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Give Use Your Tired, Your Poor, Your Huddled Masses . . . Except When They Have HIV: An Analysis of Current United States Immigration Policy Regarding HIV-Positive Aliens in Light of Guantanamo Bay

Jason W. Konvicka
University of Richmond

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GIVE US YOUR TIRED, YOUR POOR, YOUR HUDDLED MASSES . . . EXCEPT WHEN THEY HAVE HIV: AN ANALYSIS OF CURRENT UNITED STATES IMMIGRATION POLICY REGARDING HIV-POSITIVE ALIENS IN LIGHT OF GUANTANAMO BAY*

Dante would have been delighted by the Immigration and Naturalization Service waiting rooms. They would have provided him with a tenth circle of Hell. There is something distinctly infernal about the spectacle of so many lost souls waiting around so hopelessly, mutually incomprehensible in virtually every language under the sun, each clutching a number from one of those ticket issuing machines which may or may not be honored by the INS clerks before the end of the Civil Service working day.[1]

I. INTRODUCTION

On September 30, 1991, a party of military leaders overthrew the first democratically elected government in Haitian history.[2] Although Haiti's former president, Jean Bertrand Aristide escaped to safety,[3] many of his supporters were not so fortunate. Numerous Haitians were tortured and killed due to their political affiliation.[4] Fearing similar persecution, thousands of Haitian nationals abandoned their belongings and fled to the high seas in an attempt to reach the United States.[5] Soon thereafter, the United States Coast Guard began interdicting an increasing number of Haitian boats as they made their way into international waters.[6]

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* The author would like to thank David A. Damiani for his assistance during the preliminary research stage, when this topic was little more than the basis for excited debate between two eager law students.

1. Peter Brimelow, *Time to Rethink Immigration: The Decline of the Americanization of Immigrants*, NAT'L REV., June 22, 1992, at 30.

2. Susan Beck, *Cast Away*, AM. LAW., Oct. 1992, at 51; Stuart Taylor, Jr., *Clinton Flouts the Rule of Law*, LEGAL TIMES, Mar. 8, 1993, at 25.

3. Ben Barber, *Clinton Turns Up Heat on Haiti's Military Regime*, CHRISTIAN SCI. MONITOR, Apr. 7, 1993, at 3.

4. Sale v. Haitian Ctrs. Council (Sale I), 113 S. Ct. 2549, 2554 (1993) (citation omitted).

5. Thomas Scheffey, *Harold Hongju Koh; Professor, Yale Law School*, CONN. L. TRIB., Dec. 28, 1992 - Jan. 4, 1993, at 20; *see* Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. 1028, 1034 (E.D.N.Y. 1993).

6. *See* Sale v. Haitian Ctrs. Council (Sale I), 113 S. Ct. at 2554; Lynn Duke, *Haitian Refugees With HIV Remain in Limbo as Asylum Claims Stall*, WASH. POST, Aug. 7, 1992, at A3. The Coast Guard's actions were authorized by a United States/Haitian agreement that was entered into on September 23, 1981. Agreement on Interdiction of Migrants, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559. Haiti and the United States entered into this agreement in an attempt to prevent aliens without visas from illegally migrating to the United States. Under the agreement, the United States reserves the right to board any ship flying the

Overwhelmed by this massive Haitian exodus, the United States government sent many of the intercepted aliens to the American naval base at Guantanamo Bay, Cuba.[7] Finally, on May 24, 1992, President Bush directed the Coast Guard and the Navy to stop any vessel attempting to illegally sail to the United States and to return its occupants to the port of origin.[8] Although the President's order (also known as the Kennebunkport Order[9]) did not specifically refer to Haitian boats, it effectively forced the repatriation of all interdicted Haitians without any screening[10] by the Immigration and Naturalization Service ("INS").[11]

Prior to the Kennebunkport Order, United States immigration laws required all aliens coming to the United States to undergo processing to determine their potential refugee status.[12] This processing, or "preliminary screening," could take place either on board a Coast Guard/Navy ship or within the continental United States. For Haitians intercepted before the Kennebunkport Order, this "preliminary screening" took place at Guantanamo Bay.

As the INS began the screening process, many of the Haitians were determined to be candidates for political asylum.[13] To be considered a

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Haitian flag in order to ascertain the condition, registry and destination of the vessel, and the status of those on board. If a violation of either United States or Haitian immigration law is discovered, the ship may be detained on the high seas or sent back to Haiti after prior notification of the Haitian government. *Id.* at 3559-60.

7. Susan Benesch, *Haitians Stuck at U.S. Base Want White House To Act*, ST. PETERSBURG TIMES, Feb. 4, 1993, at 2A.

8. Exec. Order No. 12,807, 3 C.F.R. 303 (1992), *reprinted in* 8 U.S.C. § 1182 (Supp. IV 1992) ("[T]he Secretary of Defense . . . [and] the Attorney General . . . shall issue appropriate instructions to the Coast Guard to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.").

9. Michael Heyman, *Is it Lawful for the United States to Interdict Haitian Vessels on the High Seas and Summarily Repatriate Their Occupants?*, PREVIEW U.S. SUP. CT. CASES, Feb. 19, 1993, at 249.

10. *Id.*

11. The Immigration and Naturalization Service ("INS") was created by act of Congress in 1891. Its duties are divided into four main areas of responsibility: (1) [F]acilitating the entry of persons that are legally admissible as visitors or as immigrants to the United States; (2) granting benefits and assistance as provided under the Immigration and Nationality Act; (3) preventing unlawful entry or employment by those not entitled; and, (4) apprehending or removing aliens who enter or remain illegally in the United States. THE UNITED STATES GOVERNMENT MANUAL 398 (Office of the Fed. Register, Nat'l. Archives and Records Admin., 1992/1993) [hereinafter U.S. GOVT. MANUAL].

12. *See* Exec. Order No. 12,324, 3 C.F.R. 180 (1982), *reprinted in* 8 U.S.C.S. § 1182 app. at 342-43 (Law. Co-op. 1987) ("[N]o person who is a refugee will be returned without his consent."). Although Executive Order 12,807 has similar language in reference to refugees, its effect has been the forced repatriation of all Haitians interdicted after May 24, 1992, without prior INS screening. *See* Heyman, *supra* note 9, at 249.

13. Benesch, *supra* note 7, at 2A (stating that approximately 10,000 political asylum candidates were allowed to enter the continental United States for additional INS screening).

