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Haitian Centers Council, Inc. v. Sale: Rejecting the Indefinite Detention of HIV-Infected Aliens

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HAITIAN CENTERS COUNCIL, INC. v. SALE: REJECTING THE INDEFINITE DETENTION OF HIV-INFECTED ALIENS

Since the first settlers arrived in this country, the United States has always been a melting pot of nationalities. The constant influx of aliens led the federal government to begin regulating who could enter the country, over a century ago. One resulting piece of legislation was the Immigration and Nationality Act\(^1\) (INA), which sets forth twenty-two grounds that can bar an alien from entering the United States.\(^2\) In June, 1993,

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2. Id. § 1182(a) (Supp. 1993). The provision states that the following classes of aliens are excludable: 1) any alien who has a communicable disease of public health significance; 2) any alien who has, or had, a physical or mental disorder that may pose, or has posed, a threat to the welfare of the alien or others; 3) any alien who is a drug abuser or addict; 4) any alien convicted of, or who has committed, a crime involving moral turpitude or a crime in violation of a law involving a controlled substance; 5) any alien convicted of two or more offenses; 6) any alien who is a drug trafficker or who has assisted, abetted or conspired with others to traffic drugs; 7) any alien who comes to the United States to engage in prostitution or other unlawful commercialized vice, who has engaged in prostitution, or who intends to import prostitutes; 8) any alien who has committed a serious criminal offense in the United States and who has asserted immunity from prosecution in the United States; 9) any alien who comes to the United States to engage in unlawful activity related to espionage or sabotage, export sensitive goods, commit espionage, or to overthrow the Government of the United States; 10) any alien who has engaged in, or who is likely to engage in, a terrorist activity; 11) any alien whose entry or proposed activities in the United States would have potentially serious adverse foreign policy consequences; 12) any immigrant who is or has been a member of or affiliated with the Communist or other totalitarian party; 13) any alien who was associated with the Nazi government of Germany, or governments occupied, established by, or allied with the Nazi government, between March 23, 1933, and May 8, 1945; 14) any alien who has engaged in actions amounting to genocide; 15) any alien who is likely to become a public charge; 16) any alien who seeks to enter the United States to perform skilled or unskilled labor, unless the Attorney General certifies that the alien's employment will not adversely affect the wages and working conditions of similar U.S. workers; 17) any alien who is a graduate of a foreign medical school and comes to the United States to practice medicine, who has not passed the National Board of Medical Examiners Examination; 18) any alien who was previously deported who seeks admission within one year; 19) any alien who was previously deported for a crime or as an alien enemy who seeks admission within five years (or within 20 years for an alien convicted of
Congress amended the INA to include infection with the Human Immunodeficiency Virus (HIV) as a legitimate reason to bar an alien's entry into the country.\(^3\) Congress's ability to enact exclusionary laws is based on its power to protect and preserve the sovereignty of the United States.\(^4\) The judiciary has continuously held that Congress's exclusionary powers are inherently broad.\(^5\) Precedent, therefore, establishes that the HIV-exclusion law is valid. The law, however, was recently used to justify the indefinite detention of approximately 200 HIV-infected Haitian refugees at the U.S. Naval Base in Guantanamo Bay, Cuba (hereinafter Guantanamo).\(^6\) This application of the HIV-exclusion law clearly violated the Haitians' liberty interests in not being indefinitely detained.\(^7\)

Despite the fact that all of the HIV-infected Haitian refugees detained at Guantanamo qualified for political asylum within the United States, they were barred from entering the United States by the HIV-exclusion law because of their HIV infection.\(^8\) The law created a serious dilemma


\(^{4}\) See infra part I.A. for a discussion of Congress's plenary powers over immigration.

\(^{5}\) Id.


\(^{7}\) Id. at 1045. Because no vaccine or cure for HIV infection appears imminent, and infection with the virus can lead to the development of AIDS and consequently death, Congress had a valid public protection rationale for making HIV-infection a grounds for exclusion. However, the validity of the law does not justify its application to indefinitely detain the HIV-infected Haitian refugees being held at Guantanamo.

\(^{8}\) House Votes to Ban HIV-Infected Immigrants, LEGAL INTELLIGENCER, Mar. 12, 1993, at 5.
for these Haitian refugees. Had they simply been aliens with HIV, rather than refugees with HIV, the Haitians would have been returned to Haiti after being denied entry into the United States. As political refugees, however, the HIV-infected Haitians could not return to Haiti for fear of persecution. Because they could not be returned to Haiti, nor, as HIV-infected aliens, could they enter the United States, the HIV-infected Haitians remained indefinitely detained against their will at Guantanamo.

In *Haitian Centers Council, Inc. v. Sale*, the HIV-infected Haitians challenged the government’s right to indefinitely detain them. The plaintiffs were not challenging the validity of the HIV-exclusion law, rather, the government’s reliance on the law to justify forced and indefinite detention. The United States District Court for the Eastern District of New York held that U.S. immigration law did not permit the indefinite detention of aliens. This decision, therefore, enabled the HIV-infected Haitian refugees to circumvent the HIV-exclusion law and gain entry into

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9. 8 U.S.C. § 1101(a)(42)(A) (1988). An alien qualifies as a “refugee” if he is outside the country of his nationality and is unwilling or unable to return to his country because of a well-founded fear of persecution. Id.
12. Id. at 1045.
13. Id. See 8 U.S.C. § 1225(c) (1988 & Supp. 1992). The INA provides for the temporary detention of an alien for a duration necessary to determine whether the alien is excludable and subject to deportation. Id. However, if immediate deportation is not practical or proper because the alien’s country of origin will not accept him, the matter is left to the discretion of the Attorney General. Id. § 1227(a)(1) (1988).

