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EXCLUDING IMMIGRANTS ON THE BASIS OF HEALTH: THE *HAITIAN CENTERS* COUNCIL DECISION CRITICIZED

I. INTRODUCTION

Congress passed the first immigration statute barring immigrants from entering the United States for health-related reasons in 1879.¹ The exclusion served two functions: first, it protected American citizens against contagious diseases brought in from foreign countries; and, second, it prevented immigrants from financially burdening American taxpayers with the cost of care and treatment of these new residents.² These objectives are present in every immigration statute dealing with the medical exclusion of immigrants.

Acquired Immune Deficiency Syndrome (AIDS) has profoundly affected human inter-relationships. Every eighteen seconds an individual is infected with the Human Immunodeficiency Virus (HIV).³ Once HIV enters an individual's system, the virus causes AIDS by gradually destroying

1. An Act to Prevent the Introduction of Infectious or Contagious Diseases into the United States and to Establish a National Board of Health, ch. 202, § 1, 20 Stat. 484 (1879).

[T]he members . . . shall frame all rules and regulations authorized or required by this act, and shall make or cause to be made such special examinations and investigations at any place or places within the United States, or at foreign ports, as they may deem best, to aid in the execution of this act and the promotion of its object.

Id.

2. *Id.* § 2. The National Board of Health (NBH) was responsible for formulating regulations that would preserve American health and welfare. *Id.* §§ 1, 2.

The duties of the National Board of Health shall be to obtain information upon all matters affecting the public health, to advise the several departments of the government, the executives of the several States, and the Commissioners of the District of Columbia, on all questions submitted by them, or whenever in the opinion of the board such advise may tend to the preservation and improvement of the public health.

Id. § 2.

3. John M. Dwyer, *Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of the Human Immunodeficiency Virus*, 9 J. CONTEMP. HEALTH L. & POL'Y 167, 168 (1993).

the immune system.⁴ In some United States cities, AIDS and its related infections account for over half the deaths of young adults.⁵ Currently, hospitals are overburdened, underfinanced, and, therefore, unable to properly care for all patients infected with HIV.⁶ Because a cure has not yet been developed,⁷ AIDS has become one of the most serious medical threats of our time.⁸ This threat prompted Congress to consider the use of immigration laws to help prevent the spread of AIDS, and to enact the National Institutes of Health Revitalization Act, a law preventing HIV-infected aliens from permanently entering the United States.⁹

Shortly after the enactment of the Revitalization Act, the immigration ban prevented 148 HIV-infected Haitians from entering the United States.¹⁰ The Haitians immediately challenged the ban in *Haitian Centers*

4. *Surgeon General's Report on Acquired Immune Deficiency Syndrome*, 256 JAMA 2784, 2784 (1986) [hereinafter *Surgeon General's Report*].

5. *In Some Cities, AIDS Found Top Killer of Young Adults*, WASH. POST, June 16, 1993, at A3. "Nationally, AIDS and related infections were the second-leading cause of death among young men, after unintentional injury." *Id.* Individuals with AIDS rarely survive for more than two and a half years after the onset of their first serious infection. Dwyer, *supra* note 3, at 168-69.

6. Bernard Meyer, *Immigrants, International Travelers, and HIV*, 21 NEW ENG. J. MED. 1491, 1491 (1990).

7. CONG. RES. SERV., AIDS: ACQUIRED IMMUNE DEFICIENCY SYNDROME, IP 261 A (1993).

8. Robert J. Blendon et al., *Public Opinion and Health Care*, 267 JAMA 981, 981 (1992). Between 60-100% of those infected with HIV eventually develop AIDS. Rona Morrow, Comment, *AIDS and Immigration: The United States Attempts to Deport a Disease*, 20 INTER-AM. L. REV. 131, 131 n.1 (1988). AIDS could have an irreversible effect on public health and the practice of medicine due to the fact that it has the potential to affect millions of lives. Blendon, *supra*, at 981.

9. The National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43 § 2007, 107 Stat. 210 (1993) (codified as amended in 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994)) [hereinafter *Revitalization Act*].

The Revitalization Act amended 8 U.S.C. § 1182(a)(1)(A)(i) as follows: "Section 212(a)(1)(A)(i) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(1)(A)(i)) is amended by adding at the end the following: 'which shall include infection with the etiologic agent for acquired immune deficiency syndrome. . . .'" *Id.* Prior to the amendment, the relevant portion of 8 U.S.C. § 1182 stated: "Any alien who is determined . . . to have a communicable disease of public health significance . . . is excludable." 8 U.S.C. § 1182 (a)(1)(A)(i) (Supp. 1994).

It would be appropriate for Congress to require an immigrant to submit to an HIV test prior to entering the United States because AIDS is a worldwide epidemic and directly relevant to immigration policies. Denise M. Druhot, *Immigration Laws Excluding Aliens on the Basis of Health: A Reassessment After AIDS*, 7 J. LEGAL MED. 85, 110 (1986). The author writes that if immigration officials could exclude aliens infected with AIDS, it would be a positive attempt to control the spread of the disease. *Id.*

10. *Judge Orders Haitians in Guantanamo Released*, LEGAL INTELLIGENCER, June 9,

*Council, Inc. v. Sale*¹¹ and United States District Court Judge Sterling Johnson, Jr. ruled in their favor allowing them entry into the United States.¹² The Clinton Administration, through the Department of Justice, decided not to appeal the *Haitian Centers Council* ruling, and instead, complied with the federal order admitting the HIV-infected Haitians into the country.¹³ This decision negated the effectiveness of the Revitalization Act, which was enacted to prevent such entries from occurring.