"refugee,"[14] and therefore qualify for political asylum, an alien must show that he or she has a "credible fear"[15] of persecution if returned to his or her native country.[16] Aliens who demonstrate this "credible fear" qualify for a transfer to the United States for further processing of their asylum claim. At this point they are considered "screened in."[17] Once these "screened in" aliens reach American soil, they proceed through a second, more in-depth screening process.[18] During this second interview, the INS officials must find that the interviewee has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion."[19] Those Haitians who cannot adequately show a fear of persecution at either the preliminary or secondary screening are "screened out" and quickly repatriated to Haiti.[20]

Unique to the Haitians seeking asylum, a restriction denying entry to aliens testing positive for human immunodeficiency virus ("HIV")[21]

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14. The term "refugee" is statutorily defined as:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42)(A) (1988).

15. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1344 (2d Cir. 1992) ("[A] *credible fear* of returning to the country of origin is defined 'as an apprehension or awareness, which appears to be truthful . . . of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion.' "), *rev'd sub nom.* Sale v. Haitian Ctrs. Council (Sale I), 113 S. Ct. 2549 (1993) (emphasis added) (citation omitted).

16. Immigration and Nationality Act, 8 U.S.C. § 1158(a) (1988) (stating that an "alien may be granted asylum . . . if the Attorney General determines that such alien is a refugee . . . .").

17. Haitian Ctrs. Council v. McNary, 969 F.2d at 1330 ("Those individuals found to have a credible fear of persecution if returned to Haiti are 'screened-in,' and are eligible for transfer to the United States to pursue an asylum claim.").

18. *Id.* at 1335.

19. 8 U.S.C. § 1158(a) (1988); *see* 8 U.S.C. § 1101(a)(42)(A) (1988) (defining "refugee").

20. Haitian Ctrs. Council v. McNary, 969 F.2d at 1331.

21. HIV or Human Immunodeficiency Virus is the retrovirus which causes Acquired Immune Deficiency Syndrome (AIDS). Robert Gallo & Luc Montagnier, *AIDS in 1988*, SCI. AM., Oct. 1988, at 40. AIDS is a deadly and currently incurable viral disease which is characterized by the breakdown of the body's cellular immune system which in turn inhibits the ability to resist illness. Jeffrey Laurence, *The Immune System In AIDS*, SCI. AM., Dec. 1985, at 84. Although AIDS has only been clinically recognized since 1982, it is predicted that between 1.3 million and 2.5 million people are currently infected. GERALD J. STINE, AIDS xvii, 293 (1993); *see AIDS Spending*, ECONOMIST, Aug. 15, 1992, at 89. The number of adults infected with HIV is estimated at being 30 million by the year 2000. Furthermore, it has been predicted that 95% of those inflicted with HIV will develop AIDS within nine to fifteen years. STINE, *supra*, at 293.

Scientists now know that HIV hinders the immune system by specifically identifying, infecting, and killing T4 "helper" cells. Gallo & Montagnier, *supra*, at 40. In a normal environment, T4 cells aid the body by differentiating between healthy cells and diseased orga-

emerged as a dominating factor. Current United States immigration policy prohibits all HIV-positive aliens from entering the United States unless they qualify for a waiver.[22] Aliens granted asylum as political refugees may qualify for such a waiver.[23] In order to do so, however, the HIV-positive Haitians at Guantanamo Bay would have to pass the second INS screening, which is equivalent to the one their healthier Haitian counterparts underwent in the comforts of the continental United States.

Receiving their second interview in the less desirable setting of Guantanamo Bay was not the only discrimination the HIV-infected refugees faced. While "screened in" Haitians who received their second asylum screening in the United States were statutorily guaranteed attorney access during the interview process,[24] HIV-infected Haitians at Guantanamo Bay were denied such representation.[25] United States courts at

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nisms. When diseased cells are present, the T4 cells determine the appropriate counteractive response for the body. Court E. Golumbic, Comment, *Closing The Open Door*, 15 YALE J. INT'L L. 162, 170 (1990). As HIV systematically kills off an infected person's T4 cells, the victim becomes more susceptible to opportunistic infections that a normally healthy person would reject. STINE, *supra*, at 57. Finally, AIDS develops when the immune system has been so heavily ravaged by HIV that its ability to protect has been virtually destroyed. *See* Laurence, *supra*, at 84-88. For a more detailed discussion on T4 cells and the effects of T4 depletion see ROBERT SEARLES WALKER, AIDS: TODAY, TOMORROW 24-29 (1st ed. 2nd prtg. 1992); Howard Z. Streicher & Emmanuel Heller, *Human Retroviruses and Human Disease*, *in* AIDS: PRINCIPLES, PRACTICES, AND POLITICS 21-23 (Inge B. Corless & Mary Pittman-Lindeman eds., 1989). For an excellent and current source regarding the biological, medical, social, and legal aspects of AIDS see generally STINE, *supra*.

22. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. IV 1992) (excluding from admission "[a]ny alien . . . who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance . . .").

23. 8 U.S.C. § 1157(c)(3) (1988). Examples of aliens who may receive waivers include: [A]liens granted asylum, aliens temporarily visiting the United States as tourists or students, and aliens who qualify for amnesty under the legalization provision of the Immigration Reform and Control Act. 8 U.S.C. § 1255(d)(2)(B)(i) (1988). However, for an HIV-positive alien to receive a waiver, he or she is required to show the following: (1) [T]hat the danger posed to the public health by the alien's admission is minimal; (2) that the potential of spreading the disease created by the alien's admission is minimal; and, (3) that no governmental agency will have to incur any financial cost without the agency's prior consent. 8 C.F.R. § 245a.3(d)(4) (1990).

24. 8 C.F.R. Section 208.9(b) outlines the procedure for asylum interviews:

> The Asylum Officer shall conduct the interview in a nonadversarial manner. . . . The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for the form of relief sought. The applicant *may have counsel or a representative present* and may submit affidavits of witnesses.

8 C.F.R. § 208.9(b) (1993) (emphasis added). *See* 8 U.S.C. § 1362 (1988).

25. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1333 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council (Sale I), 113 S. Ct. 2549 (1993); *see* Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. 1028, 1036 (E.D.N.Y. 1993) (stating that attorneys with Haitian Service Organizations requested permission to contact the Haitian detainees at Guantanamo and were denied such access); Keith Henderson, *Haiti Refugees Challenge U.S. Law and Conscience*, CHRISTIAN SCI. MONITOR, Mar. 29, 1993, at 12.

both the district and appellate level have held that the Guantanamo Bay Haitians had the same right to counsel as Haitians in the United States,[26] but the Justice Department persuaded the Supreme Court to stay the decision until it decided the case.[27] Therefore, this group of approximately 250 Haitians was forced to remain in the prison-like setting of Guantanamo Bay, many for almost two years, while they awaited a final determination of their legal rights and immigration status.[28]

This Note begins by discussing the historical development of the United States' current immigration policy regarding HIV-infected aliens, followed by a brief analysis of the recent legal struggles of the HIV-infected Haitian refugees once held at Guantanamo Bay. The Note proceeds to focus on why the current United States immigration policy regarding HIV is unsound, specifically showing that the two major concerns of the current policy's supporters — the threat of contamination and the fear of increased health care costs — are factually unfounded. Finally, a change is suggested in the current exclusionary policy of the United States and the likelihood of such a change during the Clinton presidency is explored.