Some courts have held that this provision of the INA gives the executive branch the authority to detain excludable aliens indefinitely. In Tartabull v. Thornburgh, 755 F. Supp. 145 (E.D. La. 1990), plaintiffs were Cubans who had come to the United States during the 1980 Mariel boatlift. Id. at 146. They had been detained since 1980 and sought habeas corpus relief claiming that the INA did not authorize the Attorney General to detain them indefinitely. Id. Rejecting this assertion, the court held that the Attorney General did have such power in a case where the aliens could not be returned to their country of origin. Id. at 147.

In contrast, other courts have held that the indefinite detention of aliens is unconstitutional. See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (holding that the Attorney General lacked the authority to detain excludable aliens beyond a reasonable period of time necessary to procure their return to their country of origin). Similarly, in *In re Brooks*, 5 F.2d 238 (D. Mass. 1925), the court ordered the release of a Russian alien from incarceration at Deer Island in Boston Harbor, where he had been detained for nine weeks pending deportation, because he could not be returned to his country of origin due to a lack of diplomatic relations between the United States and Russia. Id. at 239-40. The *Brooks* court held:

[i]there is no power . . . in any other tribunal in this country to hold indefinitely any . . . alien in imprisonment, except as punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclu-
This Note discusses the HIV-exclusion law and its effects on the Guantanamo Haitians. Part I examines the history of United States immigration laws and investigates the doctrinal sources that provide Congress with the power to exclude aliens for health-related reasons. Part II focuses on the plight of the refugees in Haitian Centers Council, and how they were able to circumvent the HIV-exclusion law and gain entry into the United States. Finally, Part III discusses the effect of Haitian Centers Council on other HIV-infected aliens seeking to enter the United States. This Note concludes that the decision in Haitian Centers Council was a legally and morally correct decision. The HIV-exclusion law may be a valid law, but it should not be distorted to justify forced and indefinite detention of aliens. The law exists to protect the sovereignty and health of the nation, which are important governmental functions. All other concerns, however, should not be set aside in furtherance of this protection. Certainly, the indefinite detention of individuals who have committed no crime should not be justified under the veil of the HIV-exclusion law.

I. History of United States Immigration Laws

A. The Plenary Power Doctrine

In 1892, the Supreme Court stated that “[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners . . . or to admit them only . . . upon such conditions as it may see fit to prescribe.”15 Thus, immigration into the United States is a privi-

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15. Ekiu v. United States, 142 U.S. 651, 659 (1892). See also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding constitutionality of statute authorizing deportation of resident aliens based on membership in the Communist Party, even if membership terminated before enactment of the statute); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 539 (1950) (excluding alien, who had worked as civilian employee for the U.S. armed forces and who was married to a U.S. citizen, for reasons that were confidential but which “would be prejudicial to the interests of the United States”); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding the constitutionality of a statute that permitted the deportation of any resident Chinese laborer who failed to apply to the Internal Revenue Service for a certificate of residence); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (affirming that indefinite detention of a resi-
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lege, not a right. An alien may be granted this privilege only if he meets the requirements prescribed by the sovereign United States government.

Because the purpose of immigration legislation is the protection of state sovereignty, Congress's power to regulate immigration is inherently broad. This grant of broad power is known as the plenary power doctrine. The doctrine stands for the proposition that Congress's power over immigration is as comprehensive as necessary to ensure the preservation of the nation. Congress can therefore exclude foreigners whenever the public interest demands.

For example, the discovery of gold in 1848 prompted a mass immigration of laborers from China. In response, Congress promulgated an Act prohibiting Chinese laborers from entering the United States in order to protect the rights of domestic laborers. When the number of Chinese immigrants increased to a level where the number of Chinese laborers residing in the United States became a competitive threat, Congress denied their continued immigration. Congress's actions in this incident alien of 12 years, who was seeking to re-enter the United States after a visit to China, was not an unlawful restraint of the alien's liberty.

16. *Knauff*, 338 U.S. at 542 (pointing out that “an alien who seeks admission to this country may not do so under any claim of right”).

17. *Id.*

18. *Developments in the Law - Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1312 (1983). Plenary power encompasses the authority to regulate substantive and procedural immigration matters. The government determines which aliens can enter and what procedures will be used to permit their entry. *Id.*

19. *Id.* For almost a century the Supreme Court has asserted that the legislative and executive branches possess plenary power over the exclusion of aliens. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1922); *Ekiu*, 142 U.S. at 660.