Proponents of the law banning HIV-infected immigrants criticized the *Haitian Centers Council* case and the decision by the White House not to appeal.¹⁴ Proponents argued that permitting HIV-infected individuals entry into the United States could force U.S. taxpayers to cover the medical costs of AIDS treatment for immigrants who would not be able to pay for their own medical expenses.¹⁵ Currently, the cost of treating an AIDS patient from the time of diagnosis to death is approximately \$102,000.¹⁶ If the HIV ban were lifted, experts estimate that an additional 600 to 800 immigrants afflicted with HIV would apply for entry into the United States annually.¹⁷ If these individuals were unable to afford their own

1993, at 5. The Haitians qualified for political asylum in the United States, but the ban against HIV-infected immigrants prevented their entry. *Id.*

11. 823 F. Supp. 1028 (E.D.N.Y. 1993).

12. *Id.*

13. Greg McDonald, *Clinton Will Abide by Haitians Ruling*, HOUS. CHRON., June 10, 1993, at A1.

14. 139 CONG. REC. H3992 (daily ed. June 23, 1993) (statement by Rep. Goss).

By not immediately challenging the Judge's order to admit the HIV-infected Haitians, the Clinton Administration has left this country open to a dangerous precedent of immigration policy set by judges, not legislators. Bringing these HIV-infected people into this country is in direct violation of legislation recently passed by Congress and signed by President Clinton. This ruling tells would-be immigrants all over the world that, if you can get a foot in the door, even under a fraudulent political refugee asylum request, you are probably home free.

Id.

15. McDonald, *supra* note 13, at A16. Rep. Lamar Smith wrote a letter to President Clinton stating:

Judge Johnson's decision fails to take into consideration the broad economic and health concerns of the overwhelming majority of American citizens and members of Congress Never have we knowingly admitted new sources of infection of a terminal disease, especially one that has reached epidemic proportions [Granting entry to the Haitians] would lead to a flood of aliens seeking treatment at the expense of the U.S. taxpayer.

Id.

16. RUTH E. WASEM & LARRY M. EIG, CONG. RES. SERV., HIV-POSITIVE HAITIANS DETAINED AT GUANTANAMO 5 (1993).

17. Malcolm Gladwell, *U.S. Won't Lift HIV Immigration Ban: Cost of Treating Those Who Develop AIDS Called Unacceptable*, WASH. POST, Aug. 2, 1991, at A6.

health care costs, American taxpayers could be left with an eighty million dollar health care bill.¹⁸ It is hard to justify spending eighty million United States tax dollars to care for HIV-infected immigrants while thirty-seven million Americans are unable to afford health insurance.¹⁹

This Comment criticizes the *Haitian Centers Council, Inc. v. Sale* decision. Part II discusses the history of American immigration law as applied to health-related exclusions. Parts III and IV discuss AIDS and its effect on current immigration law. Part V poses the arguments for and against the exclusion of HIV-infected immigrants. Part VI discusses the *Haitian Centers Council* decision and its potential effects on the American public. This Comment concludes that the current ban on HIV-infected immigrants is necessary and in the best interest of the United States and its citizens because American tax dollars are better spent on research and treatment of Americans afflicted with AIDS rather than the treatment and care of HIV-positive immigrants.

II. THE HISTORY OF EXCLUDING IMMIGRANTS FOR HEALTH-RELATED REASONS

Prior to 1875, immigration was regulated on a state-by-state basis, allowing almost unrestricted entry into the United States.²⁰ In 1875, the United States Supreme Court held such regulations unconstitutional because they violated the federal government's power to regulate foreign commerce.²¹ This decision represented the emergence of the federal immigration policy that is present in our country today.

In 1879, Congress first excluded immigrants for medical reasons pursuant to a statute entitled, "An Act to Prevent the Introduction of Infectious or Contagious Diseases into the United States and to Establish a

18. This figure was calculated by multiplying 800 (the possible number of HIV-infected aliens that could enter the country if there were no ban) by \$100,000 (the approximate cost to care for an individual suffering from AIDS).

19. 139 CONG. REC. S1724 (daily ed. Feb. 17, 1993) (statement of Sen. Dole).

20. C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 202 (Supp. 1993).

21. *Henderson v. New York*, 92 U.S. 259, 270-71 (1875).

[T]he provisions of the Constitution of the United States . . . gives [sic] to Congress the power to regulate commerce with foreign nations A law or rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

Id.

National Board of Health."²² This statute served two objectives: first, to prevent immigrants with severe contagious ailments from entering the country; and, second, to protect the welfare of the United States.²³

Later that year, Congress delegated to the National Board of Health (NBH) the power to enforce the rules and regulations that prevent individuals from foreign countries with contagious or infectious diseases from entering into the United States.²⁴ Further, the President was given the authority to appoint a medical officer at various foreign ports to inspect the sanitary conditions of all vessels and crews bound for the United States.²⁵ Anyone found to be infected with one of the enumerated diseases specified by the NBH was denied shore leave at all United States ports and forced to stay aboard ship.²⁶

In 1882, individuals with physical or mental disabilities were considered undesirable and thus excluded from immigrating to the United States.²⁷ The 1882 Act prohibited the landing of any "lunatic, idiot, or any person unable to care for himself or herself without becoming a public charge."²⁸ In 1891, exclusion was extended to persons suffering from a loathsome or dangerous contagious disease.²⁹ Under the Act of 1891, the focus for exclusion shifted from infectious to dangerous diseases because advances in medical technology allowed the medical profession to treat infectious diseases that were once grounds for exclusion.³⁰

Immigration laws remained essentially unchanged until Congress passed the Immigration and Nationality Act of 1952 (INA).³¹ The INA

22. Ch. 202, 20 Stat. 141 (1879).

23. *Id.*

24. An Act to Prevent the Introduction of Infectious or Contagious Diseases into the United States, ch. 11, 21 Stat. 5-7 (1879). "That the National Board of Health shall . . . aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious or infectious diseases into the United States from foreign countries . . ." *Id.* § 3.

