THE INA ASYLUM APPLICATION PROCEDURE FOR POLITICAL REFUGEES WITH HIV

INTRODUCTION

The Immigration Act of 1990[1] was intended to open America's "front door"[2] to legal immigration, yet many of those who have since migrated to the United States with this policy in mind have found themselves left helpless at its doorstep. While the underlying objectives of United States immigration law appear consistent with the country's world-wide humanitarian image, executive discretionary policies have diminished their effectiveness, especially with respect to political asylum for refugees. The reformed provisions of the Refugee Act of 1980[3] and the basic immigration standards created by the Immigration and Nationality Act of 1952 (INA)[4] regulate the flow of aliens seeking asylum into this country. In accordance with these provisions, an alien who satisfies the statutory classification of a refugee is eligible for asylum within the United States. While this reasoning seems logical on its face, the Supreme Court has nonetheless ruled in support of an executive policy that appears inconsistent with immigration law.[5]

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1. The Immigration Act of 1990, Pub. L. No. 101-649 (1990).

2. STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING S. 358, 26 Weekly Comp. Pres. Doc. 1946 (Dec. 3, 1990). President Bush recognized the contribution of reformed immigration policies in the Immigration Act of 1990, which would permit a greater number of legal immigrants into the United States. This reformed policy was considered a successful result of the reform actions taken by former President Ronald Reagan 10 years earlier, when he identified illegal immigration as a serious problem and "detrimental to the interests of the United States," Proclamation No. 4865, 46 Fed.Reg. 48,107 (1981).

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

4. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (Codified as amended in 8 U.S.C.). The provisions for the admission of refugees from abroad are contained in 8 U.S.C. §§ 1153, 1157, 1158, 1182(a) (1990).

5. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549 (1993) (reversing 969 F.2d 1350 (2d Cir. 1992)).

In *Sale v. Haitian Centers Council, Inc.*,[6] the Supreme Court, in an eight to one vote, upheld a presidential order which directed the Coast Guard to intercept Haitians fleeing their politically overthrown nation for the United States. To arrive at this decision, the Court addressed two widely-debated issues: The role of the Attorney General in the execution of presidential orders on matters of immigration; and the significance of the 1980 Refugee Act in light of United States treaty obligations to refugees. The majority held that Congress did not intend for the INA to extend to refugees beyond United States borders and, consistent with this limitation, the discretionary authority of the Attorney General is not invoked under a presidential policy to interdict aliens outside territorial waters. While this decision will weigh heavily on refugees genuinely seeking asylum in this country, there remain legitimate concerns that the underlying purpose to this legal enigma is to protect our borders from an even greater evil — AIDS.

A long-standing policy for immigrants seeking admission into the United States, yet one that has regained a heightened significance with the emergence of Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV), is the requirement that an alien be free of any communicable disease.[7] This policy was particularly effective in preventing the immigration of aliens to the United States who carried such dangerous diseases as Tuberculosis and Trachoma. Fundamental to immigration policies, this statutory provision relieves the American health care system and the American population from infectious diseases originating outside the country.[8] The United States Public Health Service (PHS), the branch of the Department of Health and Human Services that maintains immigration health standards, recommended in 1986 that AIDS be added to this exclusionary list and, before long, aliens testing positive for HIV were barred from entering the United States.

Codifying this new health policy into law was controversial among international health and service organizations. And, there still remains a serious concern over the legal effect of this new provision on refugees. The internationally recognized qualification

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6. *Id.*

7. 8 U.S.C. § 1186(a)(1)(A)(i) (1990). Among the list of excludable aliens is one "who is determined ... to have a communicable disease of public health significance."

8. Medical Examination of Aliens, 52 Fed. Reg. 32,540-03 (1987)(to be codified at 42 C.F.R. § 34.2b).

for refugee status is that an alien demonstrate a "well-founded fear of persecution."[9] Once classified as a refugee, an alien is further required under the INA to meet the basic immigration standards,[10] including the communicable disease provision. Thus, an applicant for political asylum can be refused such protection on the grounds of HIV infection. Unique to any other situation where an HIV infected alien might seek entrance into the United States, an alien who has been labelled a refugee may obtain asylum upon a discretionary waiver by the Attorney General.[11] As the delicacy of the AIDS and HIV phenomenon might indicate, the process involved in obtaining such a waiver is lengthy and, since AIDS and HIV were added to the list of dangerous contagious diseases, the waiver has only been approved in a few cases.[12]

This procedure is among the principal concerns of Haitian refugees who, at the time of this writing, are being forceably detained at the United States Naval Base at Guantanamo Bay, Cuba.[13] Thousands of Haitians, who fled their homeland by sea following the September 1991 military coup that overthrew their democratically elected President, were repatriated back to Haiti by the United States Coast Guard under Executive Order No. 12807 by former President George Bush.[14] When the United States Court of Appeals for the Second Circuit subsequently reversed an Eleventh Circuit ruling upholding the Executive Order,[15] the Coast Guard continued interdicting Haitians at sea and, instead of returning them to Haiti, brought them to Guantanamo. During their detention, several Haitians who were provided medical assistance were also found to be HIV-infected and later denied the opportunity to enter the United States and to

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9. UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, January 31, 1967, 19 U.S.T. 6223, 6261.

10. 8 U.S.C. § 1157(c)(1) (1990).

11. *Id.* § 1157(c)(3).

12. *See* Memorandum from the Lawyer's Committee for Urban Affairs, San Francisco, CA, June 8, 1992.

13. Guantanamo Bay U.S. Naval Station occupies property leased to the United States by Cuba since 1903. This area was opened to Haitian refugees as a result of *Haitian Refugee Ctr., Inc. v. Baker*, 789 F.Supp. 1552 (S.D. Fla. 1991), which issued a temporary restraining order against the United States Coast Guard from repatriating Haitians following interdiction. To accommodate the increasing numbers of interdictees after the injunction, the government opened Guantanamo as a temporary holding area instead of immediately paroling so many aliens directly into the U.S.

14. Exec. Order No. 12,807, 57 Fed.Reg. 23,133 (1992) [hereinafter *May 24 Order*].

15. Haitian Ctrs. Council, Inc. v. McNarry, 969 F.2d 1350 (2d Cir. 1992).

apply for asylum. Consequently, these Haitians remain in "legal limbo."[16]

Before the infected Haitians detained at Guantanamo can begin to consider a medical waiver, they must first overcome the statutory obstacle of submitting an asylum application. Since the medical exclusion for HIV is not statutorily executed until the Immigration and Naturalization Service (INS) reviews a refugee's asylum application, a refugee's physical well-being is conceivably of no significance to his eligibility to apply. (In the normal course of events, an INS agent would not know of an applicant's medical history until that agent actually reviews the asylum application.) Yet, to apply for asylum, an alien must be within the territorial limits of the United States or at its border. This is where the Haitian refugees' claim seemingly falls short. Since Guantanamo is outside the United States, the protection of the INA arguably does not reach those Haitian detainees seeking asylum.

This article assesses the Supreme Court's legal rationale for denying Haitian detainees, specifically those infected with HIV, the opportunity to apply for asylum when their confinement outside the United States was the result of extraterritorial immigration activities by the United States Coast Guard. Recent changes in American immigration policies and the political impact of international treaties and agreements concerning refugees have complicated the plain meaning of INA application procedures. Interpreting these statutes, in conjunction with their underlying Congressional purpose to conform to a universal concern for the protection of the politically afflicted, is necessary to determine *when* refugee status is conferred upon an alien and *what* privileges accompany such status. Although the Supreme Court, in *Sale*, provided the legal community with a more precise understanding of the Attorney General's role in admitting refugees, the politically persecuted fleeing their countries still await a sound explanation why the United States has unexpectedly tightened its immigration standard by limiting the number and type of refugees it will admit.