20. Although no provision of the Constitution expressly endows Congress with the power to exclude aliens, it has always been considered necessary to protect the country from foreign dangers immune from constitutional limitations. See, e.g., *Fong Yue Ting* v. United States, 149 U.S. 698 (1893); *Ekiu*, 142 U.S. 651; *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

21. *See The Chinese Exclusion Case*, 130 U.S. at 609 (upholding as inherent in the right of self-preservation the power to exclude certain classes of persons whose presence is deemed injurious to the country).

22. *Id.* at 594.


25. *Id.* In this case, the plaintiff was a Chinese laborer who had previously worked in the United States for 12 years, and, who before returning to China, had procured a certificate entitling him re-entry. *Id.* at 582. Due to the implementation of this law during his trip to China, the plaintiff's certificate of return was annulled and he was prohibited from
stance evidenced the application of the plenary power doctrine to protect the jobs of U.S. laborers.

B. Judicial Deference

For many years, the Supreme Court deferred to Congress's plenary power in the area of immigration policy. The Court stated that, "[i]f [Congress] considers the presence of foreigners . . . to be dangerous to [the nation's] peace and security, . . . [then] its determination is conclusive upon the judiciary." The Court has also noted that the presence of aliens can be dangerous during times of peace as well as during times of war, thus necessitating deference in both situations. The Court's deference to Congress was epitomized when it held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

Judicial deference permitted Congress to use its plenary power in whatever manner it saw fit. For example, in Shaughnessy v. Mezei, an alien, who had resided in the United States for twenty-five years, had travelled to Hungary for nineteen months and was denied re-entry into the United States. Without a hearing, the alien was ordered permanently excluded based on confidential information suggesting the alien's return would be prejudicial to the public interest for security reasons. The Court upheld the constitutionality of this governmental action with-

26. Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 14-15 (1984). Even the Warren Court, which was known for checking government authority on behalf of politically vulnerable groups, was deferential in the context of immigration law. Id. For example, the Court upheld Congress's power to exclude homosexual aliens in Boutilier v. INS, 387 U.S. 118 (1967).

27. The Chinese Exclusion Case, 130 U.S. at 606.

28. Id. "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war." Id. at 607 (quoting then Secretary of State Mr. Marcy under President Pierce).


30. See Schuck, supra note 26, at 16.


32. Id. at 208.

33. Id.
out questioning whether the alien had received due process. The Court stated that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government."

Although the Mezei decision was rendered during the height of the Cold War, when the country was preoccupied with the perceived threat of Communism, the decision was still an indication that judicial deference to Congressional immigration procedures had reached its pinnacle. Opposition to traditional judicial deference, however, did exist. Justice Jackson, dissenting in Mezei, recognized the nation's sovereign right to exclude aliens, but questioned the procedural methods used to effectuate the alien's exclusion. He asked,

[b]ecause [this alien] has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or set him adrift in a rowboat. Would not such measure be condemned judicially as a deprivation of life without due process of law? ... It seems to me that this, occurring within the United States ... may be done only by proceedings which meet the test of due process of law.

Justice Jackson stated that when indefinite detention was the means used to enforce exclusion, then procedural due process must be required. Justice Jackson opined that procedural due process for aliens meant that the alien must be informed of the grounds for his incarceration and then have a fair opportunity to overcome them.

The Supreme Court has since altered its deferential attitude toward Congress's immigration decisions. Although the Court has not ques-

34. Id. at 215. The Court stated "we do not think that respondent's continued exclusion deprives him of any statutory or constitutional rights." Id.

35. Id. at 212 (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).


37. Mezei, 345 U.S. at 219-21 (Jackson, J., dissenting). Justice Jackson criticized the majority for turning its back on a law-abiding citizen of 25 years through its deferential stance. "This man [Mezei], who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him." Id. at 219.

38. Id. at 226-27.

39. Id. at 227.
tioned Congress's sovereign right to exclude aliens, it has scrutinized exclusionary procedures to ensure compliance with the Due Process Clause of the Fifth Amendment. For example, in Landon v. Plasencia, a resident alien was denied entry into the United States for attempting to transport illegal aliens into the United States. However, because the alien had received only several hours notice of the charges against her and was not represented by counsel at the hearing, the Supreme Court remanded the case for a determination of whether she had been afforded sufficient due process.

Plasencia marked the first time that the Court allowed an excludable alien to assert procedural due process rights. Previously, only deportable aliens had been allowed to assert such rights. The case involved an exclusion hearing, not a deportation hearing. The Court found that Plasencia should have been afforded procedural due process in the exclusionary hearing she received.