II. The Development of the United States' Immigration Policy Regarding HIV

The INS, in conjunction with of the Public Health Service ("PHS")[29] of the Health and Human Services Department ("HHS"),[30] maintains a list of diseases which is used to deny admission to infected aliens. Prior to August 31, 1987 this list included chancroid, gonorrhea, granuloma inguinale, infectious leprosy, lymphogranuloma venereum, syphilis, and ac-

26. Haitian Ctrs. Council v. McNary, 969 F.2d at 1347.

27. McNary v. Haitian Ctrs. Council, 113 S. Ct. 3 (1992). The Supreme Court heard oral arguments from both sides on March 2, 1993. *See* Jennifer Kaylin, *Yale Law School Takes On an Alumnus*, N.Y. TIMES, Apr. 11, 1993, at CN6.

28. Art Pine & Michael Clary, *U.S. Moves To Stifle Haitian Exodus*, L.A. TIMES, Jan. 16, 1993, at A12. The HIV-infected Haitians may also come to the United States once their T4 cell count drops below 200. *See* Haitian Ctrs. Council v. Sale (Sale II, interim order), 817 F.Supp 336, 337 (E.D.N.Y. 1993). For additional discussion of the *Sale* decision see *infra* part III.

29. Established in 1798, the Public Health Service ("PHS") has the duty to encourage the preservation and advancement of mental and physical health in the United States. This mission is achieved by: (1) [C]oordinating with the States to implement national health policy; (2) conducting medical and biomedical research; (3) organizing programs for disease prevention and control; (4) providing resources to the States for the planning and delivery of health-related services; and, (5) assuring the safety and effectiveness of drugs, cosmetics, and medical devices through law enforcement. U.S. GOVT. MANUAL, *supra* note 11, at 311.

30. The Department of Health and Human Services ("HHS") is a cabinet-level department of the executive branch. It generally oversees any government activity involving the nation's human concerns. U.S. GOVT. MANUAL, *supra* note 11, at 302.

tive tuberculosis.[31] An alien that had one of the diseases listed could not enter the United States.[32] HIV was only added to the list after the Senate unanimously voted to approve an amendment that required the President to do so.[33] Interestingly, the vote took place without any prior debate or committee investigation into the threat of HIV.[34]

In May 1989, Dr. James Mason, HHS Assistant Secretary, requested that the HHS's Center for Disease Control ("CDC")[35] meet with Justice and State Department officials in an effort to change the existing HIV policy.[36] The CDC made its recommendation to Congress in February 1990 that HIV and all other diseases except for tuberculosis be removed from the HHS list.[37] Following this, some members of Congress began to support a change in the policy. After a brief investigation by Acting Comptroller General Milton J. Socolar, it was determined that the 1987 Helms Amendment[38] had expired and that the Secretary of HHS had the power to determine what diseases should comprise the list.[39] Congress responded by passing the Immigration Act of 1990, which statutorily empowered the HHS Secretary to make additions or subtractions to the list based on each specific disease's threat to public health.[40]

In January 1991, Dr. Louis Sullivan, HHS Secretary, publicly proposed to the State and Justice Departments that the list be redrawn to include only active tuberculosis.[41] However, Dr. Sullivan's proposal fell on deaf ears. One week before his revamped list was to go into effect, the Justice

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31. 42 C.F.R. § 34.2(b) (1989).

32. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. IV 1992).

33. *See* Supplemental Appropriations Act of 1987 (Helms Amendment), Pub. L. No. 100-71, § 518, 101 Stat. 475 (1987) (stating that "[o]n or before August 31, 1987, the President . . . shall add human immunodeficiency virus infection to the list of dangerous contagious diseases . . .").

34. 133 CONG. REC. 7415 (daily ed. June 2, 1987). Senator Danforth stated that most senators felt as if the issue had been "thrust upon them" and that there had been no real analysis of the dangers of AIDS and HIV before the vote took place. *Id.* at 7412-13.

35. In 1973 the Secretary of Health, Education, and Welfare established the Centers for Disease Control ("CDC") as a health agency within the Public Health Service ("PHS"). The CDC protects the nation's public health through its leadership and direction in the prevention and control of diseases. U.S. GOVT. MANUAL, *supra* note 11, at 315.

36. Marlene Cimons, *AIDS Panel Calls for End to Stigmatizing Foreign Visitors Who Are HIV-Infected*, L.A. TIMES, Dec. 13, 1989, at A4.

37. Philip J. Hilts, *Agency Says AIDS Should Not Bar Entry to U.S.*, N.Y. TIMES, Feb. 27, 1990, at A18.

38. *See supra* note 33 and accompanying text.

39. *President Told He Can Lift AIDS Travel Ban*, N.Y. TIMES, May 23, 1990, at A22.

40. 8 U.S.C. § 1182(a) (1988), *as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(1)(A)(i), 104 Stat. 4978, 5067 (1990).

41. 56 Fed. Reg. 2484 (1991). Tuberculosis was the only disease out of the seven listed that had been determined to be truly contagious and still a threat to public health. 139 CONG. REC. S1712 (daily ed. Feb. 17, 1993) (reprint of a news release from the Department of Health and Human Services dated January 25, 1991).

Department, under pressure from the Bush Administration, tabled the list.[42] The United States' backtracking quickly came under fire from the international community.[43] The Bush administration attempted to appease some of the concerned nations by announcing its intention to allow foreigners with HIV to enter the United States as long as they did not remain permanently.[44] This token gesture did little to appease and as a sign of protest the sponsors of the Eighth International Conference on AIDS (originally scheduled to be held in Boston in 1992) decided to move the meeting to Amsterdam.[45]

After the election of President Clinton, it seemed that HIV would finally be removed from the HHS list.[46] However, fearing that the President would do so by executive order,[47] both the House of Representatives and the Senate voted to independently codify HIV as a disease that would bar admission of infected aliens.[48] The overwhelming vote of support by Congress forced President Clinton to bow to political reality, and on June 10, 1993 he signed the legislation into law.[49] Therefore, it appears

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42. Karen De Witt, *U.S., in Switch, Plans to Keep Out People Infected With AIDS Virus*, N.Y. TIMES, May 26, 1991, at A1; Robert L. Jackson, *Several Policies to be Dumped by Decree*, L.A. TIMES, Jan. 18, 1993, at A5.