I. STATUTORY BASIS FOR THE COMMUNICABLE DISEASE EXCLUSION

Regulating immigration to the American melting pot is a constitutionaly formulated power entrusted to Congress which

16. Lynne Duke, *Haitian Refugees With HIV Remain In Limbo As Asylum Claims Stall*, Wash. Post, Aug. 7, 1992, at A3.

specifically mandates the establishment of a "uniform Rule of Naturalization."[17] The INA, accordingly, was created to insure the evenhanded treatment of aliens coming to the United States. This regulatory scheme was significantly amended by the Refugee Act of 1980 to conform with international treaties on the treatment of refugees. It has since been amended by the Immigration Act of 1990 to reflect a stronger policy against illegal immigration and to provide more information to legal immigrants regarding benefits offered by the U.S. government.[18] An important focus of the current legislation is the admissibility of aliens with dangerous, communicable diseases.

The INA initially provided under section 212(a)(6)[19] that any alien afflicted with a dangerous contagious disease was ineligible for admission into the United States. This provision reflected long-standing policies against immigrants bringing loathsome diseases into the country.[20] The most dangerous disease cited, and the one which has generated the most litigation, is Tuberculosis (TB). Since 1952, there have been seemingly endless cases decided against TB-inflicted aliens seeking admission into this country.[21] By 1987, the PHS had identified and incorporated within the INA six other dangerous communicable diseases which would bar immigrants from entering the country.[22] The 1980s also brought about the widespread concern over AIDS and the virus associated with its development, HIV. The threat of these new viruses was so strong that in 1987 Congress added AIDS and HIV to the list

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17. U.S. CONST. art. I, § 8, cl. 4.

18. STATEMENT BY PRESIDENT BUSH UPON SIGNING S. 358, 26 Weekly Comp. Pres. Doc. 1946 (Dec. 3, 1990).

19. 8 U.S.C. § 1182(a)(6) (1952).

20. *See* Zartarian v. Billings, 204 U.S. 170 (1907). A naturalized U.S. citizen sought admission for his daughter into the United States though she was diagnosed with trachoma. He claimed she was not considered an alien because of his own naturalized status. The Supreme Court held that Congress made no specific provisions permitting alien children to land within the U.S. when afflicted with a dangerous contagious disease and are therefore barred from entry.

21. *See, e.g.* United States ex rel. Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960). A Peruvian immigrant, while in Peru, applied for immigration to the U.S., claiming that she had no diseases. Upon entry to the U.S., she was found to have TB and was denied further processing. Her subsequent writ of habeas corpus was dismissed because "in view of the contagious nature of TB congressional authority allows exclusion of such aliens."

22. *See* Larry O. Gostin, *Screening Immigrants And International Travelers For The Human Immunodeficiency Virus,* 322 New Eng. J. Med., 1743, 1743 (1990). The dangerous diseases listed in section 212(a) are divided into two categories: sexually transmitted - chancroid, gonorrhea, granulomanguinale, lymphogranuloma venereum and infectious syphilis; and non-venereal - infectious leprosy and active tuberculosis.

of dangerous diseases.[23] The rationale for the change was "to prevent the importation and related further spread of HIV into the United States [since] ... any person infected with HIV is assumed to be capable of transmitting the virus."[24]

A. The exclusion as it applies to refugees

The INA generally applies to the admission and treatment of aliens, which includes any person that is not a citizen of the United States.[25] A refugee, however, is an alien who has a "well founded fear of persecution"[26] in his homeland and who is entitled to discretionary consideration for entry into the United States. The amended definition of a refugee was added to the INA by the Refugee Act of 1980 in an effort to comply with the United States' ratification of the United Nations Protocol regarding the treatment and classification of refugees.[27] As long as an asylum seeker is able to demonstrate a fear of returning to the imminent persecution in his homeland, then the nation parties to this treaty must classify such person as a refugee. Likewise, when the fear of persecution no longer exists, the asylum seeker is not entitled to this classification.[28] But, once an alien is conferred refugee status based on the urgency of his political plight, he obtains an advantage for entry into the United States, since the INA allows a waiver of nearly all exclusionary provisions that would otherwise be imposed upon an alien.[29]

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23. 133 Cong. Rec. S6943-01 (1987). Senator Helms of North Carolina introduced the proposed INA amendment: "Do not think I am alone on this Mr. President ... amend the Immigration and Nationality Act to make infection with human immunodeficiency virus a ground for exclusion for entry into the United States." *See also* Medical Examination of Aliens, 52 Fed.Reg. 32,541 (1987).

24. Medical Examination of Aliens, 52 Fed.Reg. 32,540-03 (1987).

25. 8 U.S.C. § 1101(a)(3) (1990).

26. *Id.* § 1101(a)(42). "The term refugee means any person who is outside any country of such person's nationality ... and who is unwilling or unable to return ... because of persecution or a well-founded fear of persecution."

27. UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, Jan. 31, 1967, 19 U.S.T. 6223, 6261. "The term refugee refers to any person who...owing to well founded fears of persecution...is unwilling to avail himself of the protection of that country."

28. 8 U.S.C. § 1158(b) (1990); *See also* Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991). This court held that members of solidarity were no longer being persecuted by Polish authorities and the Immigration Board could take notice of such facts in determining eligibility for granting asylum.

29. *Id.* § 1157(c)(3).

The authority of the Attorney General to grant this status to an asylum-seeker is set out in section 103(a) of the INA.[30] The authority is discretionary and is subject to the condition, among others, that the asylum seeker also be admissible as an immigrant pursuant to the INA. Thus, for the Attorney General to grant asylum, a refugee must, in theory, meet the basic standards required of an alien as outlined in section 212(a).[31] This is where the communicable disease obstacle for refugees first arises - in the exclusionary provision of section 212(a)(6). Yet, that exclusion can intervene only during an application for asylum while, at this point, the alien is simply establishing his status as a refugee.

B. The asylum application procedure

After satisfying the statutory definition of a refugee, an alien must then apply for asylum. Contrary to the broad interpretations of language found in the U.N. Protocol and the INA itself, mere refugee classification does not automatically open the door for asylum within the United States.[32] In fact, determination of refugee status simply means that it is left to the discretion of the Attorney General to grant asylum, but, of itself, gives no right to asylum.[33] Should the Attorney General ultimately deny asylum, the refugee may go elsewhere or, "in an extreme case, languish at our border."[34]

In *Sale*, the Supreme Court distinguished the duties of the Attorney General under the INA from the authority that is

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30. *Id.* § 1103(a). "The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens ...."

31. *Id.* § 1182(a).

32. *See* United States v. Aguilar, 883 F.2d 662, 679-80 (9th Cir. 1989). Appellants in this case claim that the United States violated its obligations under the U.N. Protocol by not automatically admitting into the U.S. any alien who was classified as a refugee. The court held that Congress is not bound by international law and the application procedure established in the INA cannot, therefore, be avoided by a showing of "good cause" for illegal entry.

33. INS v. Cardoza-Fonseca, 480 U.S. 421, 427-28 n.5 (1987). Cardoza is a landmark case, establishing that the Attorney General is not required under the INA to grant asylum to an alien just because he qualifies as a refugee.

34. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1369 (2d Cir. 1992) (Newman, J., concurring).

conferred upon the President.[35] While the Attorney General is charged with the enforcement of INA laws, she is not responsible for "such laws relate[d] to the powers, functions, and duties conferred upon the President."[36] It is, therefore, the Court's reasoning that since the Executive Order to repatriate Haitian refugees was issued pursuant to the powers conferred upon the President, the Attorney General was not in violation of her INA duty to conduct deportation and exclusion hearings. Furthermore, the Court held that the INA contains no provision for holding such proceedings outside the United States. Yet, this reasoning deserves a more scrupulous analysis, especially since, as Justice Blackmun indicated in his dissent, the majority has apparently conceded sole constitutional authority over immigration matters to the President and not to Congress.[37]

There are two ways of obtaining asylum: an initial application for political asylum or a petition for withholding of deportation.[38] The first method is discretionary and involves the application process set out in section 208(a) whereby the Attorney General may grant an asylum application to an alien, already within the United States, showing a well-founded fear of persecution.[39] In this case, the alien "need not demonstrate that it is more likely than not that he will be subject to persecution if deported" since the application will be granted based upon a subjective fear of persecution.[40] The second method involves a mandatory provision under section 243(h) prohibiting the Attorney General from deporting an alien who demonstrates that his life will be threatened if returned to his homeland.[41] A section 243(h) prohibition against deportation, however, can only be invoked by an alien in the course of a deportation proceeding and, as such, the application can be perceived as a request for discretionary asylum under section 208(a).[42]

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35. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2559 (1993).

36. 8 U.S.C. § 1103(a) (1990).

37. *Sale*, 113 S.Ct. at 2577 (Blackmun, J., dissenting).

38. United States v. Aguilar, 883 F.2d 662, 677 (9th Cir. 1989). *See also* Orantes-Hernandez v. Meese, 685 F.Supp 1488, 1506 (C.D. Cal. 1988) (citing 8 C.F.R. 208.3). INS regulations provide that an application for political asylum is also considered an application for withholding of deportation. *But see* INS v. Cardoza-Fonseca, 480 U.S. 421, 428, n.6. (1987). "Asylum and withholding of deportation are two distinct forms of relief."

39. *Aguilar*, 883 F.2d at 667.

40. *Id.*

41. *Id.*

42. *Id.*

C. *Haitian detainees and their asylum request*

Following their initial "screening-in,"[43] several hundred Haitian detainees were denied the benefit of applying for asylum while at Guantanamo because the United States government claimed they were statutorily considered outside United States territory. Although presence on a U.S. Coast Guard vessel or on the U.S.-leased Naval base at Guantanamo Bay is arguably[44] not within the United States as required by section 208(a), the refugees would still have a right to asylum procedures under the Second Circuit's interpretation of section 243(h). That court held the Haitians' right to apply for asylum as statutorily supported by the Refugee Act of 1980, the U.N. Protocol and the 1981 Agreement Between the United States and Haiti,[45] all of which prohibit repatriating aliens to a threat of persecution. While it is within the President's discretion to detain the Haitians at Guantanamo, the Attorney General is mandated by section 243(h) to withhold deportation of an alien who demostrates the existence of such a threat, thereby entitling the alien to an application for asylum. As soon as the Coast Guard officials completed their initial determination that their interdictees were fleeing persecution, all Haitians were entitled to be taken to the United States where they could then apply for asylum.[46] Those who were temporarily detained at Guantanamo as a result of the repatriation injunction were rerouted for reasons unrelated to their initial

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43. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1344, 1346 (2d Cir. 1992). "An alien is screened-in after being found to have a credible fear of returning to his country of origin.... Upon being screened in, the Haitian aliens' fundamental legal and human rights status is changed vis-a-vis the United States Government."

44. The Second Circuit considered the argument that since U.S. criminal law is applied to detainees and other inhabitants at Guantanamo, there is sufficient reason to extend Constitutional rights to that territory. *But see* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990). While the Supreme Court reaffirmed that fundamental Constitutional rights are guaranteed to inhabitants of territories where the U.S. has sovereign power, the Court further held that this does not include Fifth Amendment protection.

45. AGREEMENT EFFECTED BY EXCHANGE OF NOTES, Sept. 23, 1981, U.S.- Republic of Haiti, 33 U.S.T. 3559. Here, the United States agreed with Haiti to police international waters and that the U.S. Coast Guard will not return Haitians who are determined to be refugees.

46. *McNary*, 969 F.2d at 1330. "The purpose of this process, known as 'pre-screening,' is to determine whether the interdicted alien has a 'credible fear of persecution' ... [and] was designed to take place when the interdicted aliens are taken into custody on the Coast Guard cutters.... Those found to have 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."

screening-in by the Coast Guard and were, at least in theory, entitled to apply for asylum while at Guantanamo.

1. Asylum under INA section 208(a)

The asylum procedure of section 208(a) requires that an alien fit within the statutory definition of a refugee and that the alien be "physically present within the U.S. or at a land border or port of entry."[47] The language of this provision establishes a broad standard — the subjective fear of persecution[48] — for the application of the Attorney General's discretionary authority. Yet, the language is specific as to the territorial requirements for application. Before the 1980 reform, there was no specific provision for asylum applications from within the United States.[49] At that time, an asylum seeker already in the country had to request a withholding of deportation in order to be granted political asylum. The language of that provision purposefully distinguished between aliens within the United States and those outside in order to eliminate any misunderstanding of the deportation procedure.[50] With the adoption of the U.N. Protocol language,[51] however, it became necessary to create an entirely separate provision. The fundamental role of section 208(a), therefore, is to establish the process whereby refugees either paroled or illegally settled within the United States may apply for asylum.[52]

The Supreme Court identified two distinct interpretations of the phrase "within the United States."[53] The first includes aliens who have made their way into the United States, legally

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47. 8 U.S.C. § 1158(a) (1990).

48. *Id.* § 1101(a)(42).

49. Section 203(a)(7) of the pre-1980 INA was the statutory authority for granting asylum to refugees, but only from applications outside the U.S. *See also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 433 (1987). "Prior to the 1980 amendments, there was no statutory basis for granting asylum to aliens who applied from within the United States."

50. Another purpose of the immigration law was to deny application eligibility to asylum seekers who had illegally entered the United States and were thus subject to deportation.

51. *See* UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, January 31, 1967, 19 U.S.T. 6223, 6261 art. 33. "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . ."

52. *See* United States v. Aguilar, 883 F.2d 662, 678 (9th Cir. 1989). "[Congress] did not proclaim that anyone considering himself the victim of political persecution can cross our borders by stealth and then studiously avoid the authorities in perpetuity."

53. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2561 (1993).

or not, and who are now defending their right to stay through deportation hearings. The second category includes all other aliens who are either seeking admission or who are temporarily paroled within the country. These aliens are treated as if they had never entered the United States at all; "they [are] within United States territory but not within the United States."[54] This distinction is clearly identified in section 208(a).

But, there is still the legitimate question as to whether presence within the United States means that an asylum seeker, who has been intercepted in route to this country and found to have a credible fear of persecution, as in the case of the Haitian refugees, can be repatriated without first having the opportunity to apply for asylum. Section 208(a) establishes the rule that to apply, an alien needs to be within the territorial United States or at its borders. This leaves unresolved the question whether the forced repatriation of aliens before arriving within the United States somehow violates their opportunity to apply.