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40. See supra notes 31-39 and accompanying text.
41. U.S. Const. amend. V; see Motomura, supra note 36, at 1652-55.
42. 459 U.S. 21 (1982). This case involved the exclusion of a resident alien, Plasencia, who travelled to Mexico for a few days in order to assist the illegal entry of other aliens. Id. at 23. Upon her return, Plasencia was subjected to an exclusion hearing, not a deportation hearing. Id. Plasencia argued that she should have received a deportation hearing because such hearings were the usual means of proceeding against an alien already physically in the United States, while exclusion hearings are used as the means of proceeding against an alien seeking admission from outside the United States. Id. at 25. As a resident alien, Plasencia qualified as a deportable alien, not an excludable alien, and she claimed that she was entitled to a deportation hearing where she would benefit from procedural protections and substantive rights afforded to deportable aliens. Id. at 27. The Court rejected Plasencia's argument and held that she was not entitled to a deportation proceeding. It did, however, find that Plasencia should have been afforded procedural due process in the exclusionary hearing she received. Id. at 32.
43. Id. at 23.
44. 8 U.S.C. § 1362. Both deportable and excludable aliens are entitled to a hearing and legal counsel. Id.
45. Plasencia, 459 U.S. at 37. Plasencia listed three violations of her procedural due process rights. She argued, first, that the immigration law judge placed the burden of proof on her; second, that she was provided inadequate notice of the hearing; and third, that she waived her right to counsel without a full understanding of the right to counsel or the consequences of waiver. Id. at 35-36.
46. Id. at 32-34. There has always been a distinction between excludable and deportable aliens. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958). An excludable alien is one considered held at the border, and has never been granted admission to the United States. Shaughnessy v. ex rel. Mezei, 345 U.S. 206, 212-13 (1953). A deportable alien is one who has gained entry into the United States and is, therefore, guaranteed the protections that the Constitution grants to all people within the country's borders. Leng May Ma, 357 U.S. at 187.

No significance, however, is given to whether aliens are within the country legally. Mezei, 345 U.S. at 212 (citing Yamatay v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100-01 (1903); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953)). The irony of this policy is that illegal aliens who manage to enter without detection are then rewarded with constitutional protections that those aliens who apply legally for admission, but who are denied entry, are not af-
able aliens were afforded procedural due process rights. Thus, although Congress continues to maintain plenary power over immigration matters, judicial deference is no longer absolute. The Court now checks whether the procedures established by Congress to exclude aliens comport with the United States Constitution. This change was one factor that allowed the plaintiffs in Haitian Centers Council to successfully challenge their indefinite detention at Guantanamo and gain entry to the United States despite their HIV infection.

C. Excludable Classes of Aliens

Congress’s plenary power encompasses the power to classify groups of aliens, and to exclude them because of the harm they may pose to the nation. In 1891, Congress passed a law excluding the following “undesirables” from entering the nation: all “idiots,” insane persons, paupers or persons likely to become a public charge, persons suffering from a dangerous contagious disease, persons convicted of a felony or misdemeanor involving moral turpitude, and polygamists. The Court upheld the Act by invoking a self-preservation rationale and stated, “[a] statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security.”

Today, the INA lists twenty-two grounds to exclude an alien from the country. This list includes the exclusion of aliens afflicted with “a com-
municable disease of public health significance.” Chancroid, gonorrhea, granuloma inguinale, infectious leprosy, lymphogranuloma venereum, infectious syphilis, active tuberculosis, and, as of 1993, HIV, fall within this category.

D. The Use of Waivers to Parole Otherwise Ineligible Refugees into the United States

Although a refugee may be denied entry into the United States for a health-related reason, the Attorney General has the power to waive a refugee’s exclusion for humanitarian reasons in order to parole him into the country. A “refugee” is a person unwilling or unable to return to his country of national origin because of a well-founded fear of persecution on account of race, religion, or political opinion. Once an alien has been classified as a refugee, he may not be returned to the country from which he fears persecution.

Refugees are also exempt from two of the twenty-two grounds for exclusion. In addition, the Attorney General is permitted to waive all but four of the remaining grounds for exclusion through her parole power, including an exclusion based on an alien’s HIV infection. The INA per-

56. 8 U.S.C. § 1182(a)(1)(A)(i). The INA defines excludable aliens according to the following classifications: 1) health-related reasons; 2) criminal and related grounds; 3) national security and related grounds; 4) public charge; 5) labor non-qualification grounds; and 6) illegal entrants and immigration violators. Id. § 1182(a)(1)-(6). Exclusion for infection with HIV falls within the health-related reasons classification.

57. Medical Examinations of Aliens, 42 C.F.R. § 34.2(b) (1993).


60. Id. § 1253(h)(1).

61. Id. § 1157(c)(3) (Supp. 1993). Refugees are exempt from both the prohibition against aliens who are likely to become a public charge, id. § 1182(a)(4), and the prohibition against aliens who seek to perform labor without the permission of the Secretary of Labor, id. § 1182(a)(5). Furthermore, refugees are not subject to the limitations imposed by the immigration ceiling. Id. § 1151(b)(1)(B).

62. Id. § 1157(c)(3). “[T]he Attorney General may waive any other provision of [§ 1182] (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)).” Id. Paragraph (2)(C) refers to the exclusion of aliens who are, or who are suspected of, drug trafficking. Id. § 1182(a)(2)(C). Subparagraph (A) of paragraph (3) refers to aliens who seek to commit espionage or overthrow the government, subparagraph (B) refers to aliens who have committed, or who are likely to commit, terrorists acts, subparagraph (C) refers to the admission of aliens who would have adverse foreign policy effects, and subparagraph (E) refers to aliens who were associated with the Nazi government. Id. § 1182(a)(3)(A), (B), (C) and (E). The Attorney General’s ability to waive all grounds for exclusion except those listed above, applies not only in cases of refugees, but for any excluded alien. Id. § 1161(e)(2).