25. *Id.* § 2. These ships received a bill of health from the medical officer stating that the ship complied with health regulations. *Id.*

26. *Id.* § 5. "[I]t shall not be lawful for any vessel to enter said port [in the United States] to discharge its cargo or land its passengers except upon a certificate of the health officer." *Id.*

27. An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214 (1882). The act levied a fine on the immigrant to pay the cost of the medical examination. *Id.* § 1.

28. *Id.* § 2.

29. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 884 (1891).

30. Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What Is in the Future for Homosexual Aliens?*, 7 YALE L. & POL'Y REV. 201, 223 (1989).

31. Immigration & Nationality Act of 1952, ch. 427, 66 Stat. 163 (current version codified at 8 U.S.C. § 1101 (1987)).

codified all existing immigration laws and now serves as the basic framework for current United States immigration policy.³² Under the INA, immigrants are not eligible for entry into the United States unless authorized by the Act.³³ The determination of an authorized entry is made during an alien's deportation hearing.³⁴ In such a hearing, the government carries the burden to prove that the alien is deportable under the provisions of the INA.³⁵

The INA sets forth nine classes of aliens excludable from entry to the United States,³⁶ and codifies the policy of allowing immigrants to enter the country provided they do not endanger the health and welfare of American citizens or financially burden the United States with costly medical expenses.

III. HIV AS A COMMUNICABLE DISEASE OF PUBLIC HEALTH SIGNIFICANCE³⁷

Acquired Immune Deficiency Syndrome, which is the manifestation of HIV, causes the breakdown of an individual's immune system, leaving the victim susceptible to opportunistic illness and infection.³⁸ As of October, 1994, over one million individuals in the United States were infected

32. *Id.*

33. See generally 8 U.S.C. §§ 1101-1525 (describing rules and regulations governing an alien's entry into the United States).

34. 8 U.S.C. § 1252(b) (1987).

35. *Id.* At the hearing, the alien is entitled to full notice of all the charges, representation by counsel, confrontation by the evidence against him at an open hearing, an opportunity for cross-examination and to present witnesses on his or her behalf, and a decision substantially supported by the record. *Id.*

36. 8 U.S.C. § 1182(a)(1)-(9) (Supp. 1994). The nine classes enumerated by the INA are: 1) aliens afflicted with a communicable disease of public health significance; 2) criminals; 3) aliens considered to be security risks; 4) aliens inflicted with psychopathic personalities; 5) public charges; 6) aliens who are illegal entrants and immigration violators; 7) aliens with improper documentation; 8) aliens ineligible for citizenship; and, 9) miscellaneous. *Id.*

37. "A communicable disease of public health significance" is the terminology used in the INA to describe an affliction that can serve as the basis for exclusion from the United States. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994).

38. *Surgeon General's Report, supra* note 4, at 2784. An opportunistic disease is one that results from the body's inability to defend itself due to a compromised immune system. *Id.* Human Immunodeficiency Virus destroys the body's white blood cells, thus inhibiting the body's ability to resist disease and infection. Carro, *supra* note 30, at 223. Currently, over one million Americans may be infected with HIV. 139 CONG. REC. S1724 (daily ed. Feb. 17, 1993) (statement of Sen. Dole).

with HIV.³⁹ Furthermore, the Department of Health and Human Services reports that as of June, 1994, there have been 401,749 diagnosed cases of AIDS, resulting in 243,423 deaths.⁴⁰ To date there is no vaccine available to prevent HIV-infection, and there is no drug treatment available for persons infected with HIV to prevent the onset of AIDS.⁴¹

Although currently there is no cure for AIDS, an individual can guard against the disease by taking precautions from contracting HIV.⁴² Human Immunodeficiency Virus is transmitted through the introduction of contaminated body fluids of an infected individual into the bloodstream of another.⁴³ Infection can occur through engaging in unprotected sexual activity, using contaminated hypodermic needles and syringes, receiving a contaminated blood transfusion, and transmitting the virus through breast feeding.⁴⁴ High risk groups include homosexual and bisexual males, intravenous drug users, hemophiliacs, and recipients of blood transfusions conducted between the years of 1981 and 1985.⁴⁵

An individual infected with HIV may not develop AIDS until ten years after initial exposure.⁴⁶ The disease's lengthy incubation period is problematic because unknowing HIV-infected individuals are capable of transmitting the disease to others.⁴⁷ Ignorance of one's HIV-positive status combined with unprotected sexual activity and widespread drug usage have resulted in a deadly epidemic.⁴⁸

39. James W. Brown, *An Unrelenting Killer Spreads Worldwide; AIDS*, MED. LABORATORY OBSERVER, Oct. 1994, at 29.

40. Telephone interview with Department of Health and Human Services AIDS Hotline (Feb. 7, 1994) (notes on file with author).