2. Withholding deportation under INA section 243(h)

The Second Circuit held that the forced repatriation of aliens violates the new meaning of INA section 243(h).[55] This section, which authorizes the withholding of deportation, applies to any alien who's "life or freedom would be threatened" if returned to a country where he would suffer persecution.[56] Originally, this section authorized the Attorney General to withhold deportation, thereby providing asylum to an alien already within the United States as distinguished from aliens outside its borders. After the 1980 revision, however, the language, as interpreted by this Court, provided that the Attorney General "shall not deport or return"[57] any alien who has demonstrated that "it is more likely

54. *Id.* (internal quotations omitted).

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

56. 8 U.S.C. § 1153(h)(1) (1990).

57. *Id.*; *See also* U.N. Protocol 19 U.S.T. 6223, 6276 art. 33. The word "return," as used in the Refugee Act of 1980, was adopted from the French word "refouler," which is used in the U.N. Protocol. Depending on which French dictionary is used, the word refouler can be interpreted as meaning either to expel or to repel, drive back. The Second Circuit has adopted the latter interpretation and thus finds it unnecessary that the alien actually be within a particular country for that government to drive the alien back to his homeland. Yiu Sing Chun v. Sava, 708 F.2d 869, 877 n.25 (2d Cir. 1983). "Congress conformed domestic law to this [U.N. Protocol] treaty obligation in the Refugee Act of 1980. 8 USC §§ 1253(h)(1), 1101(a)(42)(A). Thus, the United States appears to recognize a liberty interest, the right of nonrefoulement for a refugee."

than not that the alien would be subject to persecution."[58] The emphasis in this provision is on the alien's actual physical location. The government claims that while the 1980 revision of section 243(h) was necessary to conform our refugee statutes to the U.N. Protocol, the new language still applied only to aliens within the country's territorial borders.[59] The Second Circuit, however, applying a plain language analysis of section 243(h)[60] and an ordinary meaning to the language derived from Article 33 of the U.N. Protocol,[61] held that the significance of the language is not where the refugee is returned *from* but where he is returned *to*. Thus, the interception and forcible return of Haitian refugees en route to the United States would violate 243(h) by sending potential refugees back to Haiti, regardless of whether the return originated in the United States.[62] According to this interpretation, then, the protection of this section could be invoked by aliens outside the United States who are subjected to the government's extraterritorial activities.[63]

The language also distinguishes between deportation and return, the former pertaining to immigration activities within the country, while the latter, according to the Second Circuit's interpretation, extends to extraterritorial activity. If section 243(h) prohibited the United States from forcing aliens anywhere in the world to return to a country where they face persecution,[64] then, by necessity, this would bestow upon an interdicted alien, who has demonstrated a credible fear of persecution, a de facto asylee status which would entitle the alien to apply for withholding of deportation.[65] And, according to a Ninth Circuit Court of Appeals holding, an asylum application under 243(h) provides a defense against deportation and the application itself is "necessary in order for an alien to invoke relief under section 243(h)."[66]

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58. I.N.S. v. Stevic, 467 U.S. 407, 429-30 (1984).

59. Petition for a Writ of Certiorari at 25-26, McNary v. Haitian Ctrs. Council, Inc., 969 F.2d 1350 (2d Cir. N.Y.) (No. 2023, 926144), July 29, 1992.

60. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1360 (2d Cir. 1992).

61. *Id.* (quoting *Richards v. U.S.*, 369 U.S. 1, 9 (1962)).

62. *McNary*, 969 F.2d at 1360. *But see* Petition for a Writ of Certiorari at 12, 969 F.2d 1350. "[T]he court of appeals' holding that 8 U.S.C. § 1253(h) applies to aliens outside the United States cannot be squared with the presumption against extraterritorial applications of Acts of Congress, the statutory text, its legislative history, and the parallel limitation of Article 33.1 of the U.N. Refugee Convention."

63. *McNary*, 969 F.2d at 1360.

64. *Id.* at 1368 (Newman, J., concurring).

65. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1345 (2d Cir. 1992). "The change in the operation of the interdiction program by the Rees memorandum ... authorizes a 'de facto' asylum proceeding at Guantanamo Bay ..."

66. United States v. Aguilar, 883 F.2d 662, 667 (9th Cir. 1989)

The Supreme Court, however, has finally silenced this long-standing dispute over the amended language of section 243(h). In *Sale*, the Court considered the text and structure of the INA as well as the history of the 1980 Refugee Act in holding that, while there are two distinct uses of the words deport and return, it was not Congress' intent to apply either use extraterritorially. When Congress removed the words "within the United States" from section 243(h) and inserted the word "return," it was, according to the Court, to extend the INA's statutory protection to aliens temporarily paroled within the United States and to aliens already admitted to the country. But, it was not the intent of Congress to "change the presumption that both types of aliens would continue to be found only within United States territory."[67] Accordingly, it is only in this context that the discretionary authority of the Attorney General can be invoked, since his power under the INA does not extend beyond United States territory.

This statutory analysis significantly affects the application process. Once an alien is within the United States, he is entitled to apply for discretionary asylum under section 208(a) or, if temporarily paroled in this country, the alien is entitled to a mandatory application under section 243(h). But, does this leave any merit to the Second Circuit's interpretation that section 243(h) applies extraterritorially, thereby entitling the Haitians to the asylum application procedure? If so, then to deny the Haitians an opportunity to apply for asylum is itself a violation of the INA since "[n]otification of the right to apply for asylum and for relief from deportation is mandated by the Refugee Act."[68]

To further support its interpretation of the statutory language in the 1980 Refugee Act, the Supreme Court analyzed the text and negotiating history of the U.N. Convention which preceeded and, for the most part, instigated the 1980 amendments to the INA. The Court, focusing on the French term "refoulement," held that the English translation accepted by Congress upon the ratification of the Convention and intended for incorporation into the INA, is one which presumes that the refugee is already within the borders of the member country.[69] Thus, to

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67. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2561 (1993).

68. Orantes-Hernandez v. Meese 685 F.Supp 1488, 1506 (C.D. Cal. 1988). *But see* Jean v. Nelson, 727 F.2d 957, 982 (11th Cir. 1984). Neither the Refugee Act nor the INA require the INS to inform all asylum seekers of their right to seek asylum.

69. *Sale*, 113 S.Ct. at 2563.

return a refugee means to return one that is "already within the territory, but not yet resident there."[70] And, the Court held, since "the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions."[71] Justice Blackmun, however, found the majority's interpretation more confusing; "[t]he majority's puzzling progression ... hardly justifies a departure from the path of ordinary meaning."[72] After all, Blackmun continued, can't you say that "Gage was repulsed (initially) at Bunker Hill," or that "Lee was repelled at Gettysburg[?]"[73]

The Court's holding reflected an effort to consolidate the several interpretations of "refoulement" offered at the Convention so that the true spirit of the convention could be revealed - a humanitarian intent. Additionally, the Court held that the negotiating history of the Convention did not provide for the protection of refugees who crossed frontiers in mass migrations.[74] Therefore, the humanitarian effect of the U.N. Convention on the Refugee Act of 1980 was to refuse asylum to refugees en route to the United States in mass migrations.

