at 248, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344).

24. Letter from Harold Hongju Koh, Lead Counsel for Plaintiffs, to Gene McNary, Commissioner of INS (Mar. 11, 1992) (on file with Lowenstein Clinic). One of the Haitian service organizations was the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization (LSO) at Yale Law School. The Lowenstein International Human Rights Clinic is not part of LSO, although some students are members of both organizations.

25. Affirmation of Harold Hongju Koh in Support of Order to Show Cause for a Temporary Restraining Order, Expedited Discovery and Preliminary Injunction, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. filed Mar. 17, 1992).

26. 5 U.S.C. § 552 (1988) (requiring general notice of proposed rulemaking to be published for comment).

27. 5 U.S.C. § 706(2)(A) (1988) (reviewing courts shall “hold unlawful and set aside agency action . . . found to be . . . arbitrary [or] capricious . . .”).

28. For texts of § 243(h) of the INA and Article 33 of the Refugee Convention, see *supra* notes 13-14.

(7) the U.S. government violated the Fifth Amendment's guarantee of the equal protection of the laws by creating a separate and unequal asylum track for Haitians.<sup>29</sup> These claims did not assert a right to enter the United States, but a right to procedural protections before repatriation.

The government opposed the TRO request on three grounds. First, the government argued that this case was precluded by *Baker* under the doctrines of res judicata and collateral estoppel, even though the TRO had been requested by new parties, raising new claims and contesting a policy that had not existed when *Baker* was litigated. Second, the government argued that aliens outside the United States have no rights under U.S. law, even though they are screened in by the INS and held in U.S. custody on territory subject to the "complete jurisdiction and control" of the United States.<sup>30</sup> Third, the government argued that aliens outside U.S. borders have no right to enter the United States, even though the Haitian refugees were not asserting a right to enter the country, but instead a right not to be returned to conditions of persecution in Haiti. Appended to the government's motion to dismiss was a motion for Rule 11 sanctions, claiming that this case was substantially the same case as *Baker* and therefore frivolous. The government also demanded that the Clinic post a \$10 million bond.<sup>31</sup>

Late on March 27, 1992, Judge Sterling Johnson, Jr., of the Federal District Court for the Eastern District of New York ruled that the INA provided the Haitians with a right to obtain legal counsel to assist them in their second interviews.<sup>32</sup> On this ground, Judge Johnson temporarily restrained the government from denying attorneys access to Guantánamo and from repatriating the screened-in Haitians, who had been denied access to counsel. He further ordered expedited discovery in preparation for a preliminary injunction hearing to take place five days later, granting the legal team access to the named plaintiffs on Guantánamo.<sup>33</sup>

At oral argument on April 1, we used information gathered from discovery trips to Guantánamo, Miami, and Washington, D.C., to counter the government's claim that the Guantánamo detention camp was a "humanitarian refugee camp" and that allowing lawyers on the base would disrupt military operations as well as endanger national security. Our information demonstrated that Guantánamo was an open base, that the U.S. government was holding the

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29. For elaboration on all claims, see Complaint, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. filed Mar. 17, 1992).

30. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. 3, T.S. No. 418 (United States "shall exercise complete jurisdiction and control over and within [Guantánamo]"); Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, art. 3, T.S. No. 866 (continuing in effect the 1903 agreement).

31. After considering the nonprofit status of the Haitian service organizations and the indigence of the refugees, the court ordered that we post a \$5000 bond. Preliminary Injunction Order at 30, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. Apr. 6, 1992).

32. *Haitian Ctrs. Council*, 789 F. Supp. 541, 547 (E.D.N.Y. 1992).

33. *Id.* at 548.

Haitians incommunicado behind razor-barbed wire, and that the government was subjecting Haitians to punitive detention and was barring them from traveling to any country other than Haiti.<sup>34</sup> On April 6, Judge Johnson granted a preliminary injunction based on the Haitian service organizations' First Amendment claims and the Haitians' due process claims.<sup>35</sup>

Two days after the injunction was granted, the government filed a notice of interlocutory appeal and requested Judge Johnson to stay the preliminary injunction pending its appeal. When Judge Johnson denied the stay summarily, the government asked the Second Circuit for a stay. On April 14, the Circuit panel also denied the request, but it granted an expedited appeal to take place within a month. After two more unsuccessful requests for lower court stays,<sup>36</sup> the Solicitor General's Office petitioned the U.S. Supreme Court for a stay. The next day, the Supreme Court granted the stay by a 5-4 vote.<sup>37</sup> The stay allowed the government to resume the de facto asylum interviews without guaranteeing any procedural rights for the Haitians. The government immediately began second interviews and repatriations. Among those repatriated were eighty-nine of our screened-in clients who had steadfastly refused to participate in de facto asylum interviews without counsel present.

On May 7, two weeks after the Supreme Court stayed the preliminary injunction, we filed papers in the Second Circuit opposing the government's appeal of that injunction. On June 10, the Second Circuit reinstated the injunction against second interviews and repatriations of the Haitians, but it did not order the government to grant attorneys access to Guantánamo.<sup>38</sup> Focusing on the unique status of Guantánamo and the detention of screened-in Haitians

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34. Throughout the litigation, the government maintained that the Haitians had the option to leave Guantánamo at any time, but only if they would agree to be repatriated to Haiti. *See, e.g.*, Transcript of Preliminary Injunction Hearing at 75, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. argued Apr. 1, 1992) ("The Court: You have the Haitians in—they are more or less in custody. They are in custody. They can't go anywhere. Is that correct? [Government Attorney]: They surely could. They could go back to Haiti anytime they want. We will take them back.").

35. Preliminary Injunction Order, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. granted Apr. 6, 1992). Judge Johnson found that "the nature and circumstances surrounding the connection between the Screened In Plaintiffs and the United States warrants a finding that they are entitled to cloak themselves in the protections of the due process clause." *Id.* at 29. He dismissed the INA claim on which he previously had relied for the TRO and deferred judgment on all other claims.

36. On April 16, the government applied to the Second Circuit for a stay, which the court rejected without argument. This second stay request came after Judge Johnson, at the government's request, issued a clarification of the preliminary injunction regarding the exact nature of access the lawyers were to be granted under his April 6 injunction. Judge Johnson issued the clarification on April 15. Order To Clarify Relief Granted, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. Apr. 15, 1992). On April 16, we filed a motion for expedited discovery to prepare for the expedited appeal. A week later, we filed our Second Circuit appeal papers.

37. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992).

38. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). The court did not order attorney access in order to preserve the status quo pending a full trial on the merits, reasoning that granting access would have been tantamount to final relief. On September 22, 1992, the government asked the Supreme Court to review the preliminary injunction. Petition for Writ of Certiorari from the United States Supreme Court, in *Sale v. Haitian Ctrs. Council, Inc.*, No. 92-528 (U.S. filed Sept. 22, 1992).



by U.S. authorities, the court found that there were serious questions going to the merits of the claim that Haitian refugees held on Guantánamo were protected by the Due Process Clause.<sup>39</sup>

### B. *The Non-Return Case*

On May 24, 1992, President Bush issued an executive order, the Kennebunkport Order, authorizing the summary repatriation of Haitian asylum seekers to their persecutors without even a cursory screening for colorable asylum claims.<sup>40</sup> The Order erected a “floating Berlin Wall” around Haiti, preventing Haitians from fleeing by boat to any country, not just the United States. The Coast Guard began intercepting all Haitian refugee boats outside of Haiti’s twelve-mile territorial waters and immediately returned any passengers to Port-au-Prince, where the Haitian military fingerprinted and questioned the returnees, arresting some of them upon arrival.<sup>41</sup>

On May 28, our team returned to Judge Johnson to ask for another TRO to prevent the implementation of the Kennebunkport Order. This TRO request was made on behalf of a conditionally certified class, including “[a]ll Haitian citizens who have been or will be ‘screened-in,’”<sup>42</sup> and relied on counts five, six, and seven of the original complaint.<sup>43</sup> First, we argued that the duty of non-return, as stated in section 243(h) of the INA, Article 33 of the Refugee Convention, and the 1981 U.S.-Haiti Agreement directed the United States not to return Haitians without first determining whether they were bona fide refugees.<sup>44</sup> We also argued that the Fifth Amendment right to equal protection of the laws prohibits the Executive from creating an asylum track that applies to Haitians only, denying them the congressionally created rights to apply for asylum and not to be returned to conditions of persecution. Finally, we argued that the Kennebunkport Order was arbitrary and capricious and an abuse of discretion, because it discriminated against Haitians on the basis of their race and national origin without statutory authority and without providing for judicial review as the APA required.

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39. *Id.* at 1342.

40. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

41. See Howard W. French, *Months of Terror Bring Rising Toll of Deaths in Haiti*, N.Y. TIMES, Apr. 2, 1994, § 1 at 1; *More Killings in Haiti as Refugees Arrive Back*, TORONTO STAR, May 27, 1992, at A17; *Refugee Jumps Overboard During Haiti Repatriation*, Reuters, May 30, 1992, available in LEXIS, NEWS Library, Reuters File.

42. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1039 (E.D.N.Y. 1993) (internal quotation marks omitted). We maintained that certain members of the original class of screened-in refugees (i.e., those class members who subsequently had been repatriated) had standing to contest the Kennebunkport Order because that group included: (1) those refugees who were screened in but were sent back because they refused to undergo a second screening; (2) those refugees who were screened in but mistakenly returned to Haiti; and (3) those refugees who would have been screened in under the old policy. Brief for Appellants at 7, *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (No. 92-6144).

43. For a description of these claims, see *supra* text accompanying notes 26-29.

44. For the full texts of these provisions see *supra* notes 13-14 & 8.

The government's principal response was that the United States' Haitian refugee policy was part of a larger foreign policy regarding Haiti and was therefore a political question which was not subject to judicial review.<sup>45</sup> Moreover, the government maintained that neither section 243(h) of the INA nor Article 33 of the Refugee Convention applied extraterritorially.<sup>46</sup> We rebutted that although immigration policy always has foreign policy overtones, summary repatriation is not in the sole competence of the executive. The plenary power over immigration policy rests with Congress, which had exercised its power in the INA, and the federal courts routinely review executive actions under the INA.<sup>47</sup> Even when the Executive acts outside U.S. territory, the INA bars the Executive from returning refugees to their persecutors.<sup>48</sup>

Treating the TRO request as a preliminary injunction request, Judge Johnson denied the injunction on June 5,<sup>49</sup> finding that Article 33 of the Refugee Convention was not self-executing.<sup>50</sup> Since the court had previously held that the INA did not apply outside the United States, it denied statutory relief.<sup>51</sup> Our legal team took an expedited appeal to the Second Circuit. Relying on the plain language of section 243(h) of the INA and Article 33 of the Refugee Convention, the Second Circuit granted the injunction on July 29, holding that the duty of non-return applies extraterritorially.<sup>52</sup> The next day, the government asked the Supreme Court for a stay pending certiorari, which the Court granted on August 1 without briefing or argument.<sup>53</sup> The government was once again free to interdict and summarily return all those

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45. Defendants' Opposition to the Entry of Injunctive Relief Respecting the New Executive Order at 11-13, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. filed May 29, 1992).

46. *Id.* at 19. The government also argued that *Baker* collaterally estopped us from raising these claims. *Id.* at 14-18. However, like the TRO request in the Guantánamo case, this new TRO request involved parties and circumstances different from those presented in *Baker*. These plaintiffs had not been parties to *Baker*, and the Kennebunkport Order launched a policy that was unforeseeable at the time *Baker* was litigated, thus changing circumstances dramatically and rendering preclusion inappropriate as a matter of equity.

47. Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Order To Show Cause at 2-9, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. filed June 3, 1992).

48. *Id.* at 9-13.

49. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-1258, 1992 U.S. Dist. LEXIS 8452 (E.D.N.Y. June 5, 1992).

50. A non-self-executing provision of a treaty requires implementation by legislation in order to be applied by the courts. A self-executing provision, in contrast, has binding force on its own terms, and does not require Congress to act. In determining whether or not a treaty provision is self-executing, courts generally look to the language of the treaty to determine whether it contemplated the passage of domestic legislation to implement each contracting state's obligation. See Brief of the Lawyers Committee for Human Rights in Support of Respondents as *Amicus Curiae*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344).

51. *Haitian Ctrs. Council*, 1992 U.S. Dist. LEXIS 8452 at \*6.

52. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1367 (2d Cir. 1992) ("The plain language of § 243(h)(1) of the Immigration and Nationality Act clearly states that the United States may not return aliens to their persecutors, no matter where in the world those actions are taken.")

53. *McNary v. Haitian Ctrs. Council*, 113 S. Ct. 3 (1992).

fleeing the violence in Haiti. On October 5, 1992, the Supreme Court granted certiorari.<sup>54</sup>

### C. *Outside the Courts*

The Kennebunkport Order, issued partly in response to the growing number of Haitians being processed at Guantánamo, meant that the Coast Guard would bring no more Haitians to the base. Under the preliminary injunction in the Guantánamo case, the government could not conduct de facto asylum interviews of any Haitians, including those who tested HIV-positive, once they were screened in. Since the government refused to bring any HIV-positive screened-in Haitians into the United States to pursue asylum claims, in the summer of 1992 Guantánamo effectively became a detention camp for HIV-positive refugees.

Throughout the summer, the unsanitary conditions and inadequate medical care in the refugee camp accelerated the Haitians' development of HIV-related illnesses. Shortly after a newborn infant died from pneumonia contracted in the camp,<sup>55</sup> the government proposed a settlement, offering the refugees detained on Guantánamo the opportunity to have assistance of counsel at their de facto asylum interviews. However, even if individual refugees were able to establish a well-founded fear of persecution in these interviews, the government would not guarantee that they would be admitted to the United States. Moreover, all asylum determinations would be exempt from review. In making its offer, the government relied on sections of the INA that require the exclusion of HIV-positive aliens,<sup>56</sup> but that authorize the Attorney General to waive the exclusion on humanitarian grounds.<sup>57</sup> At best, no more than a fraction of the three hundred Guantánamo Haitians would be allowed to enter the United States, even if all were determined to have a well-founded fear of persecution.<sup>58</sup>

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54. *McNary v. Haitian Ctrs. Council*, 113 S. Ct. 52 (1992). At a pretrial hearing in September, we requested official bifurcation of our litigation into the Guantánamo case and the Non-Return case because the Non-Return case presented a strict issue of law while the Guantánamo case involved complex factual issues, and because the Haitians were challenging two different policies. The court granted bifurcation in November. *Haitian Ctrs. Council v. McNary*, 144 F.R.D. 191 (E.D.N.Y. 1992).

55. We were later able to negotiate the release of some HIV-positive pregnant women to the United States, so that they and their babies could receive proper medical care during and after their deliveries. See *infra* text accompanying notes 109-15.

56. 8 U.S.C. § 1182(a)(1)(A)(i) (1993) (mandating the exclusion of "any alien . . . who is determined . . . to have a communicable disease of public health significance"). Under the Health and Human Services regulations, HIV is considered a "communicable disease of public health significance." 42 C.F.R. § 34.2(b)(4) (1993).

57. 8 U.S.C. § 1157(c)(3) (1993) ("Attorney General may waive [exclusion] . . . for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest").

58. The settlement was conditioned on our agreeing to apply jointly to the Second Circuit for the vacatur of the preliminary injunction and the accompanying opinion.

To present the settlement offer to our clients on Guantánamo, our legal team was granted access to all of our Guantánamo clients for the first time on October 6, 1992.<sup>59</sup> Since the settlement did not secure their release from detention without repatriation to Haiti, the Guantánamo Haitians rejected the government's offer, on our recommendation.<sup>60</sup> Bill Clinton, who was then leading in the presidential election polls, had strongly condemned the Kennebunkport Order<sup>61</sup> and had promised to lift the HIV exclusion,<sup>62</sup> giving us reason to believe that he would change the policy toward the Guantánamo Haitians if elected.