41. *Id.*

42. See generally *Surgeon General's Report*, *supra* note 4 (discussing techniques to prevent the spread of AIDS).

43. Carro, *supra* note 30, at 224.

44. Morrow, *supra* note 8, at 131 n.1.

45. Carro, *supra* note 30, at 224. As of 1989, 90% of all people infected with HIV were within one of these groups. *Id.* at 224 n.140. Prior to 1985, the medical community did not have the technology to screen blood for HIV and for this reason individuals who received a blood transfusion between the years 1981 and 1985 are considered a "high risk" group. *Surgeon General's Report*, *supra* note 4, at 2786.

46. Morrow, *supra* note 8, at 131 n.1.

47. Carro, *supra* note 30, at 225.

48. *Id.*

IV. THE EFFECT OF AIDS ON CURRENT IMMIGRATION REGULATION

A. *The American Population Demands Increased Protection From the Spread of HIV and AIDS*

Acquired Immune Deficiency Syndrome first appeared in this country in 1981.⁴⁹ Initially, the American public was not overly concerned with understanding AIDS, much less curing it, because the disease was almost exclusively confined to individuals in discrete "high-risk" groups.⁵⁰ Over the past several years, as the virus spread outside these groups and into the "general public,"⁵¹ there has been a public outcry for increased protection against AIDS.⁵² As part of its response, Congress passed the Supplemental Appropriations Act of 1987⁵³ requiring all immigrants seeking admission into the United States to submit to an HIV test.⁵⁴ To implement this requirement, the Secretary of Health and Human Services (HHS) added HIV to its list of dangerous contagious diseases.⁵⁵ The effect was to deny an alien entry into the United States if he or she tested positive for HIV during the required entry examination.

One of the stated reasons for the addition of HIV to the list of excludable diseases was summed up by Senator Jesse Helms (R-N.C.) who stated, "the Federal Government has the obligation to protect its citizenry from foreigners immigrating to this country who carry deadly diseases which threaten the health and safety of U.S. citizens."⁵⁶ When the

49. Sean M. Baker, *Prevention at Our Borders? Testing Immigrants for AIDS*, 12 SUFFOLK TRANSNAT'L L.J. 331, 334 (1989). Although believed to have been introduced in the United States in 1981, AIDS was not identified and isolated by the medical community until 1983. *Id.*

50. *Id.* at 338.

51. "General public" refers to individuals who would not be categorized in a "high risk" group. See *Surgeon General's Report*, *supra* note 4 and accompanying text for a discussion of "high risk" group.

52. Baker, *supra* note 49, at 331.

53. The Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475 (1987). "On or before August 31, 1987, the President, pursuant to his existing power under section 212(a)(6) of the Immigration and Nationality Act, shall add human immunodeficiency virus infection to the list of dangerous contagious diseases contained in Title 42 of the Code of Federal Regulations." *Id.*

54. Medical Examination of Aliens, 42 C.F.R. § 34.3 (1993). The need for the Supplemental Act is obvious considering that it is "only elementary that as the epidemic continues to spread abroad, immigrants in greater numbers will be bringing the AIDS virus to the United States." 133 CONG. REC. S6956 (1987) (statement of Sen. Helms).

55. 42 C.F.R. § 34.2(b)(4) (1993).

56. 133 CONG. REC. S6956 (1987) (statement of Sen. Helms). Senator Helms further stated, "[O]ther countries have already begun testing for AIDS. I see no reason why we should not do the same . . . I think the people of the United States will hold this Congress

proposed measure was debated in the Senate, some members of Congress compared the AIDS epidemic in Africa to the Black Death that struck Europe in the Fourteenth Century killing approximately one quarter of the population.⁵⁷ Further, public opinion overwhelmingly favored mandatory HIV-testing for immigrants desiring entry into the United States.⁵⁸ These reports led the Senate to pass the resolution unanimously.⁵⁹

In February, 1993, the Nickles Amendment to the National Institutes of Health Revitalization Act of 1993 (Revitalization Act) proposed the codification of United States policy banning HIV-infected immigrants from permanently entering the country.⁶⁰ The amendment included HIV infection on the list of communicable diseases constituting a "public health significance."⁶¹ The desire of the Senate to codify the ban was in response to the 1992 campaign promise of President Clinton to "lift the current ban on travel and immigration to the United States by foreign nationals with HIV."⁶² Codification of the ban would require President Clinton to obtain a repeal of the law in order to change the policy of exclusion.

The addition of HIV to the list of communicable diseases of public health significance in 1993⁶³ represented the culmination of an initiative, which began in 1987,⁶⁴ to ban HIV-infected immigrants from permanently entering the country. Excluding HIV-positive immigrants is not discriminatory. It is a continuation of the United States policy to exclude

accountable if we do not do something about it." *Id.* at S7411. Senator Helms was the sponsor of the bill to include HIV as a grounds for exclusion from the United States. *Id.* at S7405.

57. *Id.* at S7410 (statement of Sen. Helms).

58. *Id.* at S6956. A U.S. News-CNN poll reported that 74% of Americans surveyed supported mandatory HIV testing of incoming immigrants. *Id.*

59. 139 CONG. REC. S1724 (daily ed. Feb. 17, 1993) (statement of Sen. Dole). "The house accepted the provision without a vote." *Id.*

60. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994).