43. Lawrence K. Altman, *U.S. Ban on Infected Travellers Attacked at World AIDS Conference*, N.Y. TIMES, June 17, 1991, at A13; *see* Anthony S. DiNota, Note, *The World Health Organization's Resolution Condemning AIDS-Related Discrimination and Ongoing United States Noncompliance at the Border*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 151, 174 (1991).

44. Philip J. Hilts, *U.S. to Admit Some Immigrants with AIDS Under New Health Policy*, N.Y. TIMES, Aug. 3, 1991, at A7.

45. Lawrence K. Altman, *Amsterdam Picked for AIDS Meeting*, N.Y. TIMES, Sept. 12, 1991, at B11.

46. During Clinton's campaign for the Presidency he repeatedly vowed to close the Guantanamo detention camp and to allow the immigration of HIV-positive aliens. *See* Jackson, *supra* note 42, at A5; Sheffey *supra* note 5, at 20; Bill Nichols & Bruce Frankel, *Ruling to Free Haitians Is Yet Another Problem*, USA TODAY, June 9, 1993, at 11A; Muriel Dobbin, *White House Will Obey Court Order on Haitians*, SACRAMENTO BEE, June 10, 1993, at A1; *Clinton Yields, Accepts AIDS-Infected Haitians*, CHI. TRIB., June 10, 1993, § 1, at 5.

47. The Clinton Administration's plans led Congressman Bliley to state: "I think it is important for Congress to deal with this issue [immigrants with HIV] because President Clinton has announced his intention to lift the ban through executive order." 139 CONG. REC. H1203 (daily ed. Mar. 12, 1993).

48. On February 18, 1993 the Senate voted 76-23 to amend the National Institutes of Health Revitalization Act of 1993 to include a ban on HIV-infected immigrants. 139 CONG. REC. S1767 (daily ed. Feb. 18, 1993). Following the Senate's vote, the House of Representatives voted 356-58 to do the same. *Id.* at H1210.

49. The HIV-related ban on aliens falls under Section 2007 of the National Institutes of Health Revitalization Act of 1993. It states that Section 212(a)(1)(A)(i) of the Immigration and Nationality Act should be amended to include the following: "which shall include infection with the etiologic agent for acquired immune deficiency syndrome." H.R. CONF. REP. No. 103-100, 103d Cong., 1st Sess. 93 (1993). Thus Section 212(a)(1)(A)(i) of the Immigration and Nationality Act has been amended to state: "Any alien . . . who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to

the President has abandoned, temporarily at least, his intentions to have HIV removed from the HHS list.[50]

III. The Current Legal Status of Haitians at Guantanamo Bay

The Haitians' legal struggles began with a February 29, 1992 memorandum written by Grover Rees, the General Counsel for the INS.[51] The memorandum referred to those Haitian refugees who had successfully completed the first INS screening and had also tested positive for HIV. The memo stated that the HIV-positive refugees should receive their second, more comprehensive screening at Guantanamo Bay instead of in the United States.[52] Furthermore, the memo required that the second interview should " 'be identical in form, and substance or [as] nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States.' "[53]

However, as much as the Rees memorandum required the second interview in Guantanamo Bay to be "identical in form" to the screenings taking place in the United States, there was one substantial difference. While the Haitian refugees in the United States were allowed to have lawyers present during their second screening, the Haitians at Guantanamo Bay were not permitted any access to attorneys.[54] On March 18, 1992, Yale Law School Professor Harold Hongju Koh, along with several other attorneys and various public interest groups, filed suit against the INS in federal district court in Brooklyn, New York.[55] The complaint demanded that the "screened in" Haitians at Guantanamo Bay be allowed access to legal counsel during their second asylum interview[56] and that no Haitian

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have a communicable disease of public health significance, *which shall include infection with the etiologic agent for acquired immune deficiency syndrome.*" *Id.* (emphasis added).

50. *Promises, Promises*, ST. PETERSBURG TIMES, Apr. 30, 1993, at 11A. After signing the bill President Clinton explained his withdrawal from earlier promises to end the HIV ban by stating: "That's the will of the Congress, that's part of the law . . . . We have to deal with AIDS better for all of our people." Stephen Smith of the Human Rights Campaign Fund defended the President's action by stating:

> We're not happy with how the immigration issue came out and the president's [sic] not happy [either] . . . . [T]he only choice he was presented with was to veto this bill, which would not help with the immigration issue because there was more than a two-thirds vote in both houses of Congress.

Domestic News: Clinton Goes Along to Get Medical Research Budget (CNN television broadcast, June 11, 1993) (transcript on file with author).

51. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1332 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council (Sale I), 113 S. Ct. 2549 (1993).

52. *Id.* at 1333.

53. *Id.* (quoting Grover Rees memorandum, Feb. 29, 1992).

54. *Id.*

55. Susan Beck, *Cast Away*, AM. LAW., Oct. 1992, at 51.

56. Haitian Ctrs. Council v. McNary, 789 F. Supp. 541, 542 (E.D.N.Y.), *aff'd in part, vacated in part*, 969 F.2d 1326 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council

be repatriated without a proper INS asylum screening.[57] The complaint also attacked INS procedure as violative of Fifth Amendment[58] due process protections, the Administrative Procedures Act ("APA"), and various international treaties and bilateral agreements.[59] On April 7, 1992, the district court issued a preliminary injunction prohibiting the repatriation of all Haitians who had not had access to legal counsel during their second interview.[60] The United States Court of Appeals for the Second Circuit affirmed and modified the preliminary injunction in June of 1992.[61] Once again the government appealed,[62] and on June 21, 1993 the United States Supreme Court reversed the Court of Appeals' ruling in *Sale v. Haitian Centers Council (Sale I)*.[63] Although, the Kennebunkport Or-

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(Sale I), 113 S. Ct. 2549 (1993). The HIV-infected Haitians are only one part of the plaintiff class which is composed of all "screened in" Haitians at Guantanamo Bay, whether HIV-positive or not.

57. *Id.* In this part of the complaint, the plaintiffs directly challenged the constitutionality of the Kennebunkport Order which ordered the "blanket" repatriation (without prior INS asylum screening) of any Haitians interdicted at sea. *See supra* note 6 and accompanying text.