One week after winning the election, President-elect Clinton reiterated his promise to rescind the Kennebunkport Order after his inauguration.<sup>63</sup> Relying on Clinton's promise, we petitioned the Supreme Court to postpone the briefing schedule on the Non-Return case, arguing that it would be unnecessary for the Court to rule on the merits of our case. The Supreme Court denied our motion,<sup>64</sup> forcing us to file our Supreme Court brief one month before Clinton's inauguration.

At around the same time, the government began to allow us monthly access to Guantánamo. In November, for the first time, we were finally allowed access to Camp Bulkeley, where the Haitians were held. Seeing the

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59. In March 1992, we had met our seven named plaintiffs briefly for discovery purposes, but this was the first time we would meet with all 292 of our clients still on Guantánamo.

60. Our legal team agreed to postpone the trial in exchange for the government's agreement to allow us to postpone filing our opposition to certiorari in the Guantánamo case. In mid-September, the government had asked the Supreme Court to review our preliminary injunction in the Guantánamo case. *See supra* note 38.

61. During his campaign for President, Governor Clinton indicated his intent to change the Bush Administration policy of summary repatriation. *See Statement by Gov. Clinton on Haitian Refugees*, U.S. NEWSWIRE, May 27, 1992, available in LEXIS, News Library, USNWR File ("I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum . . . . As I have said before, if I were president, I would—in the absence of clear and compelling evidence that they weren't political refugees—give them temporary asylum until we restored the elected government of Haiti."); *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. NEWSWIRE, July 29, 1992, available in LEXIS, News Library, USNWR File ("The Court of Appeals made the right decision in overturning the Bush administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing."); *Gov. Clinton Reaffirms Opposition to Administration Policy on Haiti*, U.S. NEWSWIRE, Sept. 9, 1992, available in LEXIS, News Library, USNWR File ("I want to reaffirm my opposition to the Bush administration's cruel policy of returning Haitian refugees to their oppressors in Haiti without a fair hearing for political asylum . . . . [T]he Bush administration should give Haitians the same rights that the United States gives to refugees from other countries: the opportunity to apply for political asylum and receive a fair hearing.")

62. BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 41 (1992) (promising to "[l]ift the current ban on travel and immigration to the United States by foreign nationals with HIV").

63. *News Conference*, Fed. News Serv., Nov. 12, 1992, available in LEXIS, News Library, FEDNEW File ("With regard to the Haitians, I think my position on that has been pretty clear all along. I believe that there is a legitimate distinction between political and economic refugees, but I think that we should have a process in which these Haitians get a chance to make their case. I think that the blanket-sending them back to Haiti under the circumstances which have prevailed for the last year was an error. And so, I will modify that process. I am not in a position now to tell you exactly how we're going to do it, or what the specifics will be, but I can tell you I'm going to change the policy.")

64. *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 593 (1992).

conditions of their indefinite confinement, we began an aggressive media campaign, which resulted in media access to the camp and widespread video and print coverage. We set up what we called "Guantánamo Client Services," a team of students and outside service providers, to monitor each refugee's situation and respond to extralegal needs, such as medical care and communication with relatives in the United States. Our refugee resettlement team recruited Haitian organizations, housing providers, and AIDS advocates to assist in resettling the refugees who had been medically evacuated to the United States because of inadequate medical facilities on Guantánamo.

Just one week before he was to take office, Clinton announced that, contrary to his campaign promises and earlier statements as President-elect, he would maintain the Bush policy of summary repatriation.<sup>65</sup> At the end of January, the Guantánamo refugees responded to this announced change in policy by beginning a hunger strike to protest President Clinton's broken promises. Over the next several weeks, celebrities and political activists joined the call for the refugees' release.

#### D. *Return to the Courts*

On March 2 we argued the Non-Return case before the Supreme Court. Six days later, our team returned to Judge Johnson's courtroom in Brooklyn for a full trial on the merits of the Guantánamo case. In the weeks leading to the trial, we had reformulated the refugees' claims to focus on the illegality of the HIV detention camp, rather than on their original right-to-counsel claim. We added claims that people held in U.S. government custody have a due process right to adequate medical care, a protected Fifth Amendment liberty interest in avoiding disciplinary segregation without procedural due process, and a liberty interest in not being arbitrarily and indefinitely detained. We also argued that the Attorney General abused her discretion in not paroling the refugees into the United States.<sup>66</sup>

On March 25, 1993, Judge Johnson issued an interim order mandating the release of the sickest Guantánamo Haitians to anywhere but Haiti.<sup>67</sup> On June 8, 1993, Judge Johnson finally ordered the immediate release of all of the

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65. President-elect Clinton announced his policy change over the radio in Haiti, and he was asked about his turnaround at a press conference later that day. *Radio Statement of President-Elect Bill Clinton to the People of Haiti*, Fed. News Serv., Jan. 14, 1993, available in LEXIS, News Library, FEDNEW File; *News Conference*, Fed. News Serv., Jan. 14, 1993, available in LEXIS, News Library, FEDNEW File.

66. Amended Complaint, *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (No. 92-1258).

67. Interim Order, *Haitian Ctrs. Council, Inc. v. Sale*, 817 F. Supp. 336 (E.D.N.Y. 1993) (No. 92-1258). The court ordered their immediate release, or, in the alternative, adequate medical treatment on Guantánamo. Because the government could not possibly provide such treatment, the refugees were brought into the United States within weeks. See *infra* note 182 and accompanying text.

Haitians from Guantánamo.<sup>68</sup> Although we feared that the government would once again seek a stay, President Clinton's Justice Department agreed to comply with the order, reserving its right to appeal. All of the remaining refugees on Guantánamo soon arrived in the United States. On June 21, the Supreme Court upheld the summary return of Haitian refugees to their persecutors in the Non-Return case.<sup>69</sup>

## II. HAITIAN CENTERS COUNCIL FROM THE STUDENT PERSPECTIVE

Those of us who worked on this case as students learned that lawyering requires more than knowing legal rules or litigation tactics; it also requires moving beyond the courts when legal arguments alone cannot redress an injustice. As *Haitian Centers Council* unfolded, we reached into different fora to advocate on behalf of the refugees. In this Part, we go behind the public record of the litigation to illustrate how the legal team used various fora and how students played an integral part in the case. Students learned to perform multiple tasks and struggled to balance the role of lawyer with the roles of social worker, medical advisor, press agent, and social service coordinator.

### A. *The Courts as Forum of First Resort*

After *Haitian Refugee Center v. Baker* failed in the Eleventh Circuit, students in Yale's Lowenstein International Human Rights Clinic began to explore alternative legal claims that might be pursued on behalf of the Haitian refugees.<sup>70</sup> The Clinic wanted to file for another temporary restraining order to prevent the U.S. government from returning thousands of fleeing Haitians to Haiti, where they would be persecuted and perhaps even killed by the Haitian military because of their political opinions. Even if the relief were temporary, the Clinic hoped to maintain pressure on the Bush Administration and keep the issue alive in the public conscience.<sup>71</sup>

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68. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1050 (E.D.N.Y. 1993). In addition to upholding all of the Haitians' new claims, the court upheld the original claims that (1) the government had violated Haitian service organizations' First Amendment rights, *id.* at 1040-41, (2) the refugees had a due process right to counsel in their de facto asylum interviews, *id.* at 1042-43, and (3) by conducting de facto asylum interviews, the INS acted ultra vires and therefore in violation of the APA, *id.* at 1047-49. The court never explicitly ruled on the equal protection challenge to a separate and unequal asylum track for Haitians, but it did rule in favor of the claim that the Attorney General had exercised her statutory discretion "to discriminate invidiously" based on national origin. *Id.* at 1048.

69. *Haitian Ctrs. Council, Inc. v. Sale*, 113 S. Ct. 2549 (1993).

70. Students in the Clinic had developed a special interest in Haiti while litigating *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992), a suit by six Haitians tortured by former Haitian dictator Prosper Avril. In the course of that suit, the Clinic had established contact with the young government of President Jean-Bertrand Aristide and saw the promise of change he offered the Haitian people.

71. See Harold Hongju Koh, *The "Haiti Paradigm" in the United States Human Rights Policy*, 103 YALE L.J. 2391 (1994). For a discussion of the ways in which private litigants work to promote the observance of international human rights norms, see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

Throughout February 1992, we sought to learn more about conditions on Guantánamo, where the refugees were being taken for screening. Relatives of refugees held on Guantánamo and Creole interpreters working on Guantánamo under INS contract told us about the second interviews of screened-in Haitians. Refugees who did not meet the higher standard of a well-founded fear of persecution were immediately repatriated. We also heard rumors that HIV status was the reason refugees were being interviewed a second time.

Based on this new information, several Clinic members approached Harold Koh and Michael Ratner, the Lowenstein Clinic supervisors, to discuss the possibility of filing a lawsuit. To challenge this new policy as quickly as possible, the group expanded to include about ten more students who worked full-time, and dozens of others who helped on an occasional basis. Students also took advantage of their contacts from past summer jobs and went outside the law school to recruit Robert Rubin and Lucas Guttentag, two experienced immigrants' rights advocates, and Joe Tringali, a private litigator. The new co-counsel supplemented Harold Koh's expertise in international and foreign affairs law, and Michael Ratner's extensive experience as a human rights attorney.

For an intense two-and-a-half weeks, the newly formed legal team formulated legal claims and conducted additional factual research. Several students believed we should make an issue of the differential treatment accorded some Haitians based solely on their HIV status. We were concerned, however, that a claim based on HIV status would elicit little sympathy. Moreover we suspected that HIV-positive refugees were only the first screened-in refugees to be interviewed a second time, with others soon to follow. In all second interviews, the INS applied the "well-founded fear" standard—the same standard to which political asylum applicants in the United States are held—after already having shown a credible fear of persecution. Thus, such interviews were effectively *de facto* asylum adjudications. Haitians, however, were not afforded the procedural protections that normally accompany an asylum hearing, most importantly the right to counsel.<sup>72</sup>

Based on the observation that the INS had instituted *de facto* asylum interviews only for Haitians on Guantánamo, students developed a statutory argument and a constitutional argument to contest the INS policy. The statutory claim asserted that in the INA Congress had contemplated a right to counsel for aliens in U.S. custody on territory subject to exclusive U.S. jurisdiction. This claim was based on a student's fresh reading of the INA and

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72. This right is available in exclusion and deportation proceedings, where Congress explicitly grants a right to counsel, *see* 8 U.S.C. § 1362 (1988) (granting aliens right "[to be] represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as [they] shall choose"); this right is also available in affirmative asylum proceedings, where the Attorney General has granted the right to counsel through regulations implementing the INA, *see* 8 C.F.R. § 208.9(b) (1993) ("The applicant may have counsel or a representative present and may submit affidavits of witnesses.").

its implementing regulations. While the immigration experts on our team were skeptical of this novel argument, they recognized that it would permit the court to avoid a broad constitutional ruling limiting the Executive's power. The argument supplied the crucial ground on which Judge Johnson granted the first TRO.<sup>73</sup>

The constitutional claim, based on the Fifth Amendment right to equal protection of the laws, relied on the fact that only Haitians were subject to summary repatriation. This argument, too, was initially dismissed by more experienced lawyers, who observed that immigration law routinely provides differential treatment according to national origin and therefore race. But Lisa Daugaard, a third-year student who would later continue to work on the case in the capacity of a supervising attorney, argued that while the INA generally allows for distinctions which have an impact on national origin and race,<sup>74</sup> the asylum provisions of the INA, sections 208 and 243(h), do not allow procedural distinctions based on race or nationality.<sup>75</sup> The equal protection claim articulated the core theme of the case: The Statue of Liberty's welcome now extended to every group of immigrants except Haitian refugees.

To fill out the emerging legal claims, we needed more detailed facts. Since access to the naval base was strictly controlled, we found other ways to gather information. Students called the U.S. Coast Guard's public information office daily to keep abreast of the number of Haitians being interdicted and repatriated. We gathered affidavits from people who had worked as interpreters with the INS on Guantánamo. In addition, we asked students in Yale's Immigration Clinic, who were going to Miami in March 1992 to work with the Haitian Refugee Center in processing Haitian asylum claims, to bring a list of questions to ask refugees who had just arrived from Guantánamo.

The Immigration Clinic students stayed at the Budget Inn in the center of Miami's Little Haiti, the temporary home for many of those refugees. Sitting at the dining tables and using whatever interpreters were available, students interviewed refugees into the night. Many of the Haitians had arrived within forty-eight hours of these interviews, and they were eager to talk about the screening procedures on the base and the bureaucratic errors of U.S.

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73. The discovery order accompanying the TRO allowed us to gather information that later proved critical in winning the preliminary injunction. In granting the preliminary injunction, however, Judge Johnson dismissed the statutory claim and rested on due process grounds. Preliminary Injunction Order at 22-24, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. granted Apr. 6, 1992).

74. *See, e.g.*, 8 U.S.C. § 1152 (Supp. V 1994) (establishing limitations on the number of immigrants allowed to come to the United States based on country of origin); 8 U.S.C. § 1153(c) (Supp. V 1994) (establishing preferences for entry visas based on the country of origin, creating "high-admission states" and "low-admission states").

75. *See American Baptist Churches v. Meese*, 712 F. Supp. 756, 774 (N.D. Cal. 1989) ("Congress has instructed the Executive that nationality may not be considered when applying section 208(a) of the Refugee Act and section 243(h) of the Immigration and Nationality Act"); *Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982) ("The discretion [in treatment of unadmitted aliens] may not be exercised to discriminate invidiously against a particular race or group.").



government officials. They also told stories about the mistreatment and inhumane conditions suffered at the hands of the U.S. military, stories which would later prove to be the crux of the case. The information showed that the administrative chaos on Guantánamo and the lack of any legal representation denied the Haitians a meaningful asylum determination. Focusing on the right to counsel, the students' factfinding confirmed that Guantánamo was an open base, complete with a McDonalds and a Baskin Robbins. This information helped the legal team preempt the anticipated government argument that lawyers on the base would disrupt military operations.

Meanwhile, the students who had remained in New Haven, along with Michael Ratner and Harold Koh, headed to the offices of Simpson Thacher & Bartlett in New York City on March 16, the day before we filed the TRO request. After commandeering a conference room and several computers, we began to put the finishing touches on the TRO papers. Then, three key events occurred, which confirmed that the government was implementing an unprecedented policy.

First, while methodically reviewing the *Baker* record, Joe Tringali discovered a crucial admission that the Solicitor General made in his opposition to HRC's certiorari petition: "Under current practice, *any* aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum . . . ."76 Pointing to this statement, we could now argue that when the Supreme Court had denied certiorari in *Baker* it had been unaware that the government planned to abandon this policy and simply conduct *de facto* asylum interviews without lawyers on Guantánamo.

Second, we obtained a leaked copy of an internal INS memorandum, written by Grover Rees, General Counsel for the INS, which set forth in detail new procedures for interviewing HIV-positive screened-in refugees on Guantánamo. The interviews were to be "identical in form and substance, or as nearly so as possible," to asylum interviews in the United States.<sup>77</sup> Written only five days after the Solicitor General had represented to the Supreme Court that the INS would bring screened-in Haitians to the United States, the Rees Memorandum demonstrated that the INS had in fact reversed its policy and was conducting asylum proceedings on Guantánamo.