61. *Id.* "Notwithstanding any other provision of law, regulations or directives concerning the exclusion of aliens on health related grounds, infection with HIV, the human immunodeficiency virus, shall constitute a communicable disease of public health significance of section 212(a)(1)(A)(i) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(1)(A)(i))." 139 CONG. REC. S1708 (daily ed. Feb. 17, 1993).

62. 139 CONG. REC. S1724 (daily ed. Feb. 17, 1993)(statement of Sen. Dole). At that time, the President could remove the ban by issuing an executive order. With the passage of the bill, only Congressional action could lift the ban. *Id.*

63. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994).

64. Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475 (1987).

individuals who present a health risk to this country. The ban serves the legitimate purpose of protecting the health and well-being of the American public.

B. Immigration Procedures Are Established to Safeguard the American People From HIV-Infected Immigrants

Extensive administrative procedures determine the eligibility of an alien to permanently enter the United States. First, an alien who desires entry to the United States must acquire an immigration visa.⁶⁵ Such an alien is required to undergo both a physical and mental examination to receive an immigrant visa.⁶⁶ Further, a Public Health Service (PHS) physician must examine any alien arriving in a United States port of entry or any alien currently residing in the United States who wishes to change his immigration status.⁶⁷

Depending on the results of the physical examination, an alien who carries a communicable disease of public health significance, such as HIV, may be denied entry into the United States.⁶⁸ There are, however, procedural safeguards designed to protect against the denial of a visa based on a false finding of HIV infection. First, the presence of HIV must be "clearly established" before an alien can be denied entry.⁶⁹ Second, if HIV is "clearly established," the alien will receive a second exami-

65. 8 U.S.C. § 1201(d) (1987). There are two types of visas: an immigrant visa and a nonimmigrant visa. *Id.* § 1201(a) (1987). Immigrants are aliens seeking permanent residence in the United States; nonimmigrants are temporarily admitted for a specific purpose, such as a vacation or business. JOYCE C. VIALET, CONG. RES. SERV., IMMIGRATION LEGISLATION— QUESTIONS AND ANSWERS 1 (1991). The decision of the American consul to deny a visa to an alien is not subject to judicial review. *Pena v. Kissinger*, 409 F. Supp. 1182, 1185 (S.D.N.Y. 1976).

66. 8 U.S.C. § 1201(d). For aliens applying for nonimmigration visas, it is within the discretion of the consular office to determine the necessity of a physical or mental examination. *Id.*

67. 42 C.F.R. § 34.1 (1993). Public Health Service (PHS) regulations allow physicians to consider only those listed medical conditions that are excludable by statute and to issue notifications of such condition only if the presence of the condition is clearly established. *Id.* § 34.4(a) (1993). If the examining medical officer finds nothing physically or mentally wrong with the immigrant, this information must be included in the report. *Id.* § 34.4 (d). The PHS must also examine any alien referred by the Immigration and Naturalization Service (INS) in order to determine admissibility status. *Id.* § 34.1(c).

68. 8 U.S.C. § 1182(a)(1)(A)(i). The following are communicable diseases of public health significance: (1) chancroid; (2) gonorrhea; (3) granuloma inguinale; (4) human immunodeficiency virus (HIV) infection; (5) leprosy, infectious; (6) lymphogranuloma venereum; (7) syphilis, infectious stage; and (8) tuberculosis, active. 42 C.F.R. § 34.2(b)(1)-(8) (1993).

69. 42 C.F.R. § 34.4(a) (1993).

nation to protect against erroneous diagnosis.⁷⁰

If an alien is denied a visa due to a finding of a dangerous contagious disease, such as HIV, he has no right to an administrative appeal because it has been determined that an administrative board does not hold the same expertise as the medical examiner.⁷¹ In *Knauff v. Shaughnessy*,⁷² the Supreme Court affirmed the principle that aliens who have not made entry into the United States do not enjoy full constitutional protection and, therefore, may be subject to rules that would be considered unacceptable had those rules been applied to United States residents.⁷³ Therefore, the only judicial review available to an alien awaiting entry is a petition for habeas corpus to determine whether the reasons given for his exclusion were in accordance with INA provisions.⁷⁴

In some instances, the Attorney General may waive the exclusion of an alien for health-related reasons.⁷⁵ This grant may be given to an alien having family ties to either a United States citizen or legal resident alien currently living in the United States.⁷⁶ A waiver may also be granted to lawful permanent residents who have traveled abroad voluntarily and temporarily.⁷⁷

70. 8 U.S.C. § 1224 (1987).

71. *United States ex rel. Johnson v. Watkins*, 170 F.2d 1009, 1012 (2d Cir. 1948). However, an alien denied a visa due to a finding of a communicable disease of public health significance may appeal the finding to the PHS medical board. 8 U.S.C. § 1224 (1987).

72. 338 U.S. 537 (1950).

73. *Id.* at 544. The Court held that the rights of aliens are limited and Congress has broad discretion in outlining immigration procedures. *Id.*

74. 8 U.S.C. § 1105a(b) (1987). The court may also review the Commissioner's report to determine if the alien falls within the provisions of the Act. *Gegiow v. Uhl*, 239 U.S. 114, 118 (1915).

75. 8 U.S.C. § 1182(g) (Supp. 1994).

76. *Id.*

The Attorney General may waive the application of-

(1) subsection (a)(1)(A)(i) in the case of any alien who-

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa.

Id.

77. 8 U.S.C. § 1182(c). In all of these scenarios, the Attorney General has the discretion to require a bond posting prior to granting a waiver. *Id.* § 1182(g)(2) (Supp. 1994).