63. The statutory provision that excludes aliens who are HIV-infected,
mits waiver of an exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." The decision to grant parole, however, is within the discretion of the Attorney General.

One of the reasons that the HIV-infected Haitian refugees remained indefinitely detained in Guantanamo was the Attorney General’s refusal to waive exclusion and grant them parole. The Attorney General, however, should not have feared granting parole to the HIV-infected Haitians because paroling an excludable alien does not change the alien’s status for immigration law purposes. Paroled aliens still are considered excludable, as if they were not within the borders of the United States, and therefore may subsequently be returned to U.S. custody or deported. In addition, paroled aliens cannot challenge a subsequent confinement or deportation because, as excludable aliens, they still have no right to constitutional protections. Therefore, parole of the HIV-infected Haitian refugees detained at Guantanamo would have been a more appropriate alternative than indefinite detention. Parole would have allowed the government to maintain control over the HIV-infected Haitian refugees, while allowing the Haitians an opportunity to receive the medical care they needed and that was not available to them at

§ 1182(a)(1)(A)(i), is excluded from the list of grounds that are deemed unavailable. \textit{Id.} §§ 1161(e)(2), 1157(c)(3). Therefore, the Attorney General may waive the exclusion of aliens or refugees who are barred from entering the United States because of HIV infection.

64. 8 U.S.C. §§ 1157(c)(3), 1161(e)(2).

65. Tartabull \textit{v.} Thornburgh, 755 F. Supp. 145, 147 (E.D. La. 1990) (noting that the parole provision "affords the Attorney General a great deal of discretion in deciding whether to parole or to detain an excludable alien").

66. 8 U.S.C. § 1182(d)(5)(A). Parole allows an alien to be released into the community without changing his immigration status. \textit{Id.} However, the parole statute includes a limitation on the grant of parole to refugees. Section 1182(d)(5)(B) provides: "The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title." Whether this section would have prohibited the Attorney General from granting the HIV-infected Haitian refugees parole is an issue that cannot be answered because the Attorney General did not consider parole as a way to permit the HIV-infected Haitians entry into the United States.

67. \textit{See Tartabull,} 755 F. Supp. at 147 (noting "parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served the alien shall forewith return or be returned to the custody from which he was paroled").

68. \textit{Id.}

69. \textit{See supra} note 46 for an explanation of why excludable aliens have no right to the protections afforded by the Constitution.
II. CHALLENGING THE LAW BANNING HIV-INFECTED IMMIGRANTS

A. Background

In 1993, HIV-infected Haitians were able to circumvent the HIV-exclusion law by challenging their indefinite detention in a United States facility. Their detention arose out of the 1981 Alien Migration Interdiction Operation (AMIO) agreement between the United States and Haiti. The AMIO permitted the U.S. Coast Guard to board vessels leaving Haiti in order to inquire about the purpose of the voyage, the conditions of the vessel, and the status of the passengers. When the Coast Guard believed a Haitian vessel was bound for the United States, it would detain the vessel and interdict all passengers. If upon interdiction the Coast Guard determined the vessel to be unseaworthy, it would require all Haitians to board the U.S. vessel and would then destroy the Haitian vessel. Thus, the interdicted Haitians were given no choice but to remain on board the U.S. ship and be taken to wherever the Coast Guard elected.

From 1981 to 1991, the Coast Guard interdicted approximately 25,000 Haitians, many of whom were forcibly repatriated to Haiti because they did not qualify for refugee status in the United States. Immigration into Guantanamo.  

70. As early as May, 1992, the military doctors at Guantanamo raised concerns about lack of adequate medical care for HIV-infected Haitians, and especially for those who had developed AIDS. Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1038 (E.D.N.Y. 1993). While counseling and care were available for the HIV-infected detainees, the segregated camp for HIV-positive detainees could have caused a serious medical problem if any type of infectious disease were to have hit the camp. Id. at 1039; see infra note 99 and accompanying text (discussing potential consequences of segregating HIV-infected individuals in confined areas). Additionally, the camp contained neither a CT scanner nor a variety of specialists (such as ophthalmologists, neurologists, pulmonologists, nephrologists, and oncologists) that are necessary to diagnose and treat those with AIDS. Id. at 1038.
71. Id. at 1034.
72. Id.
73. Id.
74. Id. at 1034-35.
75. Id. at 1035.
77. See Malissia Lennox, Note, Refugees, Racism and Reparations: A Critique of the United States' Haitian Immigration Policy, 45 STAN. L. REV. 687, 705 (1993). Most of these Haitians could not be granted asylum because they were economic refugees, not political refugees. Given that Haiti is the poorest nation in the Western Hemisphere, with 85% of its residents living below the poverty level, the United States has often found that most
the United States increased drastically in September, 1991, after Jean Bertrand Aristide, Haiti's first democratically elected president, was overthrown by a military coup. Consequently, interdiction also increased drastically. More than 34,000 Haitians were intercepted within the six months following the coup, an extremely large number compared to the 25,000 who were intercepted in the ten years prior to the coup.