Third, in the middle of the night, hours before the TRO filing, a handwritten Affirmation arrived at Simpson Thacher from the team of students in Miami.<sup>78</sup> Faxed from the tiny office of the Budget Inn, this Affirmation

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76. Brief for the Respondents in Opposition to Certiorari at 3, *Baker v. Haitian Refugee Ctr.*, No. 91-1292, reproduced in Joint Appendix at 252, *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993) (No. 92-344) (emphasis added).

77. Memorandum from Grover Rees, General Counsel, INS, to John Cummings, Acting Assistant Commissioner for Refugees, Asylum, and Parole, INS (Feb. 29, 1992) (on file with Lowenstein Clinic).

78. The information was not received until late on the night of March 16, and the Affirmation was completed at approximately 3:00 a.m. Since we were to appear in court in Brooklyn six hours later, the

provided evidence that the second interviews were being conducted without counsel present. It detailed one refugee's account of screening procedures and revealed that immediate repatriation was the consequence of failing the de facto asylum interview.

These three pieces of evidence, confirming that screened-in Haitians were being repatriated without access to lawyers, provided a solid basis for distinguishing this case from *Baker*. Armed with the information gathered over the preceding days and nights, the team emerged from Simpson Thacher at sunrise on March 17, 1992, and headed into court to file for the TRO supported by the following theory: The INS had instituted a de facto asylum process on Guantánamo for Haitians only; the process on Guantánamo was near chaos; lawyers would be helpful to the refugees during their interviews; and lawyers would not disrupt any military operations on Guantánamo. Haitian refugees subject to this new policy and their lawyers had a right to speak to each other before the Haitians were sent back to conditions of persecution.

In oral argument before Judge Sterling Johnson, Jr., in Brooklyn, the government insisted that, coming as it was after the Eleventh Circuit's ruling in *Baker*, the new litigation was precluded under the doctrines of res judicata and collateral estoppel. We responded that the proposed class of "[a]ll Haitian citizens who have been or will be 'screened-in'"<sup>79</sup> differed from the broader *Baker* class, which had included all Haitians who had been or would be interdicted and screened, regardless of the outcome of their screening interviews.<sup>80</sup> Screened-in refugees had no reason to challenge the screening procedures contested in *Baker*, since they had benefitted from those procedures.<sup>81</sup> The government also argued that Haitian refugees outside the United States had no rights under United States law.<sup>82</sup> We rebutted that asylum seekers brought to Guantánamo by the U.S. government enjoy protections guaranteed by the Constitution and the INA, because an agreement between the governments of the United States and Cuba rendered Guantánamo subject to the exclusive control and jurisdiction of the United States.<sup>83</sup>

Our team left the courtroom exhilarated from the argument, but with no idea of how the judge would respond. Our exhilaration soon turned into a feeling of impending doom. When we returned to our office, the fax machine was receiving a copy of the government's motion to dismiss our claims, and

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information had to be faxed immediately and there was no notary public available to transform the Affirmation into an Affidavit.

79. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1039 (E.D.N.Y. 1993) (internal quotation marks omitted).

80. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1334-35 (2d Cir. 1992).

81. *See Transcript of TRO Argument at 7-8, 17-18, Haitian Ctrs. Council v. McNary*, 789 F. Supp. 541 (E.D.N.Y. argued Mar. 18, 1992).

82. *Id.* at 32.

83. *See supra* note 30.

their request for a \$10 million bond.<sup>84</sup> The government had also filed its motion for Rule 11 sanctions, arguing that our lawsuit was frivolous because it raised substantially the same claims that had failed in the *Baker* litigation.<sup>85</sup>

Ten days later, on March 27, Harold Koh ran up the stairs to our office, yelling: "Hey, you guys! Hey, you guys! We got the TRO! We got it!" As he listened to Michael Ratner read the TRO arriving on CCR's fax machine, Harold relayed the TRO language to the group of students packed into the small office. In prohibiting the government from interviewing screened-in Haitians on Guantánamo and granting us expedited discovery, Judge Johnson found the government's conduct "arbitrary, capricious and perhaps even cruel."<sup>86</sup> At the same time, Judge Johnson, a former Marine who had served on Guantánamo, seemed sympathetic to the government's arguments about disruption of military operations and refused to grant us access to the detention camps where the Haitians were held. Instead, until the preliminary injunction hearing on April 1, the judge granted us access to the military airport, where our named plaintiffs would be brought to us from their camps across the bay.

Over the next three days we prepared for the hearing, scrambling to gather, interpret, and compile further facts. After hours of negotiations over logistics with the government, a team of attorneys, professors, students, interpreters, and court reporters left for Guantánamo. Our flight was delayed repeatedly by the government, which controls all access to the base because of Guantánamo's military status and its location in Cuba where U.S. citizens are not free to travel. When we first arrived, the refugees refused to board the boat that was to take them across the bay to meet the legal team, because they feared that the government would repatriate them at any time. The government finally agreed to let Jocelyn McCalla, executive director of one plaintiff organization, the National Coalition for Haitian Refugees, go to the refugee camps to convince our clients that the legal team was waiting on the other side. When we finally met with the refugees—less than twenty-four hours before we were scheduled to depart from the base—we hurriedly conducted depositions, doing initial preparation of the witnesses as well as direct and cross-examination. Just before leaving Guantánamo, members of the legal team completed the depositions and affidavits that would demonstrate to Judge Johnson the need for counsel in the second interviews.

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84. Defendants' Memorandum in Opposition to Plaintiffs Motion for Temporary Restraining Order and for Preliminary Injunctive Relief, and in Support of Defendants' Motion to Dismiss the Complaint at 81, *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992) (No. 92-1258). This was ten times as large as the largest TRO bond in the history of the Second Circuit, which had been granted in *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 262 (S.D.N.Y. 1986).

85. Memorandum of Points and Authorities in Support of Defendants' Motion for Sanctions, *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992) (No. 92-1258). Harold Koh, as the signing attorney, was personally liable for these sanctions. In the face of such threats, we looked to a favorite saying of ours to boost our morale: "They're an army; we're a family."

86. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541, 547 (E.D.N.Y. 1993).

While one arm of our team was on Guantánamo, our discovery “octopus” also had arms in New Haven, Miami, and Washington, D.C. Since Judge Johnson had denied us access to the detention camps and refugees, students returned to Miami and the Budget Inn to interview more recently arrived Haitians about the asylum interview procedures on Guantánamo. Once again, their stories confirmed and supplemented the information we had gained from our Guantánamo contacts:

- Twenty-seven refugees who had been screened-in and told they were going to the United States were separated from the screened-in camp and repatriated, despite having been found to have a credible fear of persecution in Haiti.<sup>87</sup>
- Refugees were sent to Camp 7—the punishment camp—for arbitrary reasons ranging from speaking loudly to asking for sandals to wear.<sup>88</sup> Those in the punishment camp were made to sleep on rocks.<sup>89</sup>
- One woman, named Marie Zette, was mistakenly repatriated after being screened-in. Upon her return to Haiti, she was killed by the Haitian military.<sup>90</sup>

Also in Miami, students met with Lucas Guttentag to assist him in deposing two INS officials who had led the screening program on Guantánamo. With the information we had gathered from refugees the day before about the poor organization of the camps and screening errors, we were able to get the INS officials to admit on the record to the chaotic conditions at the camp. The Senior Asylum Officer and Quality Control Coordinator from Guantánamo admitted that 2500 files for people already screened had been misplaced, and approximately 1000 of these refugees were rescreened.<sup>91</sup>

Meanwhile, in Washington, D.C., students helped Michael Ratner and Joe Tringali depose several INS officials. Students also conducted document discovery, racing through boxes of heavily redacted files from the government for information about screening procedures, thoroughness, and accuracy. From

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87. Affirmation of Jerry Salut, Ken Ramone, and Marty Abel, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. affirmation dated Mar. 30, 1992). Because of the refugees' fear of retribution, we used pseudonyms to protect their identities.

88. *Id.* at 3.

89. Affidavit of Marcus Antoine at 2, *Haitian Ctrs. Council*, No. 92-1258, (E.D.N.Y. affidavit dated Mar. 30, 1992).

90. *Id.*

91. Deposition of Irma Rios, Senior Asylum Officer and Quality Control Coordinator, Immigration and Naturalization Service at 40-43, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. deposition taken Mar. 31, 1992); see also *U.S. Human Rights Policy Toward Haiti, Hearings Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 7-11 (1992) (testimony of Harold J. Johnson, Director, Foreign Economic and Assistance Issues of the Division of National Security and International Affairs, U.S. Gen. Accounting Office).

the papers, we were able to supplement the information refugees in Miami had provided about the different camps at Guantánamo.<sup>92</sup>

In New Haven, Harold Koh and other students received fax after fax from Guantánamo, Washington, D.C., and Miami, piecing together the various bits of information as they came in and completing the necessary legal research. One by one the teams returned to Simpson Thacher throughout the night of March 31 to continue organizing the incoming information, sifting crucial points from discovered documents and deposition transcripts. The discovery teams took turns briefing Harold until dawn as he prepared for the oral argument. At 10 a.m., the team returned to court to argue for the preliminary injunction.

The information gathered over the seventy-two hours of discovery thoroughly undercut the government's argument that the camps were humanitarian and orderly. With the attorneys at the counsel table, dozens of students filled the benches in the spectators' area. As the argument progressed, we scribbled down notes based on our new knowledge of the camps and passed them forward to the counsel table.<sup>93</sup> During the hearing, Harold read an affidavit gathered by the student team recently returned from Miami. The affidavit recounted the story of Marie Zette, the woman on Guantánamo who had been sent back to Haiti even though she had been screened in.<sup>94</sup> "She sang about hurting and that she regretted having to go back to Haiti because . . . she feared for her life," Harold read to a hushed courtroom. "She was sent back to Haiti. The next day, the guards called her name to be sent to Miami. It was too late." In mid-February, Harold continued, "the military police came at night and killed her while she slept."<sup>95</sup> This story established irreparable harm resulting from the U.S. government's policy and illustrated the human costs of the government's administrative errors.

When Judge Johnson granted the injunction on April 6, we were surprised that he rejected the narrower statutory right-to-counsel argument on which he had granted the TRO in favor of the broader due process claim.<sup>96</sup> Since the U.S. government had taken away their liberty, he reasoned, the refugees are "entitled, at the very least, to challenge such restrictions and the related

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92. The refugees had told us that there was one camp for people who were screened in and ready to go to the United States, one camp for people who had been screened out and would be repatriated, one camp for people with lost files who would have to be rescreened, one camp for people waiting to be interviewed, and one camp for those refugees being punished by the military.

93. The ripping sound from our legal pads drew surprised stares from opposing counsel. For every topic that arose in the argument, there was a student who knew the issue well from legal research, document discovery, or refugee interviews. Lucas Guttentag passed a note back to us, calling us the "Human LEXIS Machine."

94. Transcript of Hearing Before the Hon. Sterling Johnson, Jr., at 57, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. argued Apr. 1, 1992).

95. *Id.*

96. Preliminary Injunction Order, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. Apr. 6, 1992).

conduct of U.S. officials."<sup>97</sup> After days of furious activity, we celebrated the preliminary injunction with a good night's sleep.

Almost immediately, though, the government filed a request for a stay of the preliminary injunction pending appeal in the Second Circuit, and we had to file opposing papers. The stay was argued on April 14,<sup>98</sup> and at the end of the argument Judge George Pratt announced the panel's decision from the bench: The stay was denied. But again our joy was short-lived. Late on the afternoon of April 22, 1992, in a 5-4 decision, the Supreme Court reached down on an interlocutory appeal, past the Second Circuit, and stayed the district court's preliminary injunction pending appeal.<sup>99</sup> Since the Second Circuit would not hear argument on the appeal of the injunction until May 13, the government now had enough time to send all of the refugees back to Haiti, even though Judge Johnson had found that repatriations could result in torture or even death.<sup>100</sup>

Early the next morning, we received a covert call from a high-level source stationed on Guantánamo. "If there is anything you can do for your clients," he warned, "do it now; the government is beginning interviews and repatriations." A sense of urgency bordering on panic grew amongst the students. We feared that our clients were about to be sent to their deaths, and the legal claims we had developed could do nothing to prevent it. In a moment of passion, one student threatened to go on a hunger strike but was dissuaded by others who insisted that a hunger strike could not turn the boat around. Another student suggested a habeas corpus petition to prevent repatriations. A few days later, while we were researching habeas corpus, we received another urgent call telling us that eighty-nine of the Haitians were being forcibly repatriated that night. The "refuseniks," as we were later to call them, had asked repeatedly for Robert Rubin, whom they had met during the March discovery trip. The government told them they had no right to see him or any other attorney before or during their interviews, so they might as well submit to an interview. The refugees refused. Deciding that they would rather be

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97. *Id.* at 29.

98. Walking into the courtroom that day, we were surprised to see a huge crowd of reporters and spectators already seated. It turned out that Harvard Law School professor Alan Dershowitz and his team of students were defending Leona Helmsley in her tax fraud case that same day. We hoped the additional reporters in the room would improve our press coverage.

99. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992). This was the day after the Supreme Court overturned four lower court stays of the execution of Robert Alton Harris, *Vasquez v. Harris*, 112 S. Ct. 1713 (1992), and the same day the Court heard arguments in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Given the demands of these other cases, it is unclear how carefully the Court examined the government's stay request in the Haitians' case. Both the district and circuit court had denied the stay upon issuance of the original order and again after clarification of the order. The Court's decision to stay the order after it had been denied four times by lower courts was extreme, given the deference the Court usually shows to lower courts. *See, e.g.*, *Graves v. Barnes*, 405 U.S. 1201, 1203 (1992) (Powell, J., in chambers) ("Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment . . . is entitled to a presumption of validity.").

100. Preliminary Injunction Order at 17, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. Apr. 6, 1992).

repatriated than submit to another interview without procedural rights, eighty-nine of the refugees, their hands lifted palms up in a Haitian gesture of peace, walked onto the U.S. Coast Guard cutter that was to sail back to Haiti that night.

Clinic members gathered in the Haiti office that evening. Harold Koh, his voice tight with exhaustion and his two-year-old son squirming in his lap, asked us what we thought we should do next. Going around the room, each student expressed a similar sentiment: We can't do nothing. The refugees had relied on our legal advice that they had a right to counsel, and now they were being sent back because they had insisted that their rights be recognized. The boat had not yet sailed and maybe we could still prevent the repatriations. "OK," said Harold, "let's see what we can do."

After a few hours of additional research, we reconvened at midnight, convinced that a habeas corpus petition was the only possibility for relief. We also decided that we could not risk filing before Judge Johnson. Relief for the remainder of the Guantánamo refugees depended on Judge Johnson, and we did not want to jeopardize their claims by filing a desperate motion on behalf of a small group of clients and perhaps alienating the court. We searched for an attorney who would be willing to file the habeas corpus petition elsewhere. Finally at 2:00 a.m., with the Coast Guard cutter likely on its way, Harold, as the counsel of record, told us all to go home. Many students argued that we should continue to pursue a habeas corpus petition. But Harold soberingly told us, "There's nothing more we can do. Even if we could find an attorney to file the petition," he said, "no judge would issue an order to stop a U.S. military vessel on the high seas and reverse its course."

We learned later from a Guantánamo contact that when the cutter arrived in Haiti the refugees refused to get off the boat because they could see the Haitian military waiting for them on the dock. The U.S. Coast Guard forced them off the cutter with firehoses.<sup>101</sup>

It only got worse. One month later, as first- and second-year students on the team left New Haven after cramming for final examinations and third-year students graduated, President Bush issued the "Kennebunkport Order" from his Maine vacation house. Announcing the new policy on Memorial Day 1992, Yale's commencement day, he authorized the Coast Guard to forcibly repatriate all Haitians fleeing by boat without any determination of possible asylum claims.<sup>102</sup> Later that day, during a nationwide conference call, refugee advocates agreed that the Yale team, with its ongoing lawsuit, was the only team in position to challenge the Kennebunkport Order. Newly graduated third-year law students literally took off their caps and gowns and sat back down at

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101. This information was later confirmed by a government document obtained through discovery. Internal U.S. Coast Guard Headquarters Telecommunication (Apr. 29, 1992) (on file with Lowenstein Clinic).

102. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

their computers to draft new TRO papers. Although we were reluctant to begin new litigation on an issue that had little chance of ultimate success before the Supreme Court, the only way to stop this policy immediately was to request another TRO.

When we appeared before Judge Johnson again, the Solicitor General himself, Kenneth Starr, appeared in Brooklyn for the government, emphasizing the importance of this issue. Judge Johnson denied the TRO request, stating that the court was constrained by Second Circuit case law to hold that Article 33 of the Refugee Convention is not self-executing.<sup>103</sup> But in dicta he strongly condemned the government's actions. Judge Johnson saw the new policy as "unconscionable" and said he was "astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so."<sup>104</sup> The government's actions, he continued, had rendered Article 33 "a cruel hoax and not worth the paper it is printed on."<sup>105</sup> Armed with Judge Johnson's virtual invitation to the Second Circuit to reverse his decision, we appealed the ruling to the Second Circuit. We were granted a preliminary injunction on July 29, 1992;<sup>106</sup> not surprisingly, the Supreme Court stayed the injunction three days later.<sup>107</sup> With dwindling hope for a court victory, we turned to advocacy outside the courts.

#### B. *Going Beyond the Courts: Refugee Resettlement, Guantánamo Client Services, and Media and Political Activism*

As we watched Guantánamo being transformed into an HIV detention camp, we began to realize the inadequacy of the right-to-counsel relief we had initially sought from the courts. Having been stayed twice by the Supreme Court, we wanted to avoid final adjudication there. Anticipating a Clinton victory, the team moved to postpone the trial on the merits and the opposition to certiorari on the preliminary injunction in the Guantánamo case, and submission of the Supreme Court brief in the Non-Return case. Instead, we focused our energy on helping the refugees through means other than court-ordered relief. To that end, students led efforts in refugee resettlement, Guantánamo client services, and media and political activism.

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103. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-1258, 1992 U.S. Dist. LEXIS 8452, at \*5 (E.D.N.Y. June 5, 1992) (citing *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982)).

104. *Id.*

105. *Id.*

106. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

107. *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3 (1992).



### 1. *Refugee Resettlement*

In September 1992, we entered settlement negotiations with the government in the Guantánamo case. Both sides were amenable to negotiations regarding the Guantánamo Haitians at this time. The Bush Administration seemed reluctant to defend in court its policy of indefinite detention, and we had recognized that the right to counsel we were seeking was inadequate relief. On September 14, we negotiated with the government for three hours over the terms of the settlement and the treatment of the Guantánamo Haitians.

One of our most pressing aims at this conference was to convince the government to release the pregnant women from detention and allow them to give birth in the United States. We hoped that the publicity surrounding the recent death of one infant, Ricardo Success, would help persuade the Justice Department to release the women. Ricardo had been born on Guantánamo in May 1992 to a refugee named Sillieses Success. He caught pneumonia soon after his birth because he, like all the other refugees, had been kept out of his hut for three days during the rainy season.<sup>108</sup> The government evacuated Ricardo and Sillieses to the United States in September 1992 because Guantánamo's medical facilities were inadequate to treat the critically ill infant, but by that time it was too late. Ricardo died two weeks after the evacuation.<sup>109</sup>

In the several days preceding the settlement conference, students launched into a new area of research—appropriate care for HIV-positive pregnant women. One student researched medical journals, even paging one of the journal authors to request information and advice specific to the Guantánamo Haitians. This student's research confirmed what we had feared: the risk of HIV transmission at birth increases when HIV-positive deliveries are made without adequately trained health care workers or special equipment.<sup>110</sup> We strongly suspected that Guantánamo was not equipped to provide proper care to the refugees.<sup>111</sup>

Anticipating that the government might refuse our request to parole pregnant women into the United States because of the cost, we also sought the

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108. The military forced the refugees to stay in an open air pavilion for three days after the refugees set fire to some huts during clashes with the military.

109. In the days following Ricardo's death, the government sought to ship Ricardo's body back to Guantánamo for burial. After strong protestations by his mother and our legal team, he was buried in the United States.

110. See, e.g., H.L. Minkoff, *Care of Pregnant Women Infected with Human Immunodeficiency Virus*, 258 JAMA 2714 (1987). Given the health situation on Guantánamo, we feared that what normally would be a small increase in the risk of HIV transmission would become a substantial increase.

111. We learned during our October trip to Guantánamo that the base was what the military calls a "well base." The base clinic is prepared to handle only routine medical situations, and all military personnel are medically screened for serious health problems before being sent to Guantánamo. The clinic was, therefore, poorly equipped to care for the special medical needs of the HIV-positive refugees detained there.

help of the AIDS Resource Foundation for Children in New Jersey.<sup>112</sup> After a flurry of phone calls and faxes, in which students briefed the director of the Foundation on the situation on Guantánamo, he agreed to house four women who were a month away from delivery and to provide medical care through New Jersey hospitals with which he had a working relationship.

The government lawyers resisted our proposals at the settlement conference, arguing that releasing pregnant women and their families would encourage other women to become pregnant. By the end of the conference, the government agreed to parole in HIV-positive pregnant women, but they refused to parole in the pregnant women's HIV-positive family members.<sup>113</sup> The government also insisted that the women could not be brought in until one month before their due date, ignoring our argument that the women needed to be brought in earlier since HIV-positive women are more likely to deliver prematurely.<sup>114</sup>

A few days after the settlement talks, students phoned the four pregnant women who were approaching full term to tell them that the government had agreed to parole them into the United States. We tried to explain why they were being allowed to leave while their families were not. Several women were reluctant to speak to us or trust us, and even more reluctant to leave their loved ones. Their husbands did not want them to leave either. We assured the men that their wives would be well cared for, but the men insisted that they had to protect their wives and could not do so if they were separated. After a lengthy conversation, we persuaded all but one of the women to leave Guantánamo to deliver their babies in New Jersey. As we hung up the phone, we felt troubled about having convinced these women that they should choose family separation.

Over the months, we gave the same advice to our clients again and again: leave your husband, leave your mother, leave your father, leave your family. Despite our misgivings, we felt that bringing pregnant women to the United States without their families was the best course. We believed that family

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112. The Foundation works with children with AIDS and their families, providing housing, counseling, and other social services. The Foundation had an additional benefit: President Bush had named it a "Point of Light" in his "Thousand Points of Light" program. We therefore hoped that the Bush Justice Department would accept this organization as a trustworthy placement for the women.

113. We also sought the parole of some pregnant women who were HIV-negative but were being held on Guantánamo because they had a derivative asylum claim; the government also refused to yield on this issue. Family members of a person with a well-founded fear of persecution have a derivative asylum claim and are granted asylum based on their relationship to the primary claimant. Even if a pregnant refugee with the derivative claim were HIV-negative, she was also detained on Guantánamo if the family member with the principal claim had tested HIV-positive. The government, arguing that Guantánamo was equipped to handle uncomplicated pregnancies and births, maintained that there was no reason to parole pregnant women who were HIV-negative into the United States for their deliveries, even though there were significant dangers to newborns who were exposed to camp conditions.

114. In fact, the first woman scheduled to be paroled into the United States delivered her baby prematurely and remained on Guantánamo. Six months later, mother and child were medically evacuated after the baby became ill.

separations would be only temporary. Also, we hoped that the pregnant women's entry would pave the way for future releases. As we successfully resettled the incoming women, we thought the government's fears of releasing the other refugees into the U.S. population would be allayed. The fewer refugees on Guantánamo, we reasoned, the more willing a judge or an executive official would be to release all remaining refugees rather than continue holding them indefinitely. Not until later did we realize that what we had viewed as a tolerable "temporary separation" had led to a permanent dissolution of some family units, when some of those who had separated decided not to reunite once in the United States.

After the incoming pregnant women delivered their babies, students worked to find both mothers and infants permanent housing in order to make room for other women at the AIDS Resource Foundation for Children, the only placement for pregnant women acceptable to the government.<sup>115</sup> We also worked to find housing for a handful of other refugees who had been granted medical evacuations, because the government would not release them from the base unless we found suitable housing and medical care arrangements in advance. To find housing for the increasing number of refugees entering the United States, our refugee resettlement team contacted Housing Works and the Coalition for the Homeless in New York. Working together with the City of New York, they were able to find housing for all of the Guantánamo Haitians and put them on a fast track for public benefits. To our great relief, these two organizations soon took over all social services for the refugees once they entered the United States.

## 2. *Guantánamo Client Services*

The government's September settlement offer was nothing more than what the Haitians might win in court: a right to counsel during their interviews on Guantánamo. The offer did not guarantee entry into the United States for any one of them, even for those who would meet the "well-founded fear of persecution" standard for political asylum.<sup>116</sup> Because the conditions on Guantánamo were becoming unbearable for the refugees, however, we could not lightly turn down an offer that might allow even a small number of them to leave the base. Unable and unwilling to decide for our clients, and knowing

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115. Despite the formal agreement made by the government at the settlement talks to bring all pregnant women into the United States, we had to negotiate for each woman individually. These difficult negotiations became even more complicated when the Clinton transition began, because of the temporary loss of accountability within the government. For months after President Clinton was inaugurated, there was no person we could go to in the Justice Department to secure, on a case-by-case basis, the agreed-upon evacuation of pregnant women and critically ill refugees.

116. The government refused to guarantee entry because of the travel ban on foreigners who tested positive for HIV. Although that ban could be waived by the Attorney General on humanitarian grounds, the government would not make such a waiver in its settlement offer. *See supra* notes 56-57.

that the government wanted to settle the case, we pressed for access to Guantánamo to explain the settlement offer to them in person. After almost a year of litigating to keep lawyers from counseling the Haitians, the government agreed, allowing us to meet all of our Guantánamo clients for the first time.

Days before our scheduled trip to Guantánamo, the government allowed us our first phone access to Camp Bulkeley, where the refugees were being held.<sup>117</sup> Since we had heard from our contacts on Guantánamo that there were political divisions among the group of refugees, and we wanted to learn more about the internal dynamics at the refugee camp, we called three refugees whom our Guantánamo contacts had told us were camp representatives. The Haitians were wary of our eager and unfamiliar voices speaking excitedly in English. They all told us the same thing: Michel Vilsaint, who had been elected in military-sponsored elections, was recognized by the refugees as camp president. We explained who we were and the work we had been doing, and we told them that in a few days we would be coming to Guantánamo to meet with them.

On October 7, our settlement team left New Haven for Guantánamo. Michael Ratner, Harold Koh, Lisa Dugaard, three students, and three interpreters recruited by the students made this first trip. Students had arranged airplane reservations with funds approved from the law school, obtained military clearances, and obtained various equipment, such as computers and fax machines, for the trip. The team spent the evening near the military base in Norfolk, Virginia.

Over dinner, the three students suggested how to organize the teams and conduct the meetings over the next three days. Each team combined the experience and authority of an attorney with an interpreter's understanding of Haiti and the Creole language and a student's knowledge of the clients and conditions on Guantánamo. The students, who all had intensive experience in interviewing Haitian refugees, were concerned about how the attorneys would relate to the refugees. All three of the students had been trained in filing Haitian asylum applications and had learned that Haitian refugees, usually poor and not familiar with the legal jargon of asylum, were often distrustful of authority figures. The attorneys, though knowledgeable about Haiti, had had little personal contact with refugees.

Starting out before dawn the next day, we took a military flight to Guantánamo and then traveled across the bay to meet our clients. We were not allowed to go to Camp Bulkeley to see the conditions under which the refugees were being detained. Instead, the military brought us to meet all of

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117. It was during this same conversation that we spoke to the four pregnant women about leaving Guantánamo. *See supra* p. 2362.

our clients in an airplane hangar.<sup>118</sup> Unsure how to proceed, we took a moment to compose ourselves before entering the cavernous hangar.

We could see all of our clients waiting inside, and we were struck by the small size of the group—a group that the government had spent vast resources detaining. We were also astonished to see more than thirty small children playing in the corners of the hangar. We cautiously waved to the group sitting quietly in metal chairs. They waved back. One man, dressed in black pleated pants and a crisp white button-down shirt and hidden behind dark sunglasses, held a clipboard in one hand and was testing the microphone set up in front of the group. Without removing his glasses, he introduced himself to us as Michel Vilsaint, Camp President. We walked toward the line of empty metal chairs facing the group. The refugees politely stood up in unison at Michel's signal and greeted us by chanting "Yon sèl nou fèb, ansanm nou fò, ansanm, ansanm nou se Lavalas."<sup>119</sup>

Having represented the refugees for seven months, we felt a special bond with them, but since we had never met them, we knew that many of them would be reluctant to trust us. We had heard from our Guantánamo contacts that some government officials on the base had told the refugees that we were responsible for their continued detention. Aware of this underlying tension, Harold Koh stood up to address the expectant but suspicious group. "You must be asking yourselves if this Korean guy is an American," he joked. The refugees' relieved laughter encouraged him to proceed. "When I see your faces, I see the face of my father. Like you, my father supported the first democratically elected government in his country; like Aristide's government, the Korean government was overthrown in a coup. Like you, my father sought refuge in the United States. It is because of my father that I fight for you." As the refugees nodded their approval, we felt that they had taken the first step towards trusting us.

Following this introduction, we asked to speak privately to the refugees' leaders, because we did not want to discuss any confidential matters within earshot of the armed military police surrounding the hangar. We were careful to speak to representatives of all of the different groups in the camp, including Camp President Michel Vilsaint, the former camp president, and several people who represented groups of refugees who, we had been told, were dissatisfied with the formal camp leadership. Meeting in a stifling hot room, we explained to the wary group in general terms the litigation and the government's settlement offer. In explaining the settlement offer, we presented several possible options for the refugees to consider: first, voluntary repatriation;

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118. During our first Guantánamo trip, we were never allowed to leave the airstrip area; this time we were escorted across the channel in the base commander's private boat to the main part of the base.

119. "Alone we are weak, together we are strong, together, together, we are Lavalas." This phrase was coined by members of Aristide's political party, Lavalas. "Lavalas" means "flood," communicating that Aristide's movement would wash away all the corruption from the years under despotic rule.

second, acceptance of the settlement offer, in which case only some of the refugees would be granted asylum; and third, rejection of the offer. Choosing this last option, we explained, could yield two different outcomes, depending on the result of the upcoming presidential election. If President Bush were to win a second term, rejection of the settlement offer surely would mean continued litigation. However, if Clinton were to win the election, this would likely mean a favorable change of policy and possibly release from Guantánamo.

As night fell and the tense meeting came to no easy resolution, we agreed to talk further with the refugees the next day. The refugees would organize themselves into groups of twenty-five, and the camp leaders would explain to each group the decision we were asking them to make concerning the settlement offer; we would then meet with each group twice, once to explain the settlement offer and once to listen to their decisions, over the next few days.

The next day, we broke into the three teams to explain the settlement offer to each group. The refugees in these small groups listened graciously to our analysis of the different options, and thanked us for our work. Then they hurled question after question at us: Why is the government accusing us of having AIDS? Why is the United States ignoring the international law that says it is illegal to return refugees? Don't you work for the government? Why should we trust you? How can you really fight hard for us when you are not being paid? You must be very bad lawyers or you are not fighting as hard as you say, since we have been here for almost a year! We left the hangar exhausted and on the verge of tears.