V. IMPLICATIONS OF ADMITTING HIV-INFECTED IMMIGRANTS

A. *Arguments in Favor of Excluding HIV-Infected Immigrants*

Senator Robert Dole (R-Kan.), a proponent of the ban against HIV-infected immigrants, argued that

[t]his is not an anti-immigration issue. This is not a gay issue. This is a public health issue, and it is an economic health issue. There is nothing callous or heartless about protecting the physical and financial health of the American people. . . . I fail to see how permitting more people infected with the AIDS virus to permanently immigrate into America will in any way contribute to the health and well-being of the American public, or help us resolve the very serious issues facing us here at home.⁷⁸

Approximately 7.2 million people were awaiting entry into the United States from foreign countries in 1993;⁷⁹ 3.4 million of those people have a right, under United States law, to immigrate to the United States because "immediate relatives"⁸⁰ living in this country have petitioned for their entry.⁸¹ However, the United States can only legally admit 700,000 immigrants each year.⁸² Thus, proponents of the ban argue that "[k]nowing that they all cannot come here . . . we ought to set out a policy to determine that who is coming is in the interest of the people that are already here."⁸³ Because the pool of individuals who wish to enter the United States is so much greater than the number allowed, why should the United States grant entry to an HIV-infected immigrant and run the risk of infecting a United States citizen? Entry to the United States should be

78. 139 CONG. REC. S1724 (daily ed. Feb. 17, 1993) (statement of Sen. Dole). Senator Dole's speech touches upon the recurring theme that a disease will be a basis for exclusion if it threatens the health or welfare of United States citizens or if it poses a financial burden. *Id.*

79. *Id.* at S1720.

80. The INA defines "immediate relatives" as "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." 8 U.S.C. § 1151(b).

81. Melita M. Garza, *Ads Lobby for Curb on Immigrants*, CHI. TRIB., July 26, 1993, at N4. The potential enormity of the problem is emphasized by the fact that "[i]n the past 10 years, more immigrants have been admitted than in any similar period in American history." *Id.*

82. 139 CONG. REC. S1719 (daily ed. Feb. 17, 1993) (statement of Sen. Nickles).

83. *Id.* at S1720 (statement of Sen. Gramm). People with valuable skills or education who want to immigrate to America are given preference. *Id.* "We are telling people . . . [the reason] we do not want them to come into our country is because they are HIV positive, it is not because of a lack of compassion. It is because we are trying to protect our country . . ." *Id.* at S1719 (statement of Sen. Nickles).

limited to those individuals who are not a health threat to the United States.

Another argument offered by proponents of the ban is based upon the cost of caring for HIV-infected immigrants. Recent figures estimate the medical expenses for treating an HIV-infected individual are \$102,000 over the course of his or her life.⁸⁴ If the ban on HIV-infected immigrants did not exist, experts estimate that an additional 600 to 800 individuals would apply for entry into the United States annually.⁸⁵ Assuming these individuals do not have private health insurance, the U.S. State Department estimates that if HIV-positive immigrants were not excluded, United States taxpayers would have to shoulder a burden of sixty million dollars annually to cover the cost of treating HIV infected immigrants and those whom the immigrants infect.⁸⁶ These funds would be better spent on the health care problems facing the citizens of our nation. Dr. Roy Schwarz, head of the American Medical Association AIDS task force, questioned a policy allowing HIV-infected immigrants to enter the country by asserting "it doesn't make any sense, . . . we don't need any more AIDS patients, there isn't enough money to care for U.S. AIDS patients."⁸⁷

Additionally, a cost-benefit analysis, completed in Canada, examined whether the cost of treating HIV-infected immigrants outweighed the cost of screening all potential immigrants entering Canada.⁸⁸ The study revealed that between 1.7 and 13.7 million dollars could have been saved over ten years if all HIV-positive immigrants were excluded from entering Canada.⁸⁹

B. Arguments Against the Exclusion of HIV-Infected Immigrants

Some opponents of the ban disagree with using an economic rationale to justify the exclusion of HIV-positive aliens.⁹⁰ They contend that the

84. WASEM & EIG, *supra* note 16, at 5. The average yearly cost of treating someone with HIV is \$10,000. The average yearly treatment cost of AIDS per patient is \$38,300. *Id.*

85. Gladwell, *supra* note 17, at A6. Experts estimate that between 1,200 and 2,400 immigrants are affected by the HIV-positive ban yearly. *Id.*

86. *Id.*

87. 139 CONG. REC. S1722 (daily ed. Feb. 17, 1993) (statement of Dr. Schwarz that was read into the record by Sen. Cochran). The American Medical Association regards the HIV-ban as sound policy. *Id.*

88. Hanna Zowell et al., *HIV Antibody Screening Among Immigrants: A Cost-Benefit Analysis*, 265 JAMA 456, 456 (1991).

89. *Id.* The costs and benefits were based upon the in-hospital costs of treating an AIDS patient for 10 years. *Id.*

90. See generally Elizabeth M. McCormick, *HIV-Infected Haitian Refugees: An Argu-*

United States is discriminating against HIV-positive aliens because the United States does not exclude other aliens with expensive medical conditions such as heart disease or cancer.⁹¹ However, the exclusion policy is supported by more than just an economic rationale. The ban on HIV-infected immigrants protects not only the economic well-being of American citizens, but also the physical well-being. Although high medical expenses accompany both heart disease and cancer, it is inappropriate to compare such diseases to HIV because they are not contagious. It is, however, appropriate to compare HIV with tuberculosis, another highly contagious disease that is the basis for exclusion from the United States under the INA.⁹²

Opponents also support the use of the public charge doctrine in place of the HIV ban.⁹³ Under current immigration law, immigrants likely to become public charges are excluded from entering the country.⁹⁴ The public charge doctrine is advanced as a significant deterrent to HIV-positive immigrants because, pursuant to the doctrine, those infected with HIV must prove they can afford the high medical expenses that accompany the disease before being permitted to enter the country.⁹⁵ This solution, however, does not protect against the risk of transmission from those immigrants who can afford the high cost of treatment and thereby avoid the public charge exclusion.