Before the coup, interdiction proceedings had occurred aboard the Coast Guard's vessels. Due to the large numbers of Haitians seeking asylum after the coup, however, the Coast Guard moved the proceedings to Guantanamo Bay, Cuba. In addition, because so many Haitians were seeking asylum, the United States sought the assistance of other countries to accept some of the Haitian refugees. Only Belize and Honduras agreed to help, but on the condition that each Haitian seeking asylum submit to an HIV test. The results of the HIV tests indicated the presence of HIV in a number of the Haitians detained at Guantanamo. Based upon this discovery, the United States similarly elected to test for HIV all Haitians who qualified for asylum.

Because of the prevalence of HIV, the government established a separate camp at Guantanamo for those Haitians who tested HIV-positive. The camp, however, was more than just a place to reside, it was reminiscent of a prison because the HIV-infected Haitians were not free to leave and were forced to remain there indefinitely. Furthermore, the camp's medical facilities were inadequate to treat the HIV-infected patients. Despite the inadequate facilities, the refugees were forced to remain. They could not return to Haiti for fear of political persecution, and they

Haitians fleeing the country are fleeing the economic hardship and not political persecution. Id.

80. Id. at 2553.
82. Id. at 1035.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id. at 1037 (describing conditions of camp as including barbed wire surrounding the camp, plastic garbage bags tied to the sides of the building in order to keep out the rain, virtual imprisonment within the camp with military guards surrounding the perimeter of the area, and the occurrence of pre-dawn military sweeps).
88. See infra note 99.
could not enter the United States for asylum proceedings because of the law banning their entry.

B. Haitian Centers Council, Inc. v. Sale

_Haitians Centers Council_ was a class action brought by the plaintiffs on behalf of the HIV-infected Haitian refugees seeking declaratory and injunctive relief from Government action against the HIV-infected Haitians detained in Guantanamo. The plaintiffs claimed that the Government's refusal to allow the HIV-infected Haitians to meet with Haitian Services Organizations that were attempting to provide advocacy and counseling violated the Haitian's First and Fifth Amendment rights to obtain and communicate with counsel. Second, the plaintiffs claimed that the Government had violated the HIV-infected Haitians' constitutional due process right to adequate medical care and to be free from indefinite detention. The remainder of the claims involved allegations that the Attorney General had abused her discretion by relying on the HIV-exclusion law to justify withholding a grant of parole to the HIV-infected Haitians.

The United States District Court for the Eastern District of New York ruled in favor of the plaintiffs on almost all of their claims. Although the court did not consider the question of whether the HIV-infected Haitian detainees at Guantanamo had a First Amendment right, the court held

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90. Id. at 1032. The plaintiffs included Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Organization of New Haven (collectively referred to as Haitian Services Organizations), four HIV-infected Haitian detainees in Guantanamo, and two immediate relatives of the detained HIV-infected Haitians. Id.
91. The Government defendants were the Acting Commissioner of the INS, Chris Sale, the Attorney General, Janet Reno, the Secretary of State, Warren Christopher, the Commander of the United States Coast Guard, Rear Admiral Robert Kramek, and the Commander of the U.S. Naval Base at Guantanamo, Admiral Kime (collectively the “Government”). Id.
92. Id.
93. Id. The plaintiffs also claimed that this same action violated the First Amendment Rights of the Haitian Services Organizations by denying them access to their clients. Id. at 1034.
94. Id. The claims included: 1) the failure of the Government to follow rulemaking procedures; 2) arbitrary and capricious action not in accordance with the law; 3) judicial enforceability of the duty of non-refoulment; and 4) equal protection.
95. Id. at 1041. Addressing the associated claim of whether the Haitian Services Organizations' First Amendment rights had been violated in being denied access to the HIV-infected Haitian detainees, the court ruled that a First Amendment violation had occurred. Id. at 1040. The court noted that the First Amendment was applicable on the U.S. Naval
that they had a Fifth Amendment right to counsel and a liberty interest in not being wrongfully repatriated to Haiti. The court additionally held that the erroneous deprivation of counsel at asylum hearings denied the Haitians of their right to a fair adjudication in violation of their liberty interest in not being returned to Haiti.

Next, the court addressed each of the plaintiffs' remaining due process claims. First, the court stated that as individuals in official custody, the HIV-infected Haitians had a constitutionally protected due process right to adequate medical care and "safe conditions" owed to all persons in official custody. The medical facilities at Guantanamo Bay were inadequate to provide medical care for those Haitians who had developed AIDS. Further, the Immigration and Naturalization Service (INS) re-
peatedly had ignored suggestions by the U.S. military doctors at Guantanamo that the HIV-infected Haitians be evacuated to the United States.\textsuperscript{100} The court held that the INS's repeated failure to act on these recommendations constituted deliberate indifference to the Haitians' medical needs in violation of their due process rights.\textsuperscript{101}

Second, the court found that as individuals held in custody by the United States, the HIV-infected Haitians had a liberty interest in not being arbitrarily or indefinitely detained.\textsuperscript{102} Acknowledging that the Haitians were neither criminals nor national security risks, the court held that:

\begin{quote}
[t]he Government has failed to demonstrate to this Court's satisfaction that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers. Where detention no longer serves a legitimate purpose, the detainees must be released. The 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 detention is totally unacceptable to this Court.\textsuperscript{103}
\end{quote}

Addressing the plaintiffs' final claim, the court held that the Attorney General's refusal to parole the Haitians from detention because of their HIV status was an abuse of discretion.\textsuperscript{104} The court cited three specific ways in which the Attorney General had abused her discretion.\textsuperscript{105} First,

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\textsuperscript{100} Id. at 1038.