58. The Fifth Amendment to the United States Constitution reads in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The plaintiffs never argued that they had a right to enter the United States. Their contention was that as "screened in" refugees they have a right not to be deprived of their "liberty" under the Due Process Clause. They further claimed that this right of liberty "includes the freedom not to be sent back to conditions of persecution or death without a fair adjudication that they are not bona fide asylees." Haitian Ctrs. Council v. McNary, 969 F.2d at 1341.

59. Haitian Ctrs. Council v. McNary, 969 F.2d at 1332.

60. *Id.*

61. *Id.* at 1347. The Court of Appeals affirmed the district court's preliminary injunction, but vacated the parts which required the government "to allow the 'screened in' Haitian[s] . . . to have access to attorneys at Guantanamo Bay." *Id.* However, the Court did uphold the portions of the order which enjoined any *further* processing at Guantanamo Bay of those Haitians who had been "screened in." *Id.* The Court of Appeals also upheld the lower court's order in respect to prohibiting the repatriation of "screened in" Haitians, whether or not at Guantanamo Bay, who had not been allowed access to an attorney, noting that "aliens are three times more likely to receive asylum in an exclusion or deportation hearing, and twice as likely to success in an affirmative asylum claim when represented by counsel." *Id.* at 1346-47. As to whether or not the "screened in" Haitians had due process rights, the Court of Appeals made its feelings clear when it stated that "[u]pon being 'screened in,' the Haitian aliens' fundamental legal and human rights status is changed vis-a-vis the United States government [and] [o]nce 'screened in' . . . the plaintiffs are entitled to due process . . . ." *Id.* at 1345.

62. The United States Supreme Court granted certiorari on October 5, 1992. McNary v. Haitian Ctrs. Council, 113 S. Ct. 52 (1992). On March 2, 1993, the Court heard oral arguments from both Professor Koh and the Justice Department. Kaylin, *supra* note 27, at CN6.

63. 113 S. Ct. 2549 (1993). In reversing the Court of Appeals' decision, the Supreme Court held that neither section 243(h)(1) of the Immigration and Nationality Act of 1952 ("INA"), nor Article 33 of the United Nations Convention Relating to the Status of Refugees limited the power of the President "to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas." *Id.* at 2550; *see supra* note 8 and accompanying text. The Court specifically noted that the text and organization of the INA established that Section

der's forced repatriation of Haitians was upheld by the Supreme Court in *Sale I*, this decision did not represent the final legal battle between the HIV-infected Haitians at Guantanamo Bay and the United States government.

The sheer complexity of the Haitian litigation had previously resulted in a second legal confrontation which split off from the original *Sale* case.[64] On March 8, 1993, the Haitian Centers Council, led by Professor Koh, specifically challenged the government's policy of detaining HIV-infected Haitians at Guantanamo Bay without sufficiently providing for their health needs.[65] Koh claimed that such detention without provisions for adequate medical care was a direct violation of the infected Haitians' Fifth Amendment due process rights.[66] Koh's amended complaint also asserted several other causes of action, including violations of Haitian Service Organizations' First Amendment right to provide legal services to its clients held at Guantanamo Bay and "arbitrary and capricious agency action not in accordance with the law."[67]

In an often heated opinion, Judge Sterling Johnson, Jr., ruled on behalf of the plaintiffs and ordered the immediate release of all of the Haitians

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243(h)(1), which states: "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 by threatened in such country . . ." applies only to domestic procedure and not to INS procedure on board a Coast Guard vessel in international waters. *Id.* at 2558-59. In regard to Article 33, the Court held that the article's text providing that: "[N]o . . . State shall expel or return ('refouler') a refugee . . . to . . . territories where his life or freedom would be threatened . . ." applies only "to aliens physically present in the host country." *Id.* at 2563. It is interesting to note that whereas both lower courts hearing the *Sale* case had discussed and considered the "human" aspects of the case, the Supreme Court placed more significance on issues such as legislative history and the interpretation of certain terms, i.e. "refouler." This distinction is exemplified by the final words of the majority opinion: "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy." *Id.* at 2567 (quoting Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

For additional discussion and news analysis of the *Sale I* decision see Joan Biskupic, *Court, 8-1, Upholds Return of Haitians*, WASH. POST, June 22, 1993, at A1.

64. *See* Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. 1028, 1033-34 (E.D.N.Y. 1993) (discussing the plaintiff's application for and the court's granting of a bifurcated trial); Kaylin *supra* note 27, at CN6.

65. Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. at 1034; *see* Kaylin, *supra* note 27, at CN6.

66. Haitian Ctrs. Council v. Sale (Sale II, interim order), 817 F.Supp. 336 (E.D.N.Y. 1993); *see* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245 (1983) ("If, of course, the governmental entity can obtain the medical care needed by a detainee only by paying for it, then it must pay."); Liscio v. Warren, 901 F.2d 274, 276 (2d. Cir. 1990) ("[D]eliberate indifference to serious medical needs . . . constitutes a violation of the due process clause of the fourteenth amendment . . . .") (citation omitted).

67. Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. at 1034.

who still remained at Guantanamo Bay.[68] Judge Johnson specifically held, *inter alia*, that: 1) Denying Haitian Services Organizations immediate access to their clients at Guantanamo Bay was a violation of the First Amendment;[69] and, 2) the "arbitrary and indefinite detention," and the

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68. *Id.* at 1050. During the bench trial, the district court heard testimony from the Government's own medical experts who stated that HIV-infected Haitians with a T4 cell count of 200 or below and infected Haitians with a T4 cell count above 200, but with a T4 cell percentage of 13% or below, were not receiving adequate medical care at Guantanamo Bay. Haitian Ctrs. Council v. Sale (Sale II, interim order), 817 F. Supp. 336 (E.D.N.Y. 1993). The defendant Government even conceded that the medical facilities available at Guantanamo Bay were not sufficient to provide the necessary care for this class of Haitians and that they should be transferred to the United States in order to receive such care. *Id. See* Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. at 1044 (citing a lack of medical specialists "that are necessary to diagnose and treat those with AIDS").

The time-sensitive circumstances surrounding the case persuaded the district court to quickly enter a final order regarding the due process portion of the case. Haitian Ctrs. Council v. Sale (Sale II, interim order), 817 F.Supp. at 336 (stating that "[a] district court may exercise its inherent power to protect the parties appearing before it, to preserve the integrity of an action, to maintain its ability to render final judgement and to ensure the administration of justice").