The following morning, one of the refugees who had been particularly distrustful the previous day stood up and addressed the legal team. "My name is Harold Michel," he began. "Last night an angel came to me in a dream. The angel told me to trust the lawyers. I share my name with the two lawyers here, Harold and Michael. This is a sign that I should trust the lawyers."<sup>120</sup> With that, the refugees began to tell us story after story of their misery and suffering. One man showed us a photograph of his dead wife lying in pool of blood, which he had taken in an effort to substantiate his asylum claim as he fled his home in Haiti. Others spoke of suffering broken bones after being thrown into the back of U.S. military trucks on Guantánamo. They brought us plates of the lumpy, sour-smelling rice they were served every day, and showed us their legs swollen from injuries and rat bites. They told us repeatedly they could not live another day on Guantánamo. Many said they wanted to commit suicide because they could not suffer any longer.

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120. A few months after arriving in the United States under Judge Johnson's interim order, Harold Michel died of AIDS.

During these sessions, refugees brought us handfuls of colorful pills that the military doctors had given them. We knew that some of the pills were AZT for AIDS and some were INH for tuberculosis. The refugees had been too scared to take the medication because they did not fully understand what it was for. We tried to explain to them that the pills would probably help them, but that they could not be compelled to take them. This news unnerved, rather than comforted, the refugees. Over their months of detention, many of the Haitians had clung to the belief that they did not really have HIV, but that the government was conspiring to keep them out of the United States. In March 1992, they had been locked into the very hangar where we were now meeting and had been informed by loudspeaker that they would not be going to the United States and that they should stand in line to see the government doctor. One by one they were told the terrible news: "You have HIV." Pandemonium broke out as word spread quickly among the refugees still waiting in line. They remained locked in the hangar for three days before being transferred to Camp Bulkeley. Since then, they had received little or no HIV counseling.<sup>121</sup> For the first time, then, they were hearing from people who did not work for the United States government that they might actually be ill.

The final night on the base we met with Camp President Michel Vilsaint, who confirmed what each small group had been telling us. The refugees would reject the government's settlement offer, since they were not interested in having counsel present at their de facto asylum interviews on Guantánamo. They knew that even if they passed their counseled interviews, the HIV exclusion might still mean that they would be barred from entering the United States and thus soon repatriated to Haiti. Release as a group from Guantánamo to a country other than Haiti, which was what the refugees wanted, would be possible only if Clinton won the election and lifted the HIV exclusion as he had promised, or waived in the Guantánamo Haitians separately.

Michel was concerned, however, that Clinton might still lose the election. Lisa Dugaard assured him that we would then ask Judge Johnson at the trial to release the group from Guantánamo. Harold Koh quickly corrected her: We are *not* asking for release exactly, but for legal counsel to help you in your second interviews so you have a better chance of making it to the United States. Later that night, when we finally left the hangar for dinner, this disagreement developed into a heated argument among members of the legal team. Although all of us were moved to work for the Haitians' release, we could not agree on how to proceed. To tell them that victory at trial would result in their release would mislead them, since the trial was primarily about

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121. Nor had the refugees been informed that the law excluding HIV-positive people from entering the United States was subject to discretionary humanitarian waiver by the Attorney General. See *supra* note 57.

the right to counsel. On the other hand, it was increasingly clear that relying on our original legal claims would be unacceptable to the Haitians.

We did not want to say farewell to our clients. Once again, we all gathered together in the hangar. They presented us with a painting of the scales of justice trying to break free from Haiti's violent past, sang us heartbreaking songs about life on Guantánamo, and pleaded that we not forget them. "When I look out at you now," Harold assured them, "I no longer see my father's face, but I see Yolande, Michel, and Junior. I will carry the memory of your faces back with me to the United States where we, and all those working with us, will fight for you as hard as we can."

Upon returning to New Haven, we formally rejected the government's settlement offer and agreed to postpone further proceedings in the Guantánamo case. With the election weeks away, and a Clinton victory uncertain, we could not wait idly for the possibility that a new president might solve the problem. Since the refugees had no access to other service providers, we began "Guantánamo Client Services" to address their extralegal needs. Several of us gave the refugees our home phone numbers for emergencies, which included everything from suicide attempts to military mistreatment. Soon, they were also making frequent requests for soap, clothes, tapes, headphones, cameras, and innumerable other items. We found ourselves in the awkward position of deciding what was a "necessity," which we would try to provide, and what was a "luxury," which we could not provide. It was especially difficult for us to deny any of their requests, because we were acutely aware that the refugees could die behind barbed wire. During these calls, usually lasting several hours, students also informed the refugees of developments in the United States, especially the latest presidential poll results.<sup>122</sup>

The night of the presidential elections, all of the students gathered at Harold Koh's house to watch the returns. We were euphoric when the networks announced Clinton's victory. Phone calls from supporters around the country poured in to celebrate what we all assumed to be the beginning of the end of the refugees' ordeal.<sup>123</sup> We called the refugees on Guantánamo. They too had been watching the returns and celebrating. Shouts of "Clinton! Clinton! Miami! Miami!" drowned out Michel Vilsaint's voice as we tried to talk to him.

Within weeks, the refugees' mood changed dramatically. Two suicide attempts preceded our next trip to Guantánamo. Why wasn't Clinton keeping his promise, the refugees wanted to know. Why are we still on Guantánamo? We explained that President-elect Clinton would not be inaugurated until January, and that in the meantime we were working with his transition team

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122. After one student received a \$3000 bill for one month of phone calls to and from Guantánamo, we placed limits on the number and length of these calls.

123. For texts of Clinton's promises, see *supra* notes 61-63.



to secure their release, as well as to develop a policy to replace the Kennebunkport Order. For the refugees, with their second Christmas on the base fast approaching, any delay was unbearable.

In mid-November, Joe Tringali and Lucas Guttentag led a new legal team to Guantánamo. The team included four students, three interpreters, and a Haitian-American doctor.<sup>124</sup> We were finally granted access to Camp Bulkeley on this trip. The camp was located on the far end of the base. As the military drove us to meet the refugees, our team passed the McDonald's and Baskin Robbins, a shopping mall, and numerous houses, ranging from cottages to luxury homes with three-car garages. We drove through several miles of desolate land, surrounded by mine fields, and then turned a corner to face a military checkpoint. Here, so close to the familiar surroundings of a U.S. town and yet completely isolated, was the refugee detention camp. As we approached the checkpoint, our military escorts warned us that the "migrants," as they called the Haitians, might be dangerous. "If the migrants try to take you as hostages," the officer warned, "listen to our directives; otherwise, we cannot guarantee your safety. We will not negotiate for your release." Determined not to be intimidated by the military, we stepped off the van inside two barbed wire gates.

The camp was surrounded on three sides by dry, brown hills, separating it from the main part of the base, and on the fourth side by the ocean. The stark landscape was broken up sporadically by towers, where armed military guards hovered above the camp. Adding to the sense of isolation and imprisonment, concertina wire enclosed the outer perimeter of the camp, as well as the smaller area where the refugees were housed. All day, military jets roared overhead, and gunshots rang out from distant target practice.

We immediately headed to the pavilion where our clients were all waiting for us. They were eager for us to see where they lived. They led us through single-room buildings made of concrete blocks. Numerous refugees lived in each of these huts. They had hung up white sheets for a modicum of privacy. The refugees, many of whom had been on the base for nearly a year, slept on flimsy canvas cots, or sometimes even on the concrete floors. The refugees showed us how they had taped black plastic garbage bags over the chicken wire windows, trying unsuccessfully to keep the tropical rains out. The rain washed through the doors, often soaking them and their belongings. They also showed us a two-foot-long banana rat with razor sharp teeth they had captured. These rodents often crawled into the huts and bit them while they slept. The adults were most worried about the dangers these rats, as well as scorpions, snakes, and insects, posed for their children. We smelled the stench of the

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124. After our October trip, we realized it was critical that the Haitians discuss their medical conditions with a doctor they could trust, so we convinced the government to allow independent doctors from organizations such as Doctors of the World to accompany us.

port-o-potties, which the military refused to clean regularly. Right outside the barbed wire, we could see the building containing the flush toilets that their guards used.

Finally seeing the conditions in which our clients were living convinced us further that mere access to counsel would not be adequate relief. Somehow we would have to achieve precisely what our clients had been requesting: release from the base without return to Haiti.

### 3. *Media and Political Activism*

Students initiated the expansion of the legal team's advocacy to include media and political activism. At first, we had been wary of media coverage because we wanted to protect the Haitians' privacy, and because we feared the public would be unsympathetic to the Haitians. After seeing the conditions of the camp, however, we decided to seek media coverage aggressively. This effort escalated after the refugees on Guantánamo began their hunger strike and students followed their lead, with public protest taking center stage in the weeks leading up to the trial in the Guantánamo case.

When we first interviewed Haitian refugees in Miami in March 1992, we had been furious to find cameras recording our sessions with frightened Haitian asylum seekers. Fearing that media coverage would expose the refugees to repercussions in Haiti and that the presence of reporters would disrupt confidential attorney-client relationships, we asked the reporters to leave the interview rooms and speak only to refugees who consented. We grew frustrated when we saw the next day's headline in the *Miami Herald* proclaiming "Law Students Spend Break Helping Haitian Refugees."<sup>125</sup> We thought that the human interest angle of law students sacrificing spring break did not do justice to the story of the violence in Haiti and the U.S. government's treatment of the fleeing refugees.

Student ambivalence toward media coverage continued through the spring of 1992, as the legal team fought for a TRO and preliminary injunction. The HIV-positive status of the Guantánamo Haitians made the issue of media coverage especially sensitive. We did not want to violate their privacy by exposing their HIV status. We also feared that even sympathetic coverage might provoke a negative public reaction. If the public saw the refugees only as black, poor, and HIV-infected, it would be more difficult for politicians to press for their release without risking public disapproval. Instead, we tried to

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125. Harold Maass, *Law Students Spend Break Helping Haitian Refugees*, *MIAMI HERALD*, Mar. 16, 1992, at B1; see also Joanne Kenen, *Law Students Spend Florida Spring Break Helping Haitian Refugees*, *Reuters*, Mar. 20, 1992, available in LEXIS, News Library, Reuters File.

draw the attention of the media to the chaos on Guantánamo. This strategy largely diverted the media attention from the HIV status of the refugees.<sup>126</sup>

In a similar fashion, we provided the media our perspective on President Bush's summary repatriation order of May 24, 1992. One student dubbed the order the "Kennebunkport Order" to draw attention to the fact that Bush had made such a life-threatening policy decision from his vacation home in Kennebunkport, Maine. Our media relations team also named the policy of ringing Haiti with Coast Guard cutters the "Floating Berlin Wall." The newspapers immediately picked up these two phrases,<sup>127</sup> and even the courts referred to the Executive Order as the "Kennebunkport Order."<sup>128</sup>

In July, while still denied access to the detention camp, we learned through a contact on Guantánamo that a demonstration by the refugees against arbitrary punishment had ended in a violent military crackdown. Soldiers in full riot gear, accompanied by attack dogs, tanks, and helicopters, beat and handcuffed refugees dressed in t-shirts and shorts. This "July Crackdown," as we called it, led to a story in the *Washington Post* discussing the inadequate health care facilities and the desperate conditions of the refugees on Guantánamo.<sup>129</sup> The

126. See, e.g., Gail Appleson, *Court Refuses To Block Haitians' Access to Lawyers*, Reuters, Apr. 14, 1992, available in LEXIS, News Library, Reuters File; Barbara Crossette, *Lawyers Say U.S. Has Lost Haitian Refugee Files*, N.Y. TIMES, Apr. 8, 1992, at A12; *Government Fails To Block Court Order Favoring Haitian Refugees*, WALL ST. J., Apr. 15, 1992, at B6; *Human Rights Group Probes U.S. Treatment of Haitian Refugees*, Reuters, Mar. 28, 1992, available in LEXIS, News Library, Reuters File; *Judge Blocks Return of Haitian Refugees*, UPI, Mar. 28, 1992, available in LEXIS, News Library, UPI File; *Judge Orders Lawyers for Haitian Refugees*, N.Y. TIMES, Mar. 28, 1992, at A3; Fred Laberge, *Deportation of Haitians Halted in Yale Law Victory*, NEW HAVEN REG., Apr. 7, 1992, at 1; Philip Messing, *Legal, Human Rights Advocates Seek Lawyers for Haitian Refugees*, Reuters, Apr. 4, 1992, available in LEXIS, News Library, Reuters File; Deborah Pinks, *Haitians Win Right To Meet With Lawyers: Decision on Deportations Issued by 2d Circuit Panel*, N.Y. L.J., Apr. 15, 1992, at 1; *U.S. Returned Some Haitian Refugees in Error, Lawyers Claim*, CHI. TRIB., Apr. 9, 1992, at C28; *Yale Students Win Rights for Refugees in Cuba*, CONN. L. TRIB., Apr. 13, 1992, at 13.

But see Pamela Constable, *Lawsuit Focuses on Plight of Haitian Refugees*, BOSTON GLOBE, Apr. 3, 1992, at 3; *Ruling Expected Monday in Haitian Refugee Case*, UPI, Apr. 2, 1992, available in LEXIS, News Library, UPI File; Catherine Sullivan, *Yale Group To Aid Haitian Refugees*, NEW HAVEN REG., Mar. 29, 1992, at A3.

127. See, e.g., John G. Healy & Carlos Salinas, *The Hell from Which Haitians Are Fleeing*, STAR TRIBUNE (MINNEAPOLIS-ST. PAUL), Mar. 1, 1993, at 9A (President Bush "issue[d] the 'Kennebunkport Order,' returning all Haitians to Haiti without a chance to seek asylum"); *Haitian Refugees Need Not Apply*, ST. LOUIS POST-DISPATCH, Aug. 1, 1992, at 2B ("Bush's cruel 'Kennebunkport Order' . . . told the U.S. Coast Guard to intercept Haitian refugees on the open seas and return them to Haiti"); Kathie Klarreich, *Hope Fading in Haitian Village*, S.F. CHRON., Dec. 22, 1993, at A12 ("Six thousand refugees have been returned since the so-called Kennebunkport order"); Randall Robinson & Benjamin Hooks, *Haitians: Locked Out Because They're Black*, WASH. POST, Aug. 24, 1992, at A17 (U.S. "created a floating Berlin Wall around a nation struggling for democracy"); Douglas Farah, *Coast Guard Patrols, Clinton's Switch on Repatriation Delay Haitian Exodus*, WASH. POST, Jan. 21, 1993, at A14 (President Aristide's chief representative stated that Clinton "put up a . . . floating Berlin Wall [] around those seeking freedom"); William Raspberry, *"Floating Berlin Wall"—When Will U.S. End Policy of Anti-Haitian Bias?*, ATLANTA J. & CONST., Feb. 16, 1994, at A8 (President Aristide stated that when Haitians flee "they are met by a floating Berlin Wall that forces their return to the very captors they have fled").

128. See, e.g., *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1352 (2d Cir. 1992); *Haitian Centers Council v. Sale*, 823 F. Supp. 1028, 1033 (E.D.N.Y. 1993).