\textsuperscript{101} Id. at 1044.

\textsuperscript{102} Id. at 1045 (citing O'Connor v. Donaldson, 422 U.S. 563, 576 (1975); McNeil v. Director, Patuxent Inst., 407 U.S. 245, 250 (1972); Doherty v. Thornburgh, 943 F.2d 204, 209 (2d Cir. 1991); United States v. Gonzales Claudio, 806 F.2d 334, 339 (2d Cir. 1986)).

\textsuperscript{103} Id. (citations omitted).

\textsuperscript{104} Id. at 1047.

\textsuperscript{105} Id. at 1048.
she had exercised her discretion in order to discriminate invidiously. This discrimination was apparent from the fact that the Government had not previously enforced its communicable disease exclusion laws strictly against aliens, and chose only to do so for the first time with regard to the Haitians. Second, the Attorney General had deviated from established parole policy by ignoring the regulations that authorized her to parole aliens with serious medical conditions. Parole was considered appropriate when "emergent reasons" existed such that "continued detention would not be appropriate." A prime example of this was the detention of HIV-positive Haitians "in virtual prison camps for over eighteen months," and the withholding of proper medical care. Third, the court held that the Attorney General had given effect to considerations that Congress could not have intended to make relevant. In relying on the HIV-exclusion law as the reason to deny the plaintiffs parole, the Attorney General misinterpreted the statute. Although the HIV-exclusion law makes HIV-infected aliens excludable, their exclusion is not statutorily mandated. Therefore, the law did not prohibit the Attorney General from paroling HIV-infected excludable aliens. Furthermore, based on evidence that the admission of the detained Haitians would increase the incidence of AIDS in the United States' population by only a fraction of one percent, the court reasoned that there was no need to deny their parole. The court ordered that the detained Haitians be immediately released to anywhere but Haiti so that they could receive proper medical treatment. As of July, 1993, all of the HIV-infected Haitian refugees were admitted to the United States for medical treatment.

106. Id.
107. Id. The court stated that the "Haitians remain[ed] in detention solely because they [were] Haitian and ha[d] tested HIV-positive." Id.
108. Id. (citing 8 C.F.R. § 212.5(a)(1)). Furthermore, the court found that there were no regulations or guidelines providing that parole must be denied because of an alien's HIV infection. Id.
109. Id. (citing the general parole regulations contained in 8 C.F.R. § 212.5(a)(1)).
110. Id.
111. Id. at 1049.
112. Id.
113. Id. at 1049 n.9.
114. Id. at 1050.
115. In March, 1993, before the court's decision in Haitian Centers Council, the court ordered 50 Haitians who had developed AIDS sent to the United States for proper medical treatment. Haitians Escape Guantanamo Not HIV Shadow, L.A. TIMES, Dec. 12, 1993, at A2. In April, 15 Haitians who were in the advanced stages of AIDS were also admitted to the United States for medical treatment. Twenty Haitians Arrive in Miami, LEGAL INTELLIGENCER, Apr. 6, 1993, at 5. In the beginning of June, 16 Haitians were evacuated for
C. The Indefinite Detention of Excludable Aliens

The United States Supreme Court has never decided the issue of whether indefinite detention of excludable aliens is constitutional. In addition, courts that have considered the issue are split in their holdings. The INA provides for the detention of an alien while determining whether the alien is excludable and subject to deportation. Once an alien is determined to be excludable, the Act provides for his immediate deportation, unless immediate deportation is not practicable or proper. For example, an alien is not immediately deportable if neither the alien's country of origin, nor any other country will accept him.

Some courts interpret the INA as implicitly allowing indefinite detention of aliens because the statute does not expressly state the length of time that a stay of deportation may continue. These courts have held that because no country will accept the aliens, they cannot be deported, and the only way to release them would be to parole them into the United States. These courts, therefore, claim that to force the Attorney General to parole aliens would violate her discretionary power over parole decisions.

Other courts, to the contrary, have distinguished between an alien's interest in admission and his interest in being free from arbitrary and prolonged detention. In Barrera-Echavarria v. Rison, the United

humanitarian reasons. Church Group to Resettle Guantanamo Haitians, Legal Intelligence, June 11, 1993, at 5. Finally, on June 8th, the case was decided and all HIV-infected Haitians remaining at Guantanamo Bay were ordered immediately released. On June 21st, the remaining Haitian detainees were released into the United States. Closed-Door Policy for Refugees, Legal Times, July 26, 1993, at S36.

116. See Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) (holding that "indefinite detention of a permanently excludable alien . . . is not unlawful"); cf. Barrera-Echavarria v. Rison, 21 F.3d 314, 317 (9th Cir. 1994) (holding that indefinite incarceration of excludable alien for eight years because he could not be returned to Cuba, was a violation of the alien's Fifth Amendment rights); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (holding that Attorney General lacks power to detain excludable aliens beyond a reasonable period of time).