Fearing additional loss of life or diminution of the plaintiff class, the district court ordered a preliminary injunction requiring the government to either provide the necessary level of medical care at Guantanamo Bay or to medically evacuate the plaintiff class members (those with the medical conditions described above) to a place (other than Haiti) where they would receive such care. *Id.*

Within days of the final order, thirty-six of the detainees fully infected with AIDS were flown to the United States for treatment. *See* Lisa Ocker, *Haitians Celebrate Happy Reunion in Fla.*, ATLANTA CONST., Apr. 6, 1993, at A2; *U.S. to Treat Haitians Infected with HIV*, L.A. TIMES, Apr. 2, 1993, at A4. For more information on the importance of T4 cells see *supra* text and sources accompanying note 21. For the immediate news reaction and analysis following the *Sale II* decision see Lynne Duke, *U.S. Ordered to Free HIV-Infected Haitians*, WASH. POST, June 9, 1993, at A1; Mike Clary, *Judge Orders All Haitians Freed From U.S. Camp*, L.A. TIMES, June 9, 1993, at A1; Desda Moss & Maria Puente, *Freedom No Guarantee for Haitians*, USA TODAY, June 10, 1993, at A2.

69. Although the district court agreed that the government had the power to restrict nonpublic speech and association, it noted that such "actions must constitute a reasonable means of achieving a legitimate government interest." Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. at 1040. However, the district court felt that the government was unable to establish such a "legitimate interest" when it had opened the camp to some people, such as clergy, politicians, and the press, but had closed the camp to others, i.e. the Haitian detainees' attorneys, based on the content of their desired speech. *Id.* (citing Abdul Wali v. Coughlin 754 F.2d 1015, 1031 (2d Cir. 1985) (prison officials' decision to restrict inmate access to report on prison conditions exceeded allowable discretion because his decision to contain the report was based entirely on his distaste for its content)). This led the court to state that "[t]he legal rights and options of Haitian detainees . . . [were] discussed on Guantanamo, but only from a viewpoint of which the Government approve[d]." *Id.* Finally, the court decided that since it had clearly established a violation of the plaintiff attorneys' First Amendment rights, there was no need to consider the issue as to whether the Haitians at Guantanamo specifically had First Amendment rights. *Id.* at 1041 (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) ("'Prison walls do not form a barrier' . . . bar[ring] free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'") (citations omitted)).

medical care and camp conditions to which the plaintiffs were subjected denied the plaintiffs due process of law.[70]

Although all of the Haitians once held at Guantanamo Bay have now entered the United States, situations like that in Guantanamo Bay could easily recur. As much as the *Sale II* decision granted freedom to the Haitian refugees, it fails to specifically address the propriety and reasonableness of the HIV-exclusion policy which initially held them in Guantanamo Bay.[71] Under a detailed examination, taking into account the relevant scientific and financial information, the weaknesses of this policy are clearly revealed.

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70. The district court made it clear that it saw no rational reason to believe that the Haitian detainees did not have Fifth Amendment due process rights when it stated:

> These Haitians are at a military base solely because defendants [the Government] chose to take them there. . . . If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants [sic] would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin. . . . [T]he Haitian detainees have been confined for nearly two years. As the Haitians' ties to the United States have grown, so have their due process rights.

Id. at 1042 (citation omitted).

After affirming the rights of the Haitian detainees the court discussed how due process was violated. As to adequate medical care, the court noted that "[a]s persons in coercive, nonpunitive, and indefinite detention, the Haitian detainees on Guantanamo are constitutionally entitled to medically adequate conditions of confinement." *Id.* at 1043 (citing Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983) (constitutional due process requires the government to provide adequate medical care to those in detention)); *see* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (nonpunitive detainees' due process rights are greater than those of a convicted prisoner). This led the court to hold that at a bare "minimum, due process forbids governmental conduct that is deliberately indifferent to the medical needs of non-convicted detainees." Haitian Ctrs. Council v. Sale (Sale II), 823 F. Supp. at 1044 (citations omitted). Since the government had ignored the recommendations of its own military doctors to medically evacuate certain Haitians, the court found "deliberate indifference" to the Haitian's medical needs to exist and thus due process to be violated. *Id.*

In regards to the indefinite detention suffered by the Haitians at Guantanamo, the court stated:

> [T]he detained Haitians are neither criminals nor national security risks. Some are pregnant mothers and others are children. Simply put, they are merely the unfortunate victims of a fatal disease [and] [t]he Government has failed to demonstrate . . . that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers. . . . The Haitian camp at Guantanamo is the only known refugee camp in the world composed entirely of HIV refugees. The Haitians' plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court.

Id. at 1045 (citations omitted).

71. Although the Clinton administration may still appeal the *Sale II* decision, it did not interfere with the district court's order to close the Guantanamo Camp. *See* Dobbin, *supra* note 44, at A1. As of June 15, 1993, twenty-three of the 136 Haitians remaining at Guantanamo Bay had been brought to the United States pursuant to the *Sale II* decision. *See* Sharp, *infra* note 89, at 3A. It was estimated that the remaining 113 would arrive over the following two week period. *Id.*

IV. The Problems with the Current United States Immigration Policy Regarding HIV

As the debate over exclusion of HIV-infected immigrants has evolved, two main arguments have been adopted by supporters of the ban. The first argument is that allowing infected aliens into the United States will pose a dangerous health risk to Americans, since the likelihood of infection will increase. Second, ban proponents argue that admission of infected immigrants would create an unacceptable drain on an already overburdened health care system. Although initially these arguments may seem supportable, they are, in fact, responses based on fear and ignorance rather than scientific knowledge.

It seems that the issue of greatest concern to the general public is the communicability of HIV. Based on the quick and well-publicized spread of the virus, such concern is understandable. However, the truth of the matter is that HIV is relatively difficult to contract and can be avoided.[72]

HIV is generally transmitted through one of four ways. They are: (1) sexual contact involving the exchange of semen, vaginal fluids, or blood; (2) the sharing of HIV-contaminated needles between intravenous drug users; (3) transfusions of infected blood or blood products; and, (4) the passing of the virus by an infected mother to her unborn child.[73]

Research strongly indicates that the transmission of HIV requires direct contact with infected blood or blood-tainted secretions. Casual contact has not been found responsible for the spread of HIV.[74] Long-term studies of more than 400 families of AIDS victims support these findings.[75] Such information led AIDS researcher Alan Lifson to write:

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72. STINE, *supra* note 21, at 157.

73. *Id.* at 162; *see* Golumbic, *supra* note 21, at 171.