129. Lynne Duke, *Haitian Refugees with HIV Remain in Limbo as Asylum Claims Stall*, WASH. POST, Aug. 7, 1992, at A3.

*Post* followed up with a detailed account of a later demonstration staged by the refugees.<sup>130</sup> Three days later, we learned from a story in the *New York Times* that Sillieses Success, her son Ricardo and a third refugee suffering from an AIDS-related eye infection had been paroled into the United States.<sup>131</sup> Soon after baby Ricardo died, the government put Sillieses in a detention center, stating that her detention was in the "public interest," because she was HIV-positive. The *New York Times* columnist Anna Quindlen started off the press coverage on Sillieses' situation after members of our team arranged for her to visit Sillieses in jail.<sup>132</sup> Subsequent press coverage and protests outside the jail by the Haitian community in New York spurred her release just two days before Christmas. Sensing that the *Washington Post* stories had precipitated the release of some refugees, and seeing the success of publicity in Sillieses' case, students began to view the media as an additional forum for advocacy on behalf of the Haitians.

While the court cases were moving through the appellate process, publicity became the most effective way to get people off Guantánamo, albeit slowly and sporadically. Initially, our supervising attorneys did not share in our newfound enthusiasm for the media. They expressed concern about adverse public reaction<sup>133</sup> and the impact of negative press for the government on our position in the ongoing negotiations.<sup>134</sup> They believed that the Haitians would fare better through negotiations with the Bush Administration, and later through lobbying of President-elect Clinton's transition team.

After finally seeing Camp Bulkeley on our November trip, however, we became adamant about publicly exposing the U.S. government's operation of an HIV prison camp. Since our supervising attorneys still hoped to win the Guantánamo Haitians' release through negotiations with the Clinton transition team, we knew that if any press coverage were to be gained, it would have to be of our own initiative. Over Thanksgiving weekend, 1992, several students

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130. Lynne Duke, *Haitian Refugees Burn Camp; Navy Says Protesters Seek Repatriation*, WASH. POST, Aug. 31, 1992, at A7. A much longer report appeared in the *Post* a couple of weeks later. Lynne Duke, *U.S. Camp for Haitians Described as Prison-Like*, WASH. POST., Sept. 19, 1992, at A1.

131. Barbara Crossette, *3 Haitians with H.I.V. Are Allowed To Enter U.S.*, N.Y. TIMES, Sept. 3, 1992, at A6. We later learned that the third refugee was at risk of going blind. Three other refugees were eventually evacuated for the same condition in October.

132. Anna Quindlen, *Set Her Free*, N.Y. TIMES, Nov. 18, 1992, at A27.

133. For example, Anna Quindlen later told us that she was surprised by the amount of negative mail she received in response to her column calling for Sillieses Success' release. Although we had no intention of abandoning our advocacy through the media, this demonstrated that our original fears that even sympathetic stories might result in public outrage were not entirely unfounded.

134. We were in constant negotiation with the government to try to get more refugees off the base. Based on information we had gathered during our trips to Guantánamo, we sought medical evacuations for those refugees with severe health problems that could not be treated on Guantánamo. We also continued to fight for family reunification. For example, we pressed for weeks to get one refugee off the base after his HIV-positive wife had been brought to the United States to deliver their baby. Not only was he HIV-negative, but he was also the principal asylum applicant. The only reason he was held at the base at all was because he had chosen to remain there with his wife, who was now in the United States. The government did not release this man for many weeks, causing him to miss the birth of his first child.

produced a ten-page press packet, entitled *The World's First HIV Detention Camp: Haitian Refugees Imprisoned at the U.S. Naval Base at Guantánamo Bay, Cuba*. The bright blue cover featured a photograph of several Haitian toddlers behind barbed wire, and the packet provided seven different angles on the Guantánamo story.<sup>135</sup> After showing it to one of our supervising attorneys for comment, we sent out nearly one hundred copies to press contacts all over the country. The next day, the Cable News Network (CNN) was referring to the "report from the Yale University Law School" on the HIV camp on Guantánamo.<sup>136</sup>

As word spread about the HIV camp, the press corps clamored to go to Guantánamo with their cameras to videotape the conditions we had described.<sup>137</sup> On December 11, 1992, a team of reporters and accompanying cameras traveled to Guantánamo, the first team to do so since Guantánamo had become an HIV camp.<sup>138</sup> In the next week, the refugees appeared on television screens across the country, where they were transformed from faceless, poor, black people with AIDS into families with children and persecuted democracy activists.<sup>139</sup> They were finally allowed to speak to the world with their own voices.

As 1992 ended, the tide seemed to be turning. Media coverage was increasingly sympathetic to the refugees, and Clinton would soon be taking office. Agreeing that media coverage had been helpful, the attorneys now urged us to continue what we had started. At the same time, Robert Rubin and Lucas Guttentag were appointed as consultants to President-elect Clinton's immigration transition team, and Harold Koh began to coordinate an effort by refugee advocates across the country to propose a new Haitian refugee policy for the incoming administration.<sup>140</sup> Copies of the resulting policy paper were

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135. One of the story angles we suggested was "Yale Students at Work in *Haitian Centers Council v. McNary*." By this point we had come a long way from our negative attitude toward student-focused stories. Any story would now do.

136. *Haitian Refugees Stuck in U.S. 'AIDS Detention Camp'*, (CNN television broadcast transcript, Dec. 11, 1992), available in LEXIS, News Library, CNN File.

137. Not all reaction to the press packet was favorable to the refugees. The following is an excerpt from a message left by an anonymous caller from Guantánamo who identified himself as "someone who has to live down here and has to live with these cretinous people":

I think this is the most bogus piece of shit I've ever read. In crude shelters? No. They are crude because they made them crude. . . . As far as the newborns dying of pneumonia born outside, it's because a lot of time they give birth and never tell anyone they did so. . . . Surrounded by barbed-wire in shadeless enclosures? They have to be because they act like animals. . . .

Telephone Message from Anonymous Caller (Dec. 5, 1992) (transcript on file with Lowenstein Clinic).

138. Members of the *Haitian Centers Council* legal team had helped the media find another team of lawyers to file a media access lawsuit some months before. The Nation Magazine, et al. v. Barr, No. 92-8138 (S.D.N.Y. filed Nov. 9, 1992). After much adverse press, the government finally settled the case and allowed press access to Guantánamo.

139. See *World News Tonight with Peter Jennings*, ABC NEWS, Dec. 18, 1992, available in LEXIS, News library, ABCNEW File; see also Lynne Duke, *At Guantánamo Camp, Voices of Misery*, WASH. POST, Dec. 11, 1992, at A1; Philip J. Hilts, *U.S. Denies Appeal for 4 Ill Haitians*, N.Y. TIMES, Dec. 13, 1992, § 1, at 9.

140. Haitian Refugee Advocates, Summary of Haitian Refugee Policy Recommendations (Nov. 24,

circulated among top members of the foreign policy transition team. A few weeks before Clinton took office, the *New York Times* reported that his administration planned to adopt a strategy regarding the Haitian refugees that included many of the suggestions contained in the policy paper.<sup>141</sup>

Several days later, refugee advocates across the country were devastated when President-elect Clinton announced that he would maintain President Bush's policy of summary return. Not only did he lack a legal basis for adopting a policy he had previously called "illegal," he could not reconcile the policy with his own foreign policy platform of democracy and respect for human rights.<sup>142</sup> Clinton invoked President Bush's humanitarian rhetoric in describing the interception of Haitian boats as "rescues at sea," ignoring the fact that this "humanitarian" policy made him an accomplice in the persecution of Haitians trying to flee a brutal regime.

The refugees on Guantánamo responded to Clinton's turnaround with their own agenda. A few days before our February trip to Guantánamo, Michel Vilsaint unexpectedly called us. He reported that the entire group of refugees had abandoned their shacks, moved to an adjoining field, and begun a hunger strike to protest President Clinton's broken promises. All the men, women, and children were involved. Rushing to the phones from class, students urged the pregnant women and children not to starve themselves. We cautioned them that the U.S. media and public would not view their cause sympathetically if children were on a hunger strike. The refugees angrily responded that it was the Americans who were making their children suffer, not them. To this we had no response. We put out a press release reporting the Haitians' protest.

Because the Guantánamo Haitians were already immuno-suppressed, we were afraid that any further weakening of their immune systems would lead to dire consequences. Some students wanted to discourage the strike, but after a rapid, emotionally charged discussion, we provisionally decided to take a neutral position, since this was the refugees' own political decision. After a fuller discussion between students and attorneys, we decided that we could only try to ensure that they undertook the strike in the safest manner possible. We urged them to drink fluids filled with electrolytes, to stay in the shade, to exert themselves as little as possible, and to ensure that children and pregnant women continued to eat. We also brought Haitian doctors on all our subsequent trips.

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1992) (on file with Lowenstein Clinic). This plan called for the immediate parole of all the Guantánamo Haitians into the United States, and included the creation of safe-haven zones within Haiti and the reopening of Guantánamo under supervision of the U.N. High Commission for Refugees, not U.S. military officials.

141. Elaine Sciolino, *Clinton Aides Urge Freer Haiti Policy*, N.Y. TIMES, Jan. 6, 1993, at A1. The article reported that the administration would propose the expansion of in-country refugee processing and the processing of asylum claims on Guantánamo and in third countries.

142. CLINTON & GORE, *supra* note 62, at 116-20.

When we arrived on Guantánamo days into the hunger strike, we found the refugees encamped in a field in Camp Bulkeley under the burning sun. The U.S. military personnel were noticeably alarmed by the refugees' actions. Many of the refugees were dramatically thinner than we had remembered, although it was obvious that the children and most of the pregnant women were eating regularly, if surreptitiously. Many strikers followed the advice of doctors who accompanied us on our trips and took fluids, but others refused all nutrients. Yolande Jean, one of the camp leaders who had not eaten for nearly a week, read us a letter she was writing to Haiti: "To my family," she began weakly.

Don't count on me anymore, because I am lost in the struggle of life. . . . Hill and Jeff, you don't have a mother anymore. Realize that you do not have a bad mother, only that life took me away. . . . Good-bye my children. Good-bye my family. We will meet in another world.<sup>143</sup>

After a year and a half living under U.S. control, the refugees had successfully refused to live according to the dictates of the military. Ironically, the refugees had regained control of their lives only by controlling the possibility of their own deaths.

In our meetings, students convinced the attorneys of the need for a continuous presence of the legal team on Guantánamo for as long as the hunger strike continued.<sup>144</sup> For the first few weeks, with the trial only weeks away, our team would be in Camp Bulkeley to take and defend depositions. However, we wanted to maintain a continuous presence so we could provide the refugees emotional support and help prevent any further suicide attempts; there had already been numerous attempts, and later some refugees would invoke the Branch Davidian tragedy in Waco, Texas,<sup>145</sup> threatening that they too might commit mass suicide. We also wanted to keep the press updated about the situation on Guantánamo, which was important to the success of the refugees' political protest. Several refugees suggested that their deaths would shock President Clinton and Attorney General Reno enough to persuade them to allow the rest of the group to be released from Guantánamo. Although we

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143. Yolande Jean later read this letter into the record during her deposition for the trial. Deposition of Yolande Jean at 30-31, *Haitian Ctrs. Council*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (deposition taken Feb. 21, 1993, at Camp Bulkeley, Guantánamo Bay, Cuba). Months after Yolande's entry into the United States, her husband was poisoned to death in Haiti. Ian Fisher, *Haitians Living in New York Are Digesting New Letdown*, N.Y. TIMES, Nov. 1, 1993, at B1. However, her two sons were later allowed into the United States to be reunited with their mother.

144. Our team's strategy was to continue sending legal teams down to Guantánamo one after the other, so that our presence would become routine and expected and the government would no longer object. This strategy worked, and we maintained a continuous presence throughout the spring.

145. See, e.g., Sam H. Verhovek, *Death in Waco: The Overview—Scores Die as Cult Compound Is Set Afire After FBI Sends in Tanks with Tear Gas; Apparent Mass Suicide Ends a 51-Day Standoff in Texas*, N.Y. TIMES, Apr. 20, 1993, at A1.

discouraged their suicide plans, we could not deny that their perverse logic had some merit; the more tragedy there was on Guantánamo, the more the press would keep the story alive. Throughout the hunger strike, we did all that we could to keep the press interested by reporting what was happening to the Haitians,<sup>146</sup> while trying in private to persuade them that they still had something to live for.

In addition, we wanted to maintain a continuous presence in order to protect the refugees from an increasingly frustrated and impatient military. This proved crucial when one refugee stabbed another with a knife in a fight over a woman.<sup>147</sup> The two students on the base at the time ran up to the living area where the fight had taken place. The guards stationed at the camp, who were not trained or equipped to respond to medical emergencies for HIV-positive refugees, did not want to touch the bleeding refugee. Instead, another hunger-striking refugee carried him to the camp clinic. Moments later, the soldier who was assigned as our driver warned us that the knife used in the attack had been hidden by the refugees, and that the military personnel, dressed in riot gear, were preparing for a weapon sweep. Quickly, Robert Rubin, our team's lawyer on the base at the time, and the two students, were led by some of the refugees to the knife, which we promptly turned over to the military personnel. This incident further demonstrated the benefit of our continuous presence on the base. Without our presence it is likely that the military would have forcibly retrieved the knife, possibly provoking riots and injuries.

Back in New Haven, we took a cue from the Haitians' hunger strike and stepped up our own politically directed energies. While some of us had worked the political front in the months prior to President Clinton's Haitian policy announcement,<sup>148</sup> our efforts intensified afterwards. Aware of the Haitians' weakened immune systems, we simply did not know how long they could live without eating. We thought Reverend Jesse Jackson was the only person, other than President Aristide himself, who might be able to persuade the refugees to stop their hunger strike. At a pro-Aristide rally in New York City, we persuaded Reverend Jackson to visit the refugees on Guantánamo in order to urge them to discontinue their hunger strike. Reverend Jackson recorded a brief speech to the refugees, which was played over a loudspeaker to the fasting Haitians in Camp Bulkeley. Jackson's voice wafted across the moon-lit field

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146. For example, we issued press releases reporting that the hunger strike had begun, *see* Lowenstein International Human Rights Clinic, *Haitians in HIV Prison Camp Begin Hunger Strike*, Feb. 1, 1993 (on file with Lowenstein Clinic), and continued to issue them during the strike to report refugees fainting and other daily developments. *See* Lowenstein International Human Rights Clinic, *Haitians on Guantánamo Continue Hunger Strike as Their Lawyers Visit*, Feb. 3, 1993 (on file with Lowenstein Clinic).

147. Other refugees told us that this particular refugee was mentally unstable, a condition exacerbated by his indefinite confinement.

148. For example, some members of our team had helped organize a protest against the Guantánamo camp in September 1992, which was held in front of the White House. At that protest, tennis star Arthur Ashe, himself near death, had been arrested. *Arthur Ashe Among 95 Arrested in Protest*, N.Y. TIMES, Sept. 10, 1992, at A3. On February 6, 1993, Arthur Ashe died of AIDS.



where the refugees were encamped, encouraging the refugees to resume eating and promising them “our own special Valentine’s Day” together. An excited murmur arose from the fasting Haitians—a sign that they had not yet completely abandoned hope.

