No.

IN THE

Supreme Court Of The United States

October Term, 1994

Haitian Refugee Center, Inc., et al.

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Immigration and Naturalization Service or the Attorney General may engage in race and/or nationality discrimination against detained unaccompanied minor children in violation of statutory parole authority as found by this Court in *Jean v. Nelson*, 472 U.S. 846 (1985).

Whether the Government may, based on the suspected content of their speech, deny the Haitian Refugee Center, Inc., and pro bono counsel access to unaccompanied minor children and other Haitians on the United States Naval Base in Guantanamo Bay, Cuba, because, in the lower court's view, the Haitians have no rights and therefore no need for counsel.

Whether the discriminatory acts by the Immigration and Naturalization Service or the Attorney General against unaccompanied minor children based on their race and/or national origin are wholly beyond constitutional scrutiny because the children are located at Guantanamo, even though by treaty the Base is within the complete control and jurisdiction of the United States.

PARTIES TO THE PROCEEDINGS

The Petitioners are the Haitian Refugee Center, Inc., a Florida not-for-profit corporation, and Garry Joseph, Paulomme Edmond, Pierre Onel Antoine, Voidieu Jean Louis, Bergeline Jean Louis, and Padeci Jean Louis, each of them on behalf of themselves and all others similarly situated.

The Respondents are Warren Christopher, Secretary of State; William J. Perry, Secretary of Defense; Janet Reno, Attorney General; Brigadier General Michael Williams, Commander, Joint Task Force at the United States Naval Base, Guantanamo Bay, Cuba; Doris Meissner, Commissioner, Immigration and Naturalization Service; the Immigration and Naturalization Service; and the United States.

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OPINIONS BELOW

On January 18, 1995, a panel of the United States Court of Appeals for the Eleventh Circuit, on an appeal from the United States District Court for the Southern District of Florida, entered an opinion with an order, which is reported as *