74. STINE, *supra* note 21, at 156, 161; *see* John Langone, *AIDS: Special Report, in* AIDS 9 (Robert Emmet Long ed., 1987); Paul Carrick, *AIDS: Ethical, Legal, and Public Policy Implications, in* THE MEANING OF AIDS 164 (Eric T. Juengst & Barbara A. Koenig eds., 1989); EVE K. NICHOLS, MOBILIZING AGAINST AIDS 26, 41, 46-47, 187 (rev. ed. 1989); David Watts, *Questions From the Public, in* AIDS: PRINCIPLES, PRACTICES, & POLITICS 554 (Inge B. Corless & Mary Pittman-Lindeman eds., 1989); 139 CONG. REC. S1712 (daily ed. Feb. 17, 1993) (reprint of a news release from the Department of Health and Human Services dated January 25, 1991).

75. Nichols, *supra* note 74, at 46; *see* William L. Heyward & James W. Curran, *The Epidemiology of AIDS in the U.S.*, SCI. AM., Oct. 1988, at 79 (stating that after "tens of thousands of days of household contact with infected family members" not one out of 400 healthy family members was infected). In related studies, siblings of children with AIDS have not acquired the virus even after sharing the same bed and toothbrush with an infected child. Nichols, *supra* note 74, at 46-47. Scientific investigation indicates that personal interactions involving handshaking, sneezing, sharing eating utensils, or casual kissing will not result in the transmission of HIV. *Id.*; *see* STINE *supra* note 21, at 157, 160; Sara Henley, *Liz Taylor Joins Call for End to U.S. AIDS Travel Bar*, Reuters, July 23, 1992.

If HIV is not transmitted between persons in households (where exposures are repeated and may be prolonged), it would be even less likely to occur in the workplace or school. No known risk of transmission to co-workers, clients, or consumers exists from HIV-infected workers in such settings as offices, schools, and factories.[76]

A. *Negligible Threat to Public Health*

Prohibition of HIV-infected aliens will do little to curb the spread of the virus in the United States for two reasons. First, as established above, HIV is not easily communicable and cannot be spread through casual contact.[77] Since HIV is mainly contracted through unprotected sex or the use of contaminated hypodermics, the threat of infection is the same[78] to United States citizens whether aliens with HIV are allowed to enter the United States or not.[79] In other words, an American resident risks infection by unsafe sexual behavior or indiscriminate hypodermic sharing with any person, regardless of their origin or nationality. As the Public Health Service printed in January 1991: "The risk of . . . HIV infection comes not from the nationality of the infected person, but from the specific behaviors that are practiced."[80] Thus, the current policy punishes HIV-infected refugees for the poor judgment of certain Americans.

Second, the United States is more of an exporter of HIV than an importer.[81] This is due to the nation's current AIDS surplus in relation to the rest of the world.[82] In the United States alone, four out of every 1000 individuals are infected with AIDS.[83] The figure is one out of every 1000 in the rest of the world combined.[84] Thus, it is naive for ban supporters to feel threatened by the admission of a few hundred HIV-infected immigrants each year when they already live in a country with over 1.3 million HIV-positive residents.

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76. Alan R. Lifson, *Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?*, 259 J.A.M.A. 1353 (1988), *reprinted in* NICHOLS, *supra* note 74, at 47.

77. *See* sources cited *supra* note 74.

78. Although theoretically the number of potential HIV-positive "transmitters" will likely increase, the methods of transmission (i.e. unprotected sex, sharing needles, etc.) will remain the same.

79. *See* 139 CONG. REC. H1209 (daily ed. Mar. 11, 1993) (statement of Rep. Waxman).

80. Medical Examination of Aliens, 56 Fed. Reg. 2484-85 (1991) (to be codified at 42 C.F.R. § 34) (proposed Jan. 23, 1991); *see* STINE, *supra* note 21, at 156 ("With regard to HIV infection, it is not who you are but your behavior that counts.").

81. *See* Laurie Garrett, *Health Threat or Scapegoat? Travelers With HIV are Caught in Political Storm*, NEWSDAY, Aug. 4, 1991, at 51.

82. STINE, *supra* note 21, at 281 ("The United States now accounts for about 40% of reported AIDS cases worldwide.").

83. *Ban Against Foreigners Who Have AIDS is Wrong*, USA TODAY, Aug. 2, 1991, at A10.

84. *Id.*

B. *Unlikely Effect on United States Health Care Costs*

A second major concern regarding HIV, and one often cited by members of Congress and other supporters of the current policy, is that opening the immigration door to HIV-infected aliens would create an unacceptable burden on the United States' already overwhelmed health care system.[85] However, the size of this potential "burden" is debatable. While some have predicted that the number of HIV-infected immigrants entering the country would be between 600 and 800 people per year,[86] State Department HIV testing data have reported fewer than 500 people per year.[87] In addition, current statistics indicate that the cost of medical treatment for persons with AIDS from the time of diagnosis until death is approximately $103,000 per patient.[88] Therefore, by using the 500 per year figure provided by the State Department, the total annual cost to the United States health care system would be approximated at $51.5 million.[89]

Initially such a figure may seem to be a substantial sum of money. However, it pales in comparison to the amount already spent on immigrants allowed into the United States with non-communicable diseases. Canadian researchers have estimated that 1.6 percent of all immigrants will suffer from heart disease alone.[90] Using the total 1992 immigration

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85. 139 CONG. REC. H1204 (daily ed. Mar 11, 1993) (statement of Rep. Solomon); *Id.* at H1205 (statement of Rep. Moorhead); *Id.* at H1208 (statement of Rep. Bilirakis); *Id.* at H1208-09 (statement of Rep. Waxman); *Id.* at H1209 (statement of Rep. Roukema); 139 CONG. REC. S1764 (daily ed. Feb. 18, 1993) (statement of Sen. Nickles); *Id.* at S1765 (statement of Sen. Hatch); *Id.* at S1766 (statement of Sen. Mack); *Id.* at S1766 (statement of Sen. Kohl).

86. 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 A1.

87. *Id.* State Department testing results show that approximately 0.1 percent of all adult immigrants tested between 1988 and 1990 were infected with HIV. Such a percentage results in under 500 infected people per year. *Id.*

The State Department's approximation is likely to be a little high. The Public Health Service recorded a total of only 440 immigrants being turned away in 1992 due to infection with a communicable disease. Telephone Interview with Manoochehr Nozary, Health Care Statistics Division, Public Health Service (May 18, 1993). The Public Health Service's statistical records do not, however, differentiate between communicable diseases. *Id.* The Congressional Research Service ("CRS") also came up with a lower number. They approximate that between 200 to 300 HIV-infected persons seek immigration to the United States each year. 139 CONG. REC. S1766 (daily ed. Feb. 18, 1993) (statement of Sen. Kohl).

88. *AIDS Spending*, 24 NAT'L J. 1795 (1992).