Reverend Jackson traveled to Guantánamo on Valentine’s Day, 1993, two weeks into the refugees’ hunger strike, bringing with him an entourage of press, a congresswoman, and other prominent black leaders. Reverend Jackson first visited the most hard-core hunger strikers and prayed with them, holding one of the refugees who broke down in tears in the middle of the prayer. He then visited the camp’s children, more than thirty in number, who were sitting together waiting for him and chanting “Guantánamo no good, Miami yes!” Visibly shaken at the sight of so many black children behind barbed wire, he surprised the legal team by announcing that he would join the refugees in their fast.<sup>149</sup>

Reverend Jackson’s Guantánamo trip triggered a new surge of opposition to the camp. In March, a few days into the Guantánamo trial before Judge Johnson in Brooklyn, Reverend Jackson was arrested in a rally in downtown New York,<sup>150</sup> along with the movie director Jonathan Demme and actress Susan Sarandon. Before the listening crowd and television cameras, Sarandon tearfully read Yolande Jean’s goodbye letter to her children. A few days later, Sarandon and actor Tim Robbins shocked an Academy Awards audience when they told the millions of television viewers that they wore their red ribbons in solidarity with the refugees detained on Guantánamo by the U.S. government simply because they were sick with HIV. They had committed no crime, Sarandon said, yet our government imprisons them behind barbed wire.<sup>151</sup>

In addition to generating support among prominent public figures, we began working with organizations long committed to fighting for the rights of Haitians and people with AIDS. We contacted groups such as ACT UP, The 10th Department (a Haitian political group), and Amnesty International to encourage their members to attend rallies in support of the Haitians. In March 1993, a group of thirty Yale law students—most of whom were not members of the litigation team—kicked off a hunger strike in solidarity with the

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149. Reverend Jackson was joined in his fast by, among others, basketball player Olden Polynice and the Reverend Al Sharpton. See William C. Rhoden, *Dunking and Fasting for Principle*, N.Y. TIMES, Feb. 20, 1993, § 1, at 27; *Sharpton Joins Fast Against Haitian Ban*, N.Y. TIMES, Feb. 21, 1993, § 1, at 33.

150. Days after the trial in the Guantánamo case concluded, Reverend Jackson returned to Guantánamo a second time with Harold Koh and Michael Ratner. The new camp commander barred Jackson and our legal team from Camp Bulkeley. After loud protesting, Jackson was finally allowed to go to the Camp alone, and he brought several of the refugees out to meet with their attorneys and the press.

151. William Grimes, *Eastwood Western Takes Top 2 Prizes in 65th Oscar Show*, N.Y. TIMES, Mar. 30, 1993, at C1. Both Sarandon and Robbins were criticized by their peers in the entertainment industry because of these statements. See, e.g., Ed Murrieta, *Actors Put on Oscar Show Blacklist*, SACRAMENTO BEE, Apr. 1, 1993, at A2; Lois Romano, *The Reliable Source*, WASH. POST, Mar. 24, 1994, at C3; Maureen Downey, *Peach Buzz: Talk of Our Town*, ATLANTA J. & CONST., Mar. 16, 1994, at E2. Susan Sarandon and Reverend Jackson later appeared together on the Phil Donahue show to talk about the refugees. On the air, Sarandon and Yolande Jean finally met face-to-face.

Haitians. Thanks to tremendous student effort, the fast spread from school to school across the country; students in the nationwide movement conducted press conferences and demonstrations—anything to keep the Haitian issue in the public eye.<sup>152</sup> Several students who had been to Guantánamo during the refugees' hunger strike also decided to fast in solidarity with the Haitians. Other students on the legal team tried to dissuade these students from fasting, reasoning that with the trial only five days away, it was essential that every person on the team be available for trial preparation. Realizing that their fast was hurting our clients more than it was helping them, the fasters agreed to begin eating again.

During the month of February, the legal team also renewed its efforts in Congress. Earlier in the case, team members had traveled twice to Washington to testify before congressional subcommittees about the conditions on Guantánamo and about the summary repatriation policy. In addition, we had arranged for the original congressional sponsors of the 1980 Refugee Act, which included section 243(h) of the INA, to file an amicus brief in the Non-Return case. With the refugees languishing on Guantánamo, we now urged Congress to lift the HIV exclusion. We worked with members of Congress to draft and circulate a "Dear Colleague" letter seeking support for this initiative. Our effort to get Congress to lift the HIV travel ban ultimately failed on February 18, 1993.<sup>153</sup>

Our hope was that all the activity, both on and off Guantánamo, would boost the morale of the fasting refugees. We especially wanted to convince those who had offered to die for the freedom of others that we needed them alive. Our teams on Guantánamo spent hours every day sitting with the most committed group of strikers who had built a tent in the middle of the field. At one point, after many hours talking with them in the hot sun, the students broke down in tears and begged them to hang on to life a while longer. "We will miss you," we said. One of the Haitians replied quietly, "We will meet again. We will sit at a table in heaven with Jesus and feast together." "You must come to New Haven, so we can first feast together on earth," we tried again.

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152. See Carole Bass, *Hungry For Action on Haiti*, CONN. L. TRIB., Mar. 15, 1993, at 3 (Brown University); Sara Bowen, *Students: Haiti Policy Is Hypocritical*, USA TODAY, Apr. 13, 1993, at 11A (University of Michigan, University of California at Berkeley); Nadine Brozan, *Chronicle: A Fast in Support of Haitian Refugees Moves from Yale to Harvard*, N.Y. TIMES, Mar. 12, 1993, at B6; Nick Charles, *Haiti Plight Focus of Fast; CWRU Students Support Refugees*, THE PLAIN DEALER (Cleveland), Apr. 8, 1993, at 4B (Case Western Reserve University); Fred Laberge, *30 from Yale Take Up Haitian Cause*, NEW HAVEN REG., Mar. 4, 1993, at A3; Matt Neufeld, *Students Plan Hunger Strikes for Haitians*, WASH. TIMES, Apr. 1, 1993, at B3 (Howard University, George Washington University, American University, Catholic University, University of the District of Columbia, D.C. School of Law); *Protest for Haitian Detainees*, WASH. POST, Apr. 2, 1993, at B1 (Georgetown University).

153. 139 CONG. REC. S1761-67 (daily ed. Feb. 18, 1993) (debating and then defeating Kennedy proposal to limit ban).

Our job was never harder. Every week we scraped together enough resources to send in a new team to Guantánamo to relieve the previous team, whose members always came back mentally and emotionally exhausted. By this time, as trial preparation shifted into high gear, we were forced to look beyond Yale and our co-counsel to recruit volunteer attorneys, interpreters, and doctors to go to Guantánamo. Some students argued that, with trial preparation completed, we need not maintain a presence on Guantánamo; others felt that our presence and the resulting publicity provided the refugees with essential protection against future military mistreatment. In the end, we made the critical decision to maintain a continuous presence, whatever the cost, until the refugees were released.

### C. *Return to the Courts*

Our growing skepticism at the chances of legal victory had fueled our efforts outside the courts. However, in January 1993, when President Clinton announced that he was adopting the Bush policy of summary repatriation as his own, we realized we had no choice but to return to the courts to pursue final relief for our clients. We returned informed by our work with our clients, the media, and grassroots organizations.

#### 1. *The Supreme Court Brief and Argument in the Non-Return Case*

President-elect Clinton's January turnaround meant that the Supreme Court would hear argument in the Non-Return case; the issue would not be moot after all. At first, we could not believe that President Clinton would go so far as to defend the Kennebunkport Order at the Supreme Court. In fact, we had petitioned the Court in November 1992 to suspend briefing until after Clinton would be inaugurated, believing that the case would become moot once President Clinton rescinded the Order.<sup>154</sup> When the Court rejected our request, however, students and attorneys hurried to finish researching and writing the brief.

Students also worked with dozens of experts in the area of refugee law. The phones in our crowded Clinic office rang constantly as we arranged and coordinated the twelve *amicus* briefs filed in the case,<sup>155</sup> and as we worked

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154. Respondents' Motion To Suspend Briefing, *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344) (motion filed Nov. 16, 1992).

155. Briefs were filed by the following groups: (1) Former Attorneys General of the United States (application of 243(h) of the INA to aliens on high seas); (2) Human Rights Watch (deficiencies of in-country refugee processing); (3) Amnesty International (human rights situation in Haiti and *nonrefoulement*); (4) Lawyer's Committee for Human Rights (self-executing nature of Article 33 of the Refugee Convention); (5) Association of the Bar of the City of New York (state practice of *nonrefoulement* as international law); (6) NAACP (equal protection); (7) Congressional Sponsors of the Refugee Act of 1980 (congressional intent underlying § 243(h) of the INA); (8) American Immigration Lawyers'

with Professor Louis Henkin to draft an affidavit on the negotiating history of the Refugee Convention.<sup>156</sup> Our brief was finally filed from the offices of Simpson Thacher late on the night of December 21, 1992. At this point, we still thought the case would not be argued, but at least the brief would document a bleak period in U.S. history, and its preparation had provided students a remarkable opportunity to participate in Supreme Court practice.

By January, however, our team knew we had to prepare for the March 2 argument. Students arranged mootings in New Haven, New York, and Washington, D.C., for Harold Koh, who would argue the case challenging the Kennebunkport Order. When we drove to Washington, D.C. to hear Harold argue before the Supreme Court, we knew our chances of prevailing at the Court were slim. The Justices had stayed two preliminary injunctions protecting Haitian refugees, first in April by a vote of five to four, and again in August by seven to two.

The day before oral argument, the government notified Harold that it would be relying on two sections of the INA<sup>157</sup> to which it had not referred in its brief.<sup>158</sup> The government relied heavily on the Executive's emergency power under these sections of the INA, arguing that pursuant to his foreign affairs powers, the President may return Haitian refugees summarily.<sup>159</sup> This argument, Harold responded, was tantamount to arguing that the President could shoot the refugees on the high seas in order to discourage their flight.<sup>160</sup> Harold further argued that when U.S. officials choose to exercise their powers on the high seas to control immigration, they must comply with

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Association (reviewability and alien standing to bring suit under APA); (9) United Nations High Commissioner for Refugees (Article 33 and its negotiating history); (10) American Jewish Committee (history of mass migration); (11) Haitian Service Organizations (duty of nonreturn); and (12) International Human Rights Law Group (inapplicability of presumption against extraterritoriality). We sought such a large group of *amici* both to develop legal arguments that could not be fully pursued in our own 65 page brief and to illustrate to the Court and policymakers that summary repatriation was almost universally condemned. In contrast, only one *amicus* brief, filed by the Federation for American Immigration Reform (FAIR), supported the government's arguments.

156. Professor Louis Henkin had been the United States delegate to the Ad Hoc Committee on Statelessness and Related Problems in 1951, the group that was responsible for drafting the United Nations Convention Relating to the Status of Refugees. He agreed to submit an affidavit to be filed along with our brief, in which he stated that the drafters of the Convention would have considered the U.S. government's current policy to constitute *refoulement*. Affidavit of Louis Henkin, *appended to* Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 44-47 (1994). Professor Henkin is currently University Professor Emeritus and Special Service Professor at Columbia Law School.

157. INA § 212(f), 8 U.S.C. § 1182(f) ("Whenever the President finds that the entry of any aliens or any class of aliens . . . would be detrimental to the interests of the United States, he may . . . suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants . . ."); INA § 215(a), 8 U.S.C. § 1185(a) (allowing President to implement travel control on citizens and aliens during war or national emergencies).

158. See Letter from Harold Hongju Koh to Francis J. Lorton, Chief Deputy Clerk, United States Supreme Court, *Haitian Ctrs. Council*, Mar. 3, 1993 (reporting Harold Koh's contact with the government's attorneys).

159. Transcript of Supreme Court Argument at 4-7, Mar. 2, 1993, *Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993) (No. 92-344).

160. *Id.* at 14.

the statute that they invoke as the basis of their authority.<sup>161</sup> They cannot, he emphasized, invoke the power to return Haitians without the accompanying constraint not to return bona fide refugees.<sup>162</sup>

When we emerged from the Court after the argument, we were greeted by a huge Amnesty International banner protesting the summary repatriation policy. Surrounded by Reverend Jesse Jackson and Representatives Charles Rangel and Kweisi Mfume, Harold was immediately swallowed by the throng of reporters. We knew this was one of the last opportunities to make the Haitians' case to the public before the Court ruled.

In the ride back to New Haven, we speculated as to how each Justice would vote. We thought Justice Blackmun would surely condemn the summary repatriation policy as illegal,<sup>163</sup> and we expected Justice Stevens to join him, since he had opposed both stays. We wondered how Justices Souter, O'Connor, and Kennedy would vote. If the Haitians did not prevail, we hoped at least for several strong dissenting voices. We were dismayed three months later when Justice Stevens wrote for an eight-Justice majority to uphold the Kennebunkport Order, with Justice Blackmun voicing the lone dissent.<sup>164</sup> The Court held that neither section 243(h) of the INA nor Article 33 of the Refugee Convention limited the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas. While conceding that the drafters of both the Refugee Convention and the INA "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape" and that "such actions may even violate the spirit of Article 33,"<sup>165</sup> the Court nevertheless read both laws as condoning this policy.

## 2. *The Guantánamo Trial*

Only six days after the Supreme Court argument in the Non-Return case, the trial in the Guantánamo case began in Brooklyn. Given our past success before Judge Johnson in the Guantánamo case and the strength of the Guantánamo Haitians' legal claims relative to those in the Non-Return case, we felt far more optimistic than we had felt facing the Supreme Court the week before. Intensive work with our clients over the past seven months had

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161. *Id.*

162. *Id.*

163. Justice Blackmun asked only two questions during the entire argument. At the conclusion of the government's presentation, he asked, "Have you ever been in Haiti?" "No, Your Honor, I have not," responded the Deputy Solicitor General. Justice Blackmun continued, "Are you familiar with a book called *The Comedians* by Graham Greene [chronicling the desperate conditions in Haiti]?" She responded, "No, Your Honor, I'm sorry, I'm not." Justice Blackmun said, "I recommend it to you," and the attorney took her seat. Transcript of U.S. Supreme Court Argument at 11, *Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993) (No. 92-344).

164. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

165. *Id.* at 2565.

armed us with detailed facts about the situation on Guantánamo that we could use to discredit the government's persistent claim that the camp was operated in a humanitarian way. Having visited and talked with our clients extensively, we were also committed to working for their release from Guantánamo, instead of merely their right to counsel. After the Haitians' year-and-a-half of detention, an order that did not grant their release might have resulted in riots on Guantánamo and suicides. In addition, many of the Haitians would have been returned to Haiti.

The students on the team, led by Lisa Daugaard, had worked diligently during the two months before trial to come up with new legal arguments that might win the Haitians' release from detention on Guantánamo. In formulating the new claims, the legal team looked to the conditions of confinement on Guantánamo that we had come to know so intimately over the past few months. Many of the claims flowed from the premise that rights and protections guaranteed by the U.S. Constitution applied to the Haitians in U.S. custody on Guantánamo. Arguing that due process mandates adequate medical care for all persons held in official custody, we cited evidence demonstrating the inadequacy of medical care on Guantánamo. We also relied on the Due Process Clause to challenge the punitive detention of refugees for minor infractions, arguing that the Fifth Amendment bars disciplinary segregation without procedural due process. Finally, we argued that the arbitrary and indefinite detention of our clients amounted to an abuse of discretion by the Attorney General, who oversees the INS.

As we reconceptualized the legal claims of the Guantánamo Haitians to address the evolving situation, we continued to gather supporting facts. Depositions and documents that had sat untouched for months in our cluttered office suddenly occupied our attention. Students weeded through boxes containing 60,000 government documents in order to select the most crucial ones; students flew down to Guantánamo, where we worked with Robert Rubin to interview and depose several of the refugees detained at the base; students traveled to New York, Boston and North Carolina to interview and prepare potential witnesses.

Included in our list of potential witnesses were former government employees, immigration lawyers, doctors who had traveled to Guantánamo, and Haitians who had been medically evacuated from Guantánamo. Almost all of the witnesses we put on the stand at trial were identified as a result of the client services and networking that students had done throughout the litigation. We had developed a trusting relationship with the resettled refugees, which helped persuade them to testify on behalf of those still held at Guantánamo. Doctors who testified at the trial had traveled to Guantánamo only because students searched incessantly for Haitian-American doctors and convinced the government to allow them onto the base. Finally, our contacts from

Guantánamo led us to former government employees who had worked with the refugees and were willing to take the witness stand.

When we arrived at the Federal Courthouse in Brooklyn on March 8, 1993, we were greeted by demonstrators chanting, "HIV is not a crime! Why are Haitians doing time?" Inside, Judge Johnson's courtroom was filled with Haitian and AIDS activists, and reporters sat in the jury box.

Joe Tringali and Lucas Guttentag, the lead counsel for the trial, decided to open the case with a Haitian witness who could put a human face on the tragedy at Guantánamo. Everyone in the room watched intently as Fritznel Camy, a Guantánamo survivor who had been medically evacuated several months before the trial, took the stand as the first witness. Describing Guantánamo as "a park for pigs,"<sup>166</sup> Camy recounted how the military police were present at all times, there were no windows in the living areas to keep out the rain, there were no mattresses and only some refugees had cots, and there was no privacy other than sheets hung by the refugees between their cots.<sup>167</sup>

In the days that followed, we put on witnesses who testified about inadequate medical care and inhumane treatment on Guantánamo. Two students conducted direct examinations of former employees of Community Relations Services, an arm of the Department of Justice, who described squalid camp conditions and the poor relationship between the military and the refugees. Medical doctors who had traveled to Guantánamo with our legal teams testified about the inadequate medical care they had witnessed and the Haitians' pervasive lack of trust in the military doctors. Immigration experts testified about the availability of parole under the INA for the Guantánamo Haitians, as well as the differential treatment accorded Haitians in the asylum process. Depositions of Haitians who were still confined on Guantánamo, and thus unable to testify in person, were read into the record.

During the second week of trial, the government began presenting its case, with witness after witness testifying about the humanitarian nature of the interdictions. The government ignored the new claims raised in the amended complaint, which had emphasized that this case was now about conditions on Guantánamo, not the interdictions at sea. Commander Waldmann, who captained a Coast Guard cutter that interdicted and repatriated refugees, testified that refugees were grateful to be picked up by the U.S. Coast Guard.<sup>168</sup> One group of refugees interdicted and docked at Guantánamo, he testified, had "all stood up and started clapping and cheering and thanking the Coast Guard for saving them."<sup>169</sup> Under cross-examination by Joe Tringali,

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166. Transcript of Bench Trial at 19, *Haitian Ctrs. Council*, No. 92-1258 (E.D.N.Y. testimony given Mar. 8, 1993).

167. *Id.* at 19-21.

168. *Id.* at 625-45 (testimony given Mar. 11, 1993).

169. *Id.* at 647.

however, Waldmann admitted that the refugees who had been clapping had not been told that they could be held in detention for over a year,<sup>170</sup> nor that they would be tested for HIV and denied entry to the United States if they tested positive.<sup>171</sup> After obtaining these admissions, Joe asked Commander Waldmann a final question about the eighty-nine refugees who had refused second interviews in April 1992 and had been forced off the Coast Guard cutter with fire hoses when they were repatriated to Haiti. "When you left the Haitians on the dock in Port-au-Prince," Joe asked, "do you recall whether they were clapping for you then?" "No, sir," Waldmann answered.<sup>172</sup>

The government then called its military doctors and base commanders, several of whom testified that the medical facilities on Guantánamo were inadequate<sup>173</sup> and that their requests for medical evacuations had been routinely denied.<sup>174</sup> The government attorney himself made a startling admission: "[T]he medical facilities at Guantánamo," he said, "are not presently sufficient to provide treatment for such AIDS patients under the medical care standard applicable within the United States itself."<sup>175</sup> "Is the government then prepared to send those patients to the United States?" queried the Court. "The government does not intend at this point to do that," the lawyer answered.<sup>176</sup> This admission graphically illustrated the urgent medical need for our clients' release.

While the trial was proceeding, we obtained unexpected information which further demonstrated the abuse of the refugees' rights on Guantánamo. Students kept in daily telephone contact with the legal team on Guantánamo to get updates on the hunger strike and to relay the latest news of the trial to the Haitians. When we called our team on Guantánamo from a phone booth outside Judge Johnson's courtroom at the end of the first week of trial, we learned that nine refugees had escaped from Camp Bulkeley. This group, which included a man with one leg who walked on crutches, had made it approximately ten miles to the ferry landing in their attempt to flee to Cuba. The military picked them up, threw them into the military jail, and barred our team on Guantánamo from seeing them.

Early the next morning, our Guantánamo team frantically called us. As a response to the attempted escape, the military had conducted a pre-dawn raid

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170. *Id.* at 668.

171. *Id.* at 669.

172. *Id.* at 672.

173. *Id.* at 1213-14 (testimony given Mar. 17, 1993); *id.* at 1380-82 (testimony given Mar. 18, 1993).

174. *Id.* at 1214 (testimony given Mar. 17, 1993).

175. *Id.* at 836 (testimony given Mar. 15, 1993). The Centers for Disease Control had warned months before that Camp Bulkeley was medically unacceptable. Memorandum from Paul Effler, M.D., M.P.H., National Center for Prevention Services, CDC, to Charles McCance, Director, Division of Quarantine, CDC 4 (Mar. 1, 1992) (on file with Lowenstein Clinic) ("It is not desirable or feasible to attempt to adequately provide for a sizeable camp of HIV infected people here in Guantánamo Bay.")

176. Transcript of Bench Trial at 836-38, *Haitian Ctrs. Council*, No. 92-1258 (testimony given Mar. 15, 1993).



on Camp Bulkeley. At 5:30 a.m., three to four hundred military personnel dressed in full riot gear had stormed the camp, waking the 250 refugees and herding them to the eating area. Some of the refugees began throwing rocks at the soldiers in self-defense and setting fire to some huts. The military segregated the alleged rock throwers from the others, bound their hands behind their backs, conducted body cavity searches, and took them away to an underground holding area and later to the military jail. Our Guantánamo team was again denied access to the jail and was severely limited in its access to the camps.

The government flew Lieutenant Dillman from Guantánamo to Brooklyn to testify about these events at the trial, but decided against calling him soon after his arrival. However, Joe Tringali called him as a rebuttal witness and asked him questions regarding the recent raid. Lieutenant Dillman maintained that the purpose of the raid had been to conduct a “head count of the migrants” because of the escape the previous night.<sup>177</sup> He admitted, though, that there had been no public announcement of this head count because the public address system had been broken, and that, among the hundreds of soldiers present, there were only six Creole speakers on hand to explain the events to the 250 Haitians.<sup>178</sup>

Playing a videotape of the raid from the previous summer,<sup>179</sup> the “July Crackdown,” Joe Tringali drew a vivid comparison to the recent raid, bringing it alive in the courtroom. Judge Johnson watched intently as hundreds of military personnel marched across the television screen. Pointing to the batons, shields, and helmets with face masks that the soldiers were wearing, Joe asked Lieutenant Dillman if that was how he had been dressed the previous Saturday morning.<sup>180</sup> Lieutenant Dillman admitted that it was. “When the military arrived at Camp Bulkeley, sir, at 5:30 in the morning, . . . all was quiet and peaceful?” Joe asked. “Yes,” Dillman said. “When you left, there were people in the brig, there were fires and there had been some injuries?” “Yes,” Dillman answered again.<sup>181</sup>

On March 25, Judge Johnson handed down an interim order calling for the release of all Haitians held on Guantánamo who had T-cell counts under 200 or T-cell percentages 13% or below, two clinical definitions of AIDS.<sup>182</sup>

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177. *Id.* at 1582-83 (testimony given Mar. 19, 1993).

178. *Id.* at 1573-75.

179. *Id.* at 1571.

180. *Id.* at 1571-72.

181. *Id.* at 1589-90.

182. *Haitian Ctrs. Council, Inc. v. Sale*, 817 F. Supp. 336, 337 (E.D.N.Y. 1993). We soon found that we had neglected to include a long list of illnesses the CDC identifies as AIDS indicators, such as Kaposi's sarcoma, toxoplasmosis, and HIV wasting syndrome. See *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, CENTERS FOR DISEASE CONTROL MORBIDITY AND MORTALITY WKLY. REP., Aug. 14, 1987, at 10S-12S. As soon as we discovered the omission, we tried to get the government to expand the definition and bring in more people under the interim order, but the government refused.

After a few frantic days in which our resettlement team prepared to receive the Haitians, we met a group of refugees in a bittersweet reunion at La Guardia Airport. They were finally free, but only because they were the most ill.

While in the preceding months we had worked aggressively for media coverage of the plight of the Guantánamo refugees, we now reverted to our earlier skepticism of public reaction. We worked to keep news of arriving HIV-positive refugees away from the media, for fear that news reports would instill panic in the public and pressure the government to seek a stay of Judge Johnson's interim order. We also feared that the Haitians would be swamped by reporters upon arrival, which would violate their privacy and expose their families in Haiti to repercussions from the Haitian military. When the *New York Post* declared "HAITIAN AIDS REFUGEES HEADING FOR N.Y.,"<sup>183</sup> our worst fears seemed to be coming true. Luckily, the public outcry did not last, and the government complied with the order.

On June 8, 1993, Judge Johnson issued a final decision ordering the immediate release of all Haitians on Guantánamo to anywhere but Haiti.<sup>184</sup> "It's over! They're closing the camp!" we shouted over the telephone to the refugees. Michel Vilsaint replied, "Yes! Yes! Yes!" his voice filled with enthusiasm, glee, and relief. On June 11, the corridor at La Guardia Airport was filled with applause, flash bulbs and hugs for hours as the first planeload of refugees arrived from Guantánamo. One by one, the refugees filed out of the INS processing room, bleary-eyed and hungry for the enormous Haitian meal awaiting them in the airport lounge. Within two and a half weeks, the detention camp was empty.

#### REFLECTIONS AND CONCLUSIONS

Over three hundred Haitian refugees who otherwise would have been sent back to a dangerous fate in Haiti now live safely in the United States. Litigating *Haitian Centers Council*, with its pressing court deadlines and client services, required us to focus all of our physical, emotional and intellectual energies on the case. Although this intensely concentrated effort inevitably led to occasional misgivings about the demands the case made on us, our time commitment was unquestionably worthwhile. Not only did the case allow us to work with remarkable clients and co-counsel, but it also greatly contributed to our legal education. It taught us concrete legal skills, prepared us for litigation management, and shaped our approach to the law.<sup>185</sup>

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183. Ransdell Pierson, *Haitian AIDS Refugees Heading for N.Y.*, N.Y. POST, Apr. 6, 1993, at 4. Similar headlines appeared in other papers. See, e.g., David Hancock, *U.S. To Admit 36 Haitians with AIDS*, MIAMI HERALD, Apr. 2, 1993, at A1.

184. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

185. The Lowenstein Clinic is not unique in recognizing the pedagogical value of clinical impact litigation. For example, at Yale, LSO has filed numerous impact suits. See, e.g., Robert A. Solomon, *The Clinical Experience: A Case Analysis*, 22 SETON HALL L. REV. 1250 (1992) (discussing the Homelessness

At the most basic level, we acquired practical skills involved in complex litigation: drafting a complaint, conducting discovery, taking depositions, certifying a class, drafting appellate briefs, preparing witnesses and conducting direct examinations at trial. By taking part in impact litigation designed to promote changes in national policy, we also learned a range of non-litigation skills: preparing congressional testimony, drafting press releases, managing media contacts, lobbying Congress and the Executive, and mobilizing grassroots political action. Once we gained access to the Guantánamo Haitians, we developed client service skills: interviewing refugees, negotiating with government officials, processing applications for public benefits, maintaining client morale, advising clients without overriding their objectives, and tailoring legal claims to real client interests. When we faced questions regarding our role as counsel, we gained experience grappling with ethical issues: drawing the appropriate boundary lines in providing material goods and in supporting the Haitians' political activism, and balancing the interest of the class against the interests of individual clients.

Furthermore, we learned how to function as a client services organization and as an impact litigation team. Since the Lowenstein Clinic traditionally had been an appellate brief writing clinic and had never, before this case, performed large scale client services, we did not have a structure in place to meet our clients' needs. We thus had to create that structure at the precise moment that client services were most needed. Structural difficulties were exacerbated by the fact that different students were attracted to the case for different reasons. Some of us wanted to gain a broad experience by working on multiple aspects of the case, while others of us wanted an in-depth experience by focusing on one area. As the case progressed, we recognized that it would be impossible for every student to take advantage of every educational opportunity, and so we settled into a pattern in which each student concentrated on one area of the litigation. We found that the greater expertise students gained by this approach better served the clients and increased our efficiency.

While everyone on the legal team agreed that clinical impact litigation would enhance the students' legal education, students and attorneys had

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Clinic's impact case, *Savage v. Aronson*, 571 A.2d 696 (Conn. 1990)); see also *Mihalcik v. Lensink*, No. 89-529 (D. Conn. filed Aug. 15, 1989) (asserting that plaintiffs with mental retardation are deprived of liberty interests, inter alia, due to their confinement in state psychiatric hospital); *Skubel v. Sullivan*, No. 90-279 (D. Conn. filed June 4, 1992) (challenging federal regulation limiting provision of government—provided home health nursing services to physical confines of recipient's home).

For discussions of different approaches to clinical legal education, see, e.g., Anthony G. Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992); Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993); Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992); Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989).

varying expectations about the student role in the case. Some of us expected that students would actively perform all legal tasks in the case, from drafting a complaint to conducting a trial. Others expected that students would learn by watching experienced attorneys conduct litigation in which students intimately participated. The team reached a compromise on this issue, with students performing most, but not all, of the legal work.

Underlying all our differences in opinion regarding the student role in the case were gendered work divisions. Throughout the case, both men and women on our team perceived client services to be “soft work,” while legal research and writing was “hard law.” Many women on the team had chosen to do client services and were unable to delegate these duties when the time arrived for legal research and appellate brief writing. Therefore, legal research and writing largely fell to the men, who generally had not taken on as many client service responsibilities. As a result, women sometimes felt deprived of the opportunity to do “hard law.” In retrospect, we realize that the perception of our legal work as “soft” or “hard” is inappropriate and does a disservice to the legal profession generally. Client services and legal research and writing are equally valuable to the practice of law.

Finally, our representation of the Haitian refugees gave us a deeper understanding of the intersection between law and social justice. We learned that impact litigation brings about the most valuable policy changes when it is driven by clients’ needs. The case began as a class action to impose legal discipline on governmental policy. As we responded to our clients’ changing needs, the case evolved into an effort to influence legislators and executive officials through various forms of political action, and a client service operation including medical evacuation, refugee resettlement, and political asylum applications.<sup>186</sup> All of these efforts, we learned, were an important part of the transnational legal process aimed at conforming the behavior of the U.S. government to international law.<sup>187</sup> The litigation has been a valuable complement to our classroom education. In the classroom we only discuss policies, but in the litigation we challenged policies that exacted a high human cost and tried to bring about new, more humanitarian policies.

We feel privileged to have worked with the courageous refugees who, driven from their country for supporting democracy, fought for their human rights throughout their detention on Guantánamo. There were many days and nights of frustration, exhaustion, and even tears as we watched the Haitians languish on Guantánamo and the Coast Guard summarily return those who were still trying to flee Haiti. But there was also the exhilaration of winning the first TRO, the inspiration of meeting our clients for the first time and later

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186. The notion that impact suits will change focus and fora over time is a distinctive feature of transnational public law litigation. See Koh, *Haiti Paradigm*, *supra* note 71.

187. *Id.* at 2408.

listening to them sing “*Merci, Avocats*” (Thank You, Lawyers), the thrill of hearing the case argued before the Supreme Court, and the joy of greeting the refugees as they finally stepped off a plane in New York. Throughout the litigation, Harold Koh was fond of slapping us on the back and asking, “Isn’t this why you came to law school?” Of course, he was right. It was.