II. HIV AND THE ASYLUM PROCESS

The U.N. Protocol and the INA establish the sole criteria for refugee status as the well-founded fear of persecution and the unwillingness to return to the protection of one's homeland. These qualifications were determined expediently on Coast Guard vessels during the Haitian exodus. It would otherwise appear contradictory to the rationale of the provision to require a superficial list of other qualifications for innocent civilians fleeing political persecution and who obviously pose no security threat to the United States or to any other country within which they seek immediate protection. In fact, at least one positive aspect of the confrontation element of the Coast Guard interdiction program is that it saves the lives of refugees who flee their countries in unseaworthy vessels.[75] However, once screened and

70. *Id.* at 2564 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 840 (1987)).
71. *Id.*
72. *Id.* at 2570.
73. *Id.*
74. *Id.* at 2566.
75. Petition for a Writ of Certiorari at 4, McNary v. Haitian Ctrs. Council, Inc., 969 F.2d 1350 (2d Cir. N.Y.) (No. 2023, 926144), July 29, 1992. "The interdiction program has saved countless lives, as many of the boats could not have completed the long voyage to the United States."

either brought directly to the United States or, like the Haitian refugees, temporarily detained outside the country, the asylum application process should begin immediately to allow a speedy discretionary review by the Attorney General.

While at Guantanamo, however, the refugees were subjected to a second screening pursuant to a memorandum by Grover Rees, General Counsel for the INS.[76] The stated purpose for this second screening was to reestablish that each detainee fled Haiti due to a fear of persecution.[77] It is the controversy surrounding this second screening process that introduces the issue of whether an alien who carries a communicable disease such as AIDS or HIV infection can be denied the opportunity to apply for asylum. Prior to the second screening, the detainees at Guantanamo were given a medical exam, including an AIDS test. As nearly 400 previously screened-in detainees were found to be HIV-infected, the Attorney General subsequently took the position that these infected detainees should be subject to a second screening prior to their parole into the United States.[78] For the Haitians, the *Rees Memorandum* was yet another obstacle to overcome before applying for asylum.

The detainees were already de facto asylees by virtue of their previous screening. This status would seem to provide the same privileges, few as they may be, as are provided to aliens brought directly into the United States.[79] Courts have firmly held that an alien or refugee paroled within the United States pending a determination of admissibility is "treated as if stopped at the border."[80] It follows, then, that since a paroled alien is not considered to have entered the United States though still retaining the privileges of an alien within the United States for purposes of applying for asylum, the same privileges should extend

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76. Memorandum from INS General Counsel Grover Rees, February 29, 1992. The second interview of Haitians detained at Guantanamo were to 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."

77. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1344 (2d Cir. 1992) (stating the purpose of the Rees Memorandum).

78. *Petition for a Writ of Certiorari* at 6, n.3, McNary (No. 2023, 92-6144). "The thought was that persons statutorily ineligible for entry should not be brought to the United States in the absence of a determination that they are genuine refugees."

79. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958). "[D]etention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." Thus, the Supreme Court further held that 243(h) did not apply to aliens even paroled in the United States.

80. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953).

to a refugee forceably detained outside the country. Juxtaposed, this rationale implies that aliens held at Guantanamo are entitled to the same procedural benefits afforded an alien applying for asylum within the United States, including application under section 208(a).

A. Discrimination: A violation of due process

Whether aliens are afforded Constitutional rights while seeking entry into the United States is a question that has sparked much litigation throughout our nation's history. The Supreme Court has consistently ruled that the authority vested in our government should be adaptable to changing world events.[81] Accordingly, the Court has refused to extend constitutional rights to any alien applying for entrance into the United States concerning a claim that involves admission or deportation.[82] However, more recent cases, although criticized, have extended due process rights to excludable aliens concerning matters other than their exclusion.[83] For the Haitian detainees, the first screening-in adjusted their status from mere aliens to those fleeing persecution and, as such, established that they should thereafter be afforded the due process protection of the asylum procedures as set out by the INA.[84] Additionally, since the *Rees Memorandum* substantially changed American policy regarding the treatment of asylum seekers, due process of the law as established by Congress and as detailed in the INA should protect the Haitian detainees within this new procedural scheme.

The practical effect of this policy change on the HIV-infected Haitians is discriminatory in nature and is, at least impliedly,

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81. Mathews v. Diaz, 426 U.S. 67, 81 (1976). "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution."

82. Landon v. Plasencia, 459 U.S. 21, 32 (1982).

83. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (excludable aliens in the custody of the U.S. have substantive and procedural due process rights concerning matters other than their exclusion); Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987) (outside of admission procedures, excludable aliens do have due process rights).

84. In their own brief, Petition for a Writ for Certiorari at 3, McNary (No. 2023, 92-6144), the government admits that "[a]ny interdictees who made a credible showing of political refugee status were tentatively 'screened-in' and brought to the United States, where they could file a formal application for political asylum . . ."

the motivation for instituting the second screening process.[85] Returning to the basic language of the INA, there is no specific provision which precludes an HIV-infected alien from entering the United States as a de facto asylee. While the communicable disease exclusion in section 212(a) specifically bars the admission of HIV-infected aliens, the special category of refugees statutorily designated in section 208(a) must supersede the mere alien classification if a de facto asylee is to apply for asylum within the country. More simply, an alien who applies for asylum when already within the United States impliedly has, at least in his own mind, a well-founded fear of persecution which qualifies him to apply despite his medical excludability. The screened-in Haitians, for example, that were interdicted while in route to the United States, were cleared for entry solely because they were found to possess a credible fear which was an emergent reason[86] for granting parole within the U.S.[87] When the interdiction first began in September 1991, those few screened-in Haitians who were brought directly to the United States could have been HIV-infected unbeknownst to Coast Guard or INS officials. But, once within in the United States, these Haitians were allowed to apply for asylum under section 208(a), without being subjected to an arbitrary second screening.

Section 208(a) further establishes that the application procedure as designated by the Attorney General shall apply to an

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85. The decision by the Florida District court in *Haitian Refugee Ctr. v. Baker*, 789 F.Supp. 1552 (S.D.Fla. 1991) held that the government was not to return Haitians who were screened-in as having a credible fear of persecution. The government subsequently agreed to bring all screened-in Haitians to the United States to apply for asylum according to the procedure outlined in the INA. Based on this action, the Supreme Court denied certiorari on the issue of repatriation. Five days later, when there was no longer a threat of judicial review, the U.S. again changed its screening policy to require all previously screened-in Haitians to undergo a medical test. If they tested positive for HIV, then they were to submit to a second screening for fear of persecution. Two months later, the President issued his *May 24 Order* from Kennebunkport which denied screening altogether and simply ordered the repatriation of all intercepted Haitians. The President acted within his discretionary authority in ordering the repatriation and in approving the new screening policy as a measure of ensuring the general welfare of U.S. citizens. But it was the method used by the government, including the loss of several hundred files of previously screened detainees, that at least remotely indicates an intention to discriminate against HIV-infected Haitians.

86. 8 U.S.C. § 1182(d)(5)(A) (1990). "The Attorney General may ... parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission into the United States."

87. Petition for a Writ of Certiorari at 6, n. 3, McNary (No. 2023, 92-6144). Here, the government refers to the statutory procedure for parole as set out in § 1182(d)(5).

alien present within the U.S., "irrespective of such alien's status."[88] In determining precisely which alien may apply for asylum, this clause is ambiguous.[89] The language can be interpreted to mean either the refugee classification of the alien or the potential exclusionary status under section 212(a). Most probably, this status refers to the insignificance at this point of the alien's classification as refugee, since the alien will still have to formally apply for asylum and show a well-founded fear of persecution in order to be recognized as a political refugee. Yet, a more controversial reading implies that the alien will still be eligible to participate in the formal application procedure, regardless of a section 212(a) medical exclusion. This interpretation is plausible since the otherwise excludable alien could be permitted to apply for asylum within the United States following an initial screening-in, as through an interdiction effort, and later be admitted as a refugee under the discretionary waiver of the Attorney General.[90] In either situation, it is possible that an otherwise medically excludable alien could apply for asylum from within the United States. To go a step further and apply the holding that an asylum-seeker paroled within the country is considered as having the same status as an alien at the border,[91] it is reasonable to conclude that those Haitians at Guantanamo, who have also been initially screened-in, should be eligible to apply for asylum under section 208(a).