89. This estimate assumes that none of these individuals would have any health insurance or family to assist with the costs of treatment. Moreover, the $51.5 million cost of providing medical treatment would have still been almost $7 million less than the $58.4 million spent to operate the Guantanamo Bay detention camp. *See* Deborah Sharp, *Out of Confinement, into USA*, USA TODAY, June 15, 1993, at 3A.

90. Gladwell, *supra* note 86, at A1. Although the Canadian study specifically dealt with immigration to Canada, its figures have been used as the conceptual foundation for parts of

figure of 810,635[91] along with the Canadian estimate, it can be approximated that 12,970 of those immigrating to the United States in 1992 will have coronary heart disease within ten years. With the average cost of coronary heart disease treatment being $17,618 per person,[92] a total health care cost of $228.5 million results. Furthermore, this figure approximates the cost of coronary heart disease only. When the potential costs for other health problems such as cancer, diabetes, or stroke are taken into consideration, the increasing health costs argument becomes even less persuasive.[93]

V. A Need for Change in Current United States Immigration Policy

Although the appellate process kept the HIV-positive Haitians confined to Guantanamo Bay, it was an immigration policy based on fear and discrimination that was the basis for their detention. In order to prevent similar situations in the future, the United States' immigration policy regarding HIV must be changed. Specifically, HIV should be dropped from the INS list of excludable diseases.

There is substantial evidence to support such a change. Distinguished from diseases such as active tuberculosis, HIV simply cannot be spread through casual contact.[94] Furthermore, the fear of increased health care costs resulting from an influx of AIDS cases cannot be rationalized in light of the burden already experienced due to immigrants with non-ex-

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this argument due to the lack of similar statistical information pertaining to the United States.

91. Telephone Interview with Caroline Johnson, Statistics Staff, Immigration and Naturalization Service (May 18, 1993).

92. Gladwell, *supra* note 86, at A1.

93. In theory, the cost of health care for immigrants should not even be an issue, since the Attorney General has the power to deport any alien who she believes to be a potential financial burden to the United States. Title 8, United States Code, Section 1182(a)(15) states:

> [T]he following class[] of aliens shall be ineligible to receive [a] visa[] and shall be excluded from admission into the United States: . . . (15) Aliens 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 admission, are likely at any time to become [a] public charge[]

8 U.S.C. § 1182(a)(15) (1988). *See* 139 Cong. Rec. S17611-04 (daily ed. Feb. 18, 1993) (statement of Sen. Feinstein) ("But let us be clear. Cost is not a factor in this debate. The law gives the Attorney General the authority to deport any immigrant . . . who becomes a public charge, and this authority exists irrespective of the immigrant's HIV status."). Therefore, it is possible to exclude HIV-positive immigrants from admission to the United States when they cannot pay for their own medical treatment, while at the same time granting admission to those infected immigrants who can afford such costs. It seems that Congress has chosen to overlook this option (i.e. enforcing an already existing law) and has instead continued asserting the perceived health threat and more general health cost arguments with regard to such immigrants.

94. *See* discussion *supra* part IV.A.

clusive diseases.[95] Such findings have led most medical and public health organizations to oppose HIV-based restrictions on travelers and immigrants.[96] International groups such as the World Health Organization have also been firm in the belief that screening international travelers is discriminatory and ineffective in the prevention of AIDS.[97] However, it seems that the support of such groups alone has been unable to force a change in the United States' policies. In order for future HIV-positive immigrants to see their dreams of freedom materialize, the government will have to alter its adversarial position. With the inauguration of President Clinton on January 20, 1993, many believed that this change would occur.

During Clinton's campaign for the Presidency, he openly disagreed with the Bush Administration's policy of turning back Haitians without a proper INS screening.[98] He also stated that Haitian refugees should be allowed to receive the required asylum processing in the United States.[99] There were further indications that President Clinton would lift the ban on HIV-positive immigrants through an executive order.[100] Such an action could have effectively put an end to Guantanamo Bay and other similar situations. However, Congressional support for an HIV ban, and its recent passage into law[101] have shown that the personal feelings of a President do not necessarily translate into a change in national policy.

VI. CONCLUSION

As the world's most powerful nation, the United States is often viewed as both a leader and mentor in times of crisis. Yet the contradictory actions of the Government in response to HIV have been anything but the clear and forward-thinking direction expected from a leader during such times. On one hand, the United States spends more money than any

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95. *See* discussion *supra* part IV.B.

96. Garrett, *supra* note 81, at 51. A partial list of these groups includes the American Bar Association, the American Red Cross, the United States Catholic Conference, the American Civil Liberties Union, the American Jewish Congress, the American Public Health Association, the National League of Cities, and the Association of Counties. *Id.*

97. Fernando Chang-Muy, *HIV/AIDS and International Travel: International Organizations, Regional Governments, and the United States Respond*, 23 N.Y.U.J. INT'L L. & POL. 1047 (1991).

98. Al Kamen, *Haitian Exodus Could Pose Early Clinton Test*, WASH. POST, Nov. 12, 1992, at A1.

99. David Evans, *U.S. Waives Ban, Admits Haitians With AIDS Virus*, CHI. TRIB., Nov. 19, 1992, at A8.

100. 139 CONG. REC. H1203 (daily ed. Mar. 11, 1993) (statement of Rep. Bliley); Jackson, *supra* note 42, at A5. Many expected President Clinton to change the current policy within his first 100 days in office. *See* Jackson, *supra* note 42, at A5.

101. *See supra* text accompanying notes 46-50.

other country on HIV/AIDS research and education.[102] Yet its restrictive immigration policies regarding HIV have placed it in the exclusive company of only two other nations: Iraq and South Africa.[103]

The Haitian situation in Guantanamo Bay has refueled the debate over the value of a policy that has drawn negative scrutiny since its inception. As more is learned about HIV, the ineffectiveness of the current United States policy continues to be magnified. Each year there are arguments for removing HIV from the list of exclusionary diseases. However, it seems that the politically popular, yet scientifically unfounded, arguments continue to win out. Until the HIV-exclusion is removed, the United States' immigration policy regarding HIV-positive immigrants will remain an anomaly in a nation known for liberty and freedom.

Jason W. Konvicka

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102. The total 1993 budget for HIV/AIDS research and education is roughly $5.2 billion. For 1994 President Clinton has requested that over $6.1 billion be allocated for HIV/AIDS related research and education. Telephone Interview with Michon Kretschmarer, Budget Branch, Division of PHS Budget, Public Health Service (July 9, 1993).

103. 139 CONG. REC. H1204 (daily ed. Mar. 11, 1993) (statement of Rep. Waxman).