118. Id. § 1227(a)(1).

119. Id. § 1227(a)(1), (d).


122. Id.


124. 21 F.3d 314 (9th Cir. 1994).
States Court of Appeals for the Ninth Circuit upheld the release, to a halfway house or some form of supervised release program, of an excludable Cuban alien, who had been imprisoned in U.S. prisons for eight years because there was no place for him to go. In reaching its decision, the court noted that:

Barrera is . . . an excluded alien, who in a legal sense has not entered this country. [However], it is not disputed that he is a person. He is a person within our jurisdiction. As a person he is protected by the Fifth Amendment. The [incarceration] has gone on for over eight years. It can no longer be fictionally characterized as exclusion from the country. It is imprisonment within the country.

Thus, the court recognized that an alien's "alien" status should not permit the government to deprive him of due process through indefinite detention in a U.S. facility.

III. ANALYZING THE HAITIAN CENTERS COUNCIL DECISION

A. The Effect of the Decision on Other HIV-infected Aliens Seeking to Immigrate

The HIV-infected Haitians found themselves indefinitely detained in Guantanamo because they were HIV-positive refugees. Had they simply been HIV-positive aliens, rather than refugees, they would have been returned to their country of origin when their applications for admission were denied due to their HIV infection. In the future, any other HIV-infected alien seeking to immigrate will most likely not be able to circumvent the law barring their admission because of the validity of the HIV-exclusion law.

The decision in Haitian Centers Council was based on a number of factors present in the case of the HIV-infected Haitians at Guantanamo: 1) their refugee status; 2) their inability to have counsel present at asylum hearings; 3) their indefinite detention; 4) the lack of adequate medical facilities; and, 5) the Attorney General's abuse of discretion in denying parole. Most important, the United States District Court for the Eastern District of New York is a court that adopts the belief that aliens have substantive due process rights.

In order for HIV-infected refugees to gain entry into the United States

125. Id. at 315.
126. Id. (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
127. Id. at 317.
in the future, two factors would have to be present. First, the refugees would have to be denied due process of a liberty interest. Substantive due process violations would include indefinite detention, the denial of adequate medical care, or the denial of parole because of the refugee’s HIV-infection. Second, the determining factor would be in choosing the right jurisdiction. An excludable alien’s substantive due process challenge would fail miserably in a court unwilling to recognize that excludable aliens have substantive due process rights.

B. A Recent Supreme Court Decision on Immigration Law Affirms the Continued Predominance of the Plenary Power Doctrine and Judicial Deference Toward Congress

The Supreme Court has never afforded substantive due process rights to excludable aliens. In the Court’s most recent ruling on an immigration issue, the Court held that excludable aliens were not entitled to substantive due process rights. In light of this decision, it is likely that, had Haitian Centers Council reached the Supreme Court, the Court would have reversed the District Court’s holding that the HIV-infected Haitian refugees at Guantanamo were being denied due process of a constitutionally protected liberty interest.

In 1993, the Supreme Court decided the case of Sale v. Haitian Centers Council, Inc., indicating its most recent word on the immigration laws of this country. In Sale, the plaintiffs challenged the constitutionality of an Executive Order that permitted the interdiction and forced repatriation of Haitians at sea. The plaintiffs claimed that the order violated § 243(h)(1) of the INA, which prohibits the Attorney General from returning an alien to a country where the alien shows that his life or freedom would be threatened. The Court, however, found that this law had no extraterritorial application, and therefore did not apply to

130. 113 S. Ct. 2549 (1993).
131. Id.
133. Id. The plaintiffs in this case were the Haitian Centers Council and a number of individual Haitians that had been interdicted at sea. Id.
135. Sale, 113 S. Ct. at 2552.
actions taken by the Coast Guard on the high seas. In the spirit of traditional immigration law, the Court distinguished between aliens who were within our borders and those who were not, and stated that some rights are not extended to those aliens who are not yet within the country.

The Court concluded that "[t]his 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." From the Court's conclusion, it is apparent that adherence to traditional concepts of immigration law will continue.

IV. Conclusion

Since 1875, Congress has had plenary power to regulate immigration and the Court has continuously deferred to that power, even in 1993. Because the Court has only entertained questions regarding the procedural methods that Congress uses to regulate immigration, there are few challenges that HIV-infected aliens can bring in order to gain entry into the United States.

While HIV-infected aliens may seek parole from the Attorney General, that decision remains in her discretion. The only remaining way for an HIV-infected alien to enter the country is if the factors present in Haitian Centers Council fall into place: refugee status, significant substantive due process violations, and a favorable jurisdiction. Moreover, were a decision recognizing the substantive due process rights of excludable aliens appealed to the Supreme Court, it is unlikely that the Court would uphold a grant of substantive due process rights to excludable aliens. Furthermore, it is unlikely that all of these determinate factors will manifest themselves again.

The Haitian Centers Council decision is a legally sound decision. The decision recognized that although the HIV-exclusion law is valid, its erroneous application should not be permitted. The government's reliance on the HIV-exclusion law was inappropriate in the case of the HIV-infected

136. Id. at 2563.
137. Id. at 2561 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)).
138. 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)).
Haitian refugees at Guantanamo because it served as the legal justification for the indefinite detention of innocent people.

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