Therefore, a fair assessment of the requirement for a second screening is that the policy decision made by the Bush administration was to create a blanket exclusion against all HIV-infected Haitians applying for asylum within the United States. The executive branch has the discretionary power to institute such a discriminatory policy, especially in light of the economic and health-related strain that HIV and AIDS have already created within this country.

If this was indeed the underlying intention of the executive

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88. 8 U.S.C. § 1158(a) (1990).

89. In Yiu Sing Chun v. Sava, 708 F.2d 869, 874, 876 (2d Cir. 1983), the Second Circuit held that this clause could be read consistently with an exclusionary provision of the INA (concerning stowaways) in making a determination of an alien's eligibility for asylum proceedings. "Because the hearing [for asylum claim] we require will be limited solely to the issue of asylum eligibility, we preserve the basic thrust [of the INA exclusionary provision and] ... as stowaways, the petitioners are entitled to nothing more; as asylum seekers at our border, they are entitled to nothing less."

90. 8 U.S.C. § 1157(c)(3) (1990).

91. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953).

policy, however, it comes up against two overriding obstacles at this point in the asylum-seeking process. First, the policy is repugnant to the statutory provisions of the INA which entitle aliens to apply for asylum, provided the government determines the aliens are within United States territory. Secondly, the discretionary power of INS officers cannot be used discriminately against a specific group of people.[92] Courts have held, particularly in cases relating to Haitian refugees, that since United States immigration law is non-discriminatory, parole decisions must be neutral as to race or national origin.[93] The *Rees Memorandum* requiring a second screening for the detained Haitians cannot be squared with this established INS procedure, implying that the sudden executive action was intended to prevent a particular group of aliens from applying for asylum. While HIV is not within the classification of race or national origin, the screening was administered under the assumption that these Haitians, as a class, fled their homeland for a reason other than a fear of persecution, an issue that had already been dismissed at the first screening. Yet, in *Sale*, the Supreme Court dismissed this argument altogether by upholding the Swiss interpretation of refugee treaty obligations relieving member nations of any obligations in cases of mass migration.[94]

B. Extending the reach of due process

The importance of Haitian eligibility in applying for asylum under section 208(a) is twofold. First, and most importantly, it affords the impoverished and sickly Haitians the humanitarian and medical attention they so desperately need, including treatment for AIDS. While the facilities at Guantanamo are themselves sufficient to justify the Haitians' decision to flee their homeland, the Haitians undoubtedly set out to seek the full protection of the American mainland which has so notoriously become the world's humanitarian beacon. Of course, those who fled Haiti merely to seek a more comfortable and economically

92. *See* Bertrand v. Sava, 684 F.2d 204, 212 (2d Cir. 1982). "The [executive power of] discretion [over aliens outside the United States] may not be exercised to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies."

93. Jean v. Nelson, 472 U.S. 846, 855 (1985). "Title 8 C.F.R. §212.5 provides a lengthy list of neutral criteria which bear on the grant or denial of parole ... [T]he INS's parole discretion under the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin."

94. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2566 (1993).

beneficial life in the United States are not protected by the asylum process and are among those screened-out upon interdiction.[95] Since the number of asylum seekers fleeing to the United States increases annually, politically-influenced immigration policies have tightened the availability of immediate assistance through programs such as interdiction and repatriation. Those who satisfy the preliminary qualifications for asylum application, however, are provided humanitarian assistance,[96] at least until the discretionary determination of permanent asylum has been made.

Secondly, the benefit of applying for asylum from within the United States affords the asylum seeker the assistance of legal counsel, to ensure accurate application processing as provided by the INA[97] and due process. Humanitarian legal counsel for detainees at Guantanamo, however, was initially denied by INS officials under the rationale that an alien seeking admission to the United States is not entitled to constitutional rights other than those authorized by Congress as set out in the INA.[98] And, since the Supreme Court has held that the INA only applies to aliens within the United States, this further removed the Haitian detainees at Guantanamo from a right to legal counsel. Some federal courts, within their authorized realm of judicial review of the INA, have often recognized that due process rights extend to the asylum application procedure.[99] Yet, the Supreme Court has not been willing to go any further, emphatically holding that there is no extraterritorial application of the Fifth Amendment.[100] Again, it is necessary to consider the unique situation of the Haitian detainees who, by virtue of their de facto asylee status, should be entitled to section 208(a) application procedures while detained outside the United States.

The fundamental argument then, in extending Fifth Amendment protection to the detained Haitians, is that they are entitled

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95. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1330 (2d Cir. 1992). "Those individuals found not to have a credible fear are 'screened-out,' and are repatriated to Haiti."

96. Barbara Crosette, *Immigration Chief Lets Three HIV Haitians Into U.S.*, N.Y. Times, Sept. 3, 1992 at A6. "The decision to grant ... humanitarian parole is the first breach in a wall of rules, policies and court decisions that have combined to trap nearly 300 Haitians at Guantanamo because either they or a family member on whom they depend has tested positive for HIV."

97. 8 U.S.C. § 1362 (1990).

98. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982).

99. *See* Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (the due process clause applies to the statutory asylum procedure).

100. United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990).

to the same constitutional rights as an alien applying from within the country under section 208(a). A less statutorily-grounded argument advanced by Haitian supporters focuses on the activities of the Coast Guard. Since the Constitution obviously governs the conduct of Coast Guard officials during their interdiction procedures, due process should extend to their handling of the interdictees. Moreover, the screening-in of interdicted Haitians implicates due process protection since the government has effectively already begun the initial stages of the asylum application process as established by the INA. Thus, while the courts have clearly stated the general rule that Fifth Amendment protection extends only to those aliens applying for asylum from within the United States, such a fundamental constitutional right[101] must also protect aliens admittedly eligible for application within the United States but who are temporarily detained outside the country.

C. Discretionary authority of the Attorney General

Once an alien is finally allowed to apply for asylum, his admissibility will be determined in conjunction with the restrictive provisions of the INA. For a refugee, all of the qualifications for alien status are applicable as well as a limitation on the number of political refugees admitted annually as determined by the President.[102] Generally, an application for asylum will be denied upon a showing that the alien is not a refugee within the definition prescribed by the INA,[103] or that the alien is firmly resettled in another foreign country.[104] These particular characteristics remove an alien from the humanitarian consideration which is the underlying rationale for the Attorney General's authority to exercise discretion. The additional exclusions identified in section 212(a) ensure that the open door policy of the asylum program does not interfere with American standards of living.

The Attorney General's authority to admit qualified refugees can also be used to waive restrictions that would otherwise bar

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101. Dorr v. United States, 195 U.S. 138, 148 (1904). The Supreme Court held that only fundamental Constitutional rights can be invoked by the inhabitants of territories where the United States has sovereign power.

102. 8 U.S.C. § 1157(a)(2) (1990). The number of refugees admitted into the United States annually will be determined by the President before the beginning of each fiscal year.

103. *Id.* § 1158(a).