VI. *HAITIAN CENTERS COUNCIL, INC. v. SALE*⁹⁶

A. *Case History*

Shortly after the enactment of the ban on HIV-infected immigrants,

ment Against Exclusion, 7 GEO. IMMIGR. L.J. 149 (1993) (arguing that the funds saved from denying entry to HIV-infected aliens are insufficient to justify exclusion).

91. Dinah Wiley & Philip Fornaci, *Pro and Con HIV Immigrant Ban Makes No Sense*, ATL. J. CONST., Mar. 3, 1993, at A13.

92. 42 C.F.R. § 34.2 (1993). See also *Wulf v. Esperdy*, 277 F.2d 537 (2d Cir. 1960) (denying entry into the United States to an immigrant suffering from tuberculosis).

93. 137 CONG. REC. E2213 (daily ed. June 13, 1991) (statement of Rep. Frank). "Many of us agree that it would be reasonable to use the law's ban on people coming to this country who have become public charges with regard to any serious illness that had a high likelihood of leaving people dependent on public support." *Id.*

94. 8 U.S.C. § 1182(a)(4). "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable." *Id.* An alien is deemed a public charge if he or she is unable to meet anticipated expenses regardless of their nature. McCormick, *supra* note 90, at 152.

95. 137 CONG. REC. E2213 (daily ed. June 13, 1991) (statement of Rep. Frank).

96. 823 F. Supp. 1028 (E.D.N.Y. 1993).

the law received its first judicial challenge in a class action suit brought on behalf of HIV-infected Haitian refugees.⁹⁷ The Haitians were being held in a refugee camp at the United States military base in Guantanamo Bay, Cuba, because they could not be returned to Haiti for fear of political persecution,⁹⁸ yet they could not be allowed entry into the United States because they were infected with HIV.⁹⁹ In March, 1992, the HIV-infected Haitians brought suit in the United States District Court for the Eastern District of New York to challenge their indefinite detention at Guantanamo Bay.¹⁰⁰ The Haitians argued that by denying them parole in the United States because of their HIV infection, the Attorney General had abused her discretionary parole power.¹⁰¹

Judge Sterling Johnson, Jr., who presided over the proceedings, ruled in favor of the Haitians.¹⁰² He held that, although the HIV-infected immigrants are excludable under the INA,¹⁰³ their exclusion is not mandatory.¹⁰⁴ Therefore, the Attorney General had the power to parole the HIV-infected Haitians and her decision not to do so was an abuse of discretion.¹⁰⁵ The effect of the ruling was to allow the HIV-infected Haitians to gain entry into the United States despite the fact that they carried a communicable disease of public health significance.

97. *Id.*

98. *Id.* at 1035.

99. Human immunodeficiency virus is a communicable disease of public health significance and, therefore, any alien suffering from HIV is denied entry into the United States. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994). *See also* 42 C.F.R. § 34.2 (1993) (defining HIV as a communicable disease of public health significance).

100. *Haitian Centers Council*, 823 F. Supp. at 1032.

101. *Id.* at 1047. The section of the INA that pertains to waivers states:

(3) Except as provided in this subsection, an alien (A) who is applying for a non-immigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

8 U.S.C. § 1182(d) (Supp. 1994).

The Haitians argued other grounds for relief that are beyond the scope of this article. *Haitian Centers Council*, 823 F. Supp. at 1039-43.

102. *Haitian Centers Council*, 823 F. Supp. at 1049.

103. 8 U.S.C. § 1182(a)(1)(A)(i) states that any alien afflicted with a communicable disease of public health significance shall be ineligible to receive a visa and shall be excluded from entering the United States. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. 1994). Human immunodeficiency virus is currently on the list of communicable diseases of public health significance. 42 C.F.R. § 34.2(b)(4) (1993).

104. *Haitian Centers Council*, 823 F. Supp. at 1048.

105. *Id.*

B. Analysis of the Decision

The reasoning behind Judge Johnson's ruling is unsound. The applicable INA statute plainly states that aliens who are afflicted with "a communicable disease of public health significance" are "ineligible to receive visas" and "shall be excluded from admission into the United States."¹⁰⁶ Judge Johnson wrote in his opinion that because the statute does not contain the word "mandatory," it must not be absolute.¹⁰⁷ The statute excludes aliens for health-related reasons and allows for waivers in certain instances. Implicit in this is the fact that if an alien is not eligible for a waiver, the alien will not be allowed entry into the United States. To say otherwise is to construe the statute in a manner inconsistent with Congressional intent.