104. *Id.* § 1157(c)(1).

admission.[105] The parameters of this discretionary power are limited to matters of national security and public welfare.[106] The waiver, however, can be used against most other exclusions in section 212(a) for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[107] The nature of this provision makes it unlikely for the INS to grant a blanket waiver to a class of refugees seeking asylum since their fear of political persecution needs to be demonstrated personally. In fact, the provision clearly asserts that the waiver will be administered on an individual basis.[108] Administering such a provision by ensuring that individual interests are not overlooked is necessarily a difficult and involved procedure and can only be enforced under an implied order of due process.

1. Rationale for exclusionary waivers

The "humanitarian purposes" clause of the waiver provision is not construed as widely as the term suggests, since such a nebulous policy could potentially encompass all of the third world's socio-economic problems. Rather, humanitarian concern focuses on the grant of asylum as the *only* protective remedy available to an alien fleeing the persecution of his homeland. In as much as asylum offers a temporary safe haven, it is sufficient to show only a well-founded fear of persecution[109] in order to attract humanitarian assistance — regardless of the applicant's physical condition. A balancing of interests between the economic or political detriment to the United States and the deplorable alternatives faced by the asylum seeker if returned to his homeland will inevitably arise in this situation. It is the immediate protection for which an alien applies for political asylum, not some special interest in the United States. Therefore, it is difficult to refuse temporary relief to an individual who poses a minimal threat to American society, especially when it's precisely this

105. *Id.* § 1187(c)(3).

106. Specifically, 8 U.S.C. § 1157(c)(3) provides in part that the Attorney General may waive any other provision of section 212 other than paragraphs (a)(3)(A), (B), or (E) and other than so much of paragraph (a)(2)(A)(i)(II) as relates to trafficking in narcotics. 8 U.S.C. §§ 1253(h)(2)(B)-(C) also provide that certain criminal activities form a mandatory basis for denial of withholding of deportation.

107. *Id.* § 1157(c)(3).

108. *Id.* "Any such waiver by the Attorney General ... shall be granted on an individual basis following an investigation."

109. *See* Sakahavat v. INS, 796 F.2d 1201 (9th Cir. 1986).

type of protection that Congress intended to create through the Refugee Act of 1980.[110]

A broader application of the waiver involves the "family unity" clause which extends to family members who would otherwise be separated by a section 212(a) exclusion. A spouse or child, for example, will be held to the basic admission standards of an immigrant before being allowed to accompany a family member into the country as a refugee. The obvious logistical dilemma this creates for broken families left at the border justifies the discretionary waiver of the non-criminal or non-security-related exclusions for family members. Similarly, the "public interest" clause recognizes that representations made by the United States in its immigration laws and policies are relied upon by the politically oppressed in other countries, and it is therefore in our own best interest to ensure that those entitled to protection under our laws receive a fair and just review of their individual claims.[111] It is evident that the discretionary waiver wields a great power against the mechanical operation of the INA.

2. HIV-related waivers

Since the INA was amended in 1987 to include HIV as a dangerous communicable disease, there have only been three reported cases where asylum has been approved for HIV-infected refugees through the discretionary waiver.[112] In the most recent case, the refugee's request for waiver was not supported by his claim for family unity when the INS learned that the applicant failed to include the name of a brother already living within the United States. Nor was it found to be in the public interest to admit a refugee, with a wife and child, who reportedly had never entered into a legal marriage and admitted to his infidelity. However, there was a sufficient humanitarian concern considering

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110. 8 U.S.C. § 1521(a) (1990). "The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands ...."

111. *See* Fernandez-Rogue v. Smith, 599 F.Supp 1103, 1111 (N.D. Ga. 1984).

112. Memorandum from the Lawyer's Committee for Urban Affairs, San Francisco, CA, June 8, 1992. At the time of this writing, the most recent waiver approval was for a 39-year old Laotian who tested positive for HIV and waited two and a half years in a Thailand refugee camp before he, his wife and infant child could enter the United States. The process involved an initial denial of the waiver which was later affirmed by the Administrative Appeals Unit (AAU) on the basis of the applicant's alleged marital infidelity. Finally, two years after the case was reopened, the AAU reversed its earlier decision and the Laotian family was allowed to enter the United States.

the increased opportunity to receive free social and health services for his HIV infection once admitted into this country. In every case where approval was granted, the applicant was required to demonstrate that if the medical exclusion was waived, the danger to the public health of the United States would be minimal, the possibility of the spread of the infection would be minimal, and that no government agency, without prior consent, would incur a cost as a result of the refugee's admission. These requirements were issued by the PHS Commissioner in 1988 and reflect that administration's policy regarding the use of discretionary waivers for HIV infected refugees.

III. JUDICIAL REVIEW

The crystalline lesson from INA case history is that while judicial review of immigration activities is limited, the courts are not altogether barred from considering whether executive discretionary or policy decisions violate the Constitution. For aliens detained outside the United States, there is virtually no access to judicial review of immigration procedures since they are not yet within INA jurisdiction.[113] The Haitians detained at Guantanamo, however, were subjected to Coast Guard interdiction, and had a reasonable claim for violation of interdiction procedures pursuant to the United States treaty with Haiti.[114] This was sufficient to secure an injunction against the repatriation order,[115] but the Haitians were then left stranded at Guantanamo without an opportunity to apply for asylum. And, since the Supreme Court has emphatically upheld the government's position against extending asylum eligibility beyond United States territory, the Haitian detainees seem to have no legal alternative for asylum relief.

The Supreme Court has long held that the sovereign power of the executive branch to exclude aliens is "immune from judicial

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113. *See* Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986). Congress has the power to exclude aliens from entering the United States and to establish reasons for entry. These powers can be executed without judicial interference.

114. AGREEMENT EFFECTED BY THE EXCHANGE OF NOTES, Sept. 23, 1981 U.S. - Republic of Haiti, 33 U.S.T. 3559. "It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

115. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1502-03 (11th Cir. 1992). As a result of this class action by the Haitian Refugee Center, on behalf of all those Haitians subject to interdiction, a temporary restraining order was upheld to maintain the "status quo."

control."[116] But, when these political exclusionary policies become law and are integrated into a statutory immigration procedure, the courts take on a more significant role as they can now adjudicate on issues concerning law and its proper application.[117] In this regard, the Supreme Court has also held that the execution of INA provisions must comport with due process of the law[118] and that whatever Congress has authorized in the INA will be considered due process.[119] The established rule, therefore, in resolving immigration controversies is to assert the statutory protections established by the INA or other statutes before considering a constitutional claim, since constitutional provisions might not necessarily extend to aliens outside the United States.[120] In *Sale*, the Court demonstrated this process by interpreting Congressional intent on the issue of extending INA authority beyond United States territory.

A. Policy of non-discrimination

It cannot be denied that "[e]very nation has the right to refuse to admit a foreigner into [its] country."[121] In fact, to notoriously admit an overwhelming number of immigrants into a country, as has been the American tradition, without reassuring safety and general welfare to its citizens, is socially disruptive and potentially disastrous to any economy. But once an immigration policy is in place, it becomes the duty of particular agency officials to insure that the law is administered in strict adherence to statutory procedure. Where that procedure is neutral as to the admission of particular groups of aliens, the immigration policy can reasonably be considered non-discriminatory.[122] Such a non-discriminatory policy is the standard by which INS officials are to evaluate requests for parole into the United States from aliens seeking asylum. Creating this standard was the underlying purpose of the Refugee Act of 1980, as Congress intended to eliminate the geographical or racial restrictions on admission and

116. Fiallo v. Bell, 430 U.S. 787, 792 (1977).

117. Jean v. Nelson, 472 U.S. 846, 853 (1985). This court cites a lower court's holding that "this power [to grant or refuse parole] was subject to review only on a deferential abuse-of-discretion standard."

118. Landon v. Plasencia, 459 U.S. 21, 34-35 (1982).

119. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

120. *Id.*

121. Jean v. Nelson, 727 F.2d 957, 963 (11th Cir. 1984).

122. *Id.*

to limit executive discretion in the asylum procedure.[123] When an INS officer denies asylum because of race or national origin, this constitutes a violation of the INA and a judicial remedy may be sought.[124]

Assuming that some Haitian detainees have a legitimate claim to apply for asylum, which the government admits for those screened-in detainees,[125] the evidence shows that the INS's denial of parole discriminates for reasons of race or national origin. The government argued that the injunction against repatriation encouraged such an overwhelming number of refugees to flee Haiti by sea that Guantanamo was the best place to temporarily detain those who had been screened-in. And, unfortunately for the detainees, the INA asylum procedure provisions do not extend to Guantanamo. But, unlike the Mariel boatlift of 1980, when as many Cuban refugees were temporarily detained in a Pennsylvania camp where they awaited asylum adjudication,[126] the decision to place the Haitians at Guantanamo might itself have been discriminatory. Thus, the individual violations by INS officials at Guantanamo, including their refusal to parole screened-in Haitians to the United States for asylum proceedings and denying them access to legal counsel, are more identifiably discriminatory and violative of the INA.

B. Discriminating against HIV

When an alien's application for asylum is denied by an INS District Director as a result of the communicable disease exclusion, a subsequent request for review on grounds of discrimination will face the judicial challenge that whatever Congress authorized in the INA "is due process as for an alien denied entry."[127] If the application is subsequently denied by an immi-

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123. H.R. Rep. No. 608, 96th Cong., 2d Sess. 9 (1980). The new definition of refugee, which conforms with Article 33 of the U.N. Protocol, eliminates "geographical and ideological restrictions." *See also* 8 U.S.C. § 1521(b). "The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States."

124. *See* Jean v. Nelson, 472 U.S. 846, 854-57 (1982).

125. Petition for a Writ of Certiorari at 6, n.3, McNary (No. 2023, 926144).

126. *See* Reeber v. United States, WL100782, at *2, (E.D. Pa. Sept. 27, 1988). As a result of the 3,500 Cuban refugees who were paroled into the United States following the Mariel boatlift (Freedom Flotilla) from Cuba, the Attorney General ordered that most of the refugees be held in a temporary detention center at Fort Indian Town Gap, PA, while others were either sent to a Federal penitentiary or were allowed to resettle with family members in Florida.

127. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

gration judge and affirmed by the Board of Immigration Appeals (BIA), then this final order is reviewable by the United States Court of Appeals.[128] At every level of review, the adjudication of the asylum claim is statutorily predetermined by the exclusion of HIV-infected aliens to the United States. But what is the proscribed judicial review process for HIV-infected aliens denied the opportunity to apply for asylum while held in custody?

There is no statutory authority for discriminating against HIV-infected refugees. Thus, any litigation over refugees who are denied the opportunity to apply for asylum as a result of HIV will ultimately depend on judicial review of executive action. Since the judiciary can only exercise its review over matters of law, the courts are confined to the operation of executive power that is both mandated and regulated by Congress.[129] It is because of this narrow jurisdiction that the Second Circuit analyzed the section 243(h) mandatory prohibition against deportation. Furthermore, while the INA is, by its very nature, a humanitarian code, it would seem disproportionate to extract from it a rule that further burdens an entire class of already politically afflicted aliens. The power of the Attorney General to grant admission to the United States is discretionary and, as perceived in a humanitarian vein, this discretion could be extended to HIV-infected detainees whose more immediate need for political asylum might outweigh any other excludability factor.

CONCLUSION

By choosing an expedient solution to a much larger humanitarian problem, the United States government has succeeded in keeping HIV-infected aliens outside its territorial borders—though the United States will ultimately have to comply with its own immigration procedures for political refugees as mandated by the INA.[130] Since it is precisely these procedures that are in contro-

128. 8 U.S.C. § 1105(a) (1990).

129. *See* Bertrand v. Sava, 684 F.2d 204, 210, 212 (2d Cir. 1982). There needs to be judicial review of executive policies that are contrary to the will of Congress.

130. Brief for Appellants at 39, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. N.Y.) (No. 1789, 1790, 92-6090, 92-6104) June 8, 1992. In a clever argument, the counsel for the Haitian refugees likened the government's action in refusing to provide equal access to asylum within the United States to the Prince Edward County School Board in *Griffin v. County School Board*, 377 U.S. 218 (1964). In that case, the school board abolished its public schools rather than comply with the desegregation mandate

versy, it is necessary to consider the efforts taken by Congress to amend the INA through the Refugee Act of 1980 in order to incorporate the universal definition of refugee promulgated by the U.N. Protocol. The mandate in this treaty that genuine refugees not be returned to their homeland was specifically adopted by Congress and put into the INA.[131] The revised INA asylum policy has since become two pronged: section 208(a), which permits aliens within the territorial United States to apply for asylum; and section 243(h), which extends asylum procedures to those aliens even temporarily paroled in the United States. The Supreme Court has established this to be the plain reading of section 243(h) as well as the most plausible interpretation of the U.N. Protocol.

Consistent with this rationale, Haitian detainees at Guantanamo who might otherwise be entitled to apply for political asylum by virtue of their initial screening-in for immediate parole into the United States are, technically, not within the United States and, therefore, are not afforded the opportunity to apply. Although it is the government's position that the screening-in process cleared the Haitians for entry to the United States, it appears that many detainees were denied asylum application as a result of their HIV diagnosis. According to section 208(a), under which these detainees would ultimately be entitled to apply for asylum, there is no prerequisite for the application procedure which precludes HIV-infected aliens. On the contrary, under the emergent circumstances of any mass exodus from political persecution, medical status would not normally be of consequence until the refugee submits a formal application upon which the Attorney General can deny admission under the authority of the communicable disease exclusion. Thus, the detained Haitians would be eligible for asylum application under their emergent circumstances regardless of their potential medical exclusion.

To secure this internationally recognized humanitarian assistance, the detainees required access to legal counsel and to be

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instituted by the holding in *Brown v. Board of Education*, 394 U.S. 294 (1955). Similarly, in response to the injunction against repatriating Haitians, the United States government is refusing to allow HIV infected aliens to even apply for asylum while detained at Guantanamo.

131. UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, Jan. 31, 1967, 19 U.S.T. 6223, 6276. Article 33 states, "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened..."

heard in Federal courts, two fundamental constitutional rights guaranteed to American citizens only. Since Constitutional rights do not extend to matters of exclusion for aliens outside the United States, the only enforcement mechanism available to the Haitian detainees was the INA itself. Armed with their own strict interpretation of the statutory provisions as intended by Congress, the detainees rely on their original argument that because they are genuine refugees, they cannot be returned to Haiti and are at least entitled to apply for asylum. Since this controversy derives its substance from interpreting the law, it is subject to judicial review. But, as the Supreme Court has already addressed the technical application of INA protection for this compelling human crisis, it appears final that "there is no solution to be found in a judicial remedy."[132]

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132. Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2567 (1993).