Judge Johnson's ruling on the Attorney General's abuse of parole power is equally unsupported by the INA.¹⁰⁸ The power of the Attorney General to parole an inadmissible alien is for a temporary basis only.¹⁰⁹ Once the purpose of the parole has been served, the alien is to be returned to previous custody.¹¹⁰ In the case of the Haitians, however, the purpose of the parole, which is medical treatment for HIV, could not be achieved on a temporary basis because the disease is a terminal affliction. Therefore, to parole the aliens would be to do so on a permanent basis and, again, this would violate Congressional intent as evidenced by the plain language of the statute.

C. What Effect Will Granting Entry to the Plaintiffs Have on the American People?

The Clinton Administration's decision not to appeal the *Haitian Centers Council* ruling evoked serious controversy.¹¹¹ One Florida Congressman argued that the decision would lead to a large influx of HIV-infected immigrants into the United States and that it would create a greater financial strain on the resources of his state in particular.¹¹² Representa-

106. 8 U.S.C. § 1182(a).

107. *Haitian Centers Council*, 823 F. Supp. at 1047.

108. See 8 U.S.C. § 1182(d).

109. *Id.*

110. *Id.*

111. See McDonald, *supra* note 13, at A12.

112. 139 CONG. REC. H3992 (daily ed. June 23, 1993) (statement of Rep. Goss). "[I]mmigration is clearly a national problem. For too long, citizens of States like Florida have disproportionately borne the brunt of the financial and social costs of resettling immigrants." *Id.*

Once the refugees are in the country, they may become eligible for Supplemental Secur-

tive Goss also questioned the ability of the Haitians to afford medical care for AIDS treatment in the United States. If HIV-infected aliens cannot afford their medical treatment, who will pay their medical expenses?

The Court's decision in *Haitian Centers Council* is problematic because medical facilities that provide care for persons with AIDS are already overcrowded, understaffed, and underfinanced.¹¹³ This has led to serious criticism of United States immigration policies. Dan Stein, President of the Federation for American Immigration, aptly stated "[o]ur current immigration policies are inappropriate. They are not helping us with the process of nation-building. You don't have 10 people to dinner if you only have food for five."¹¹⁴ Mr. Stein's statement reiterates one of the central themes of all health-related exclusions. Admitting HIV-infected individuals into the United States is a costly mistake in both social and economic contexts. The United States currently cannot bear the necessary care of even its own citizens suffering from AIDS.

VII. CONCLUSION

Since the United States began regulating immigration, laws have been promulgated that permit the exclusion of individuals who could not meet certain health criteria or who posed a financial burden to the United States taxpayers. Now the country is faced with a deadly epidemic that has no known cure. When a person is infected with HIV, the only certainty is death.

In order to combat the HIV epidemic, the United States promulgated a law preventing immigrants who test HIV-positive from entering the country. Physicians testing immigrants for the HIV infection must follow exact procedures. The presence of HIV must be "clearly established"

ity Income when the cost of treating their illness depletes their income. This leads to further depletion of American tax dollars. WASEM & EIG, *supra* note 16, at 5. Moreover, immigrants tend to settle in a limited number of localities. Meyer, *supra* note 6, at 1491. During a seven month period, approximately 125,000 Cubans and 25,000 Haitians arrived by boat in Southern Florida. *Id.*

During this time, the state of Florida received approximately \$370 million in federal funds, most came through the Federal Emergency Management Agency. *Id.* Even with these federal funds, Florida still claims the Federal Government owes it \$150 million. 139 CONG. REC. H 3992 at 3993 (daily ed. June 23, 1993) (statement of Rep. Goss).

113. Meyer, *supra* note 6, at 1491. The States of Florida and New York may pay up to \$27.5 billion over the next five years for services provided to immigrants. 139 CONG. REC. H3597 (daily ed. June 16, 1993) (statement of Rep. Goss).

114. Garza, *supra* note 81, at N1.

before an alien can be denied. If it is detected, the immigrant receives a second examination to protect against arbitrary or biased findings. Also, the availability of waivers proves that the ban is not absolute and exceptions can be made in certain circumstances. These high standards and procedures protect immigrants from a discriminatory ban and the American public from a contagious disease of public health significance.

The current cost of treating individuals with AIDS is staggering and the figure is certain to rise. Hospitals treating AIDS patients are severely overburdened, underfinanced, and unable to properly care for all those infected with HIV. In an effort to relieve this hardship, the United States has enacted sound immigration laws that prevent HIV-infected people from immigrating to this country. The law has a simple objective, to prevent the immigration of individuals who pose either a health risk or financial burden to the general public.

As a health issue, the more HIV-positive immigrants that are allowed into the country, the greater the chances that an American resident will contract the virus. There are over 1,000,000 Americans infected with the AIDS virus and AIDS has already killed over 250,000 Americans. The United States should not knowingly admit individuals with a deadly infectious, incurable disease into the country. The United States has always had a policy of excluding aliens that are a health risk, so why should HIV-positive immigrants be treated any differently?

Further, lifting the ban on HIV-infected immigrants will drastically burden the economically strapped American health care system. Very few HIV-infected immigrants would be able to afford the medical treatment necessary to combat HIV. Allowing infected immigrants into the United States would force the country to pay millions in tax dollars that would be better spent on research and treatment of United States AIDS patients.

Therefore, this Comment concludes that the United States government made a crucial error by not appealing the *Haitian Centers Council* decision. The Clinton Administration allowed a valid law to be ignored without apparently considering the grave consequences. If this policy remains unchallenged, millions of United States tax dollars will be spent on medical treatment for refugees while thirty-seven million Americans live without any type of health insurance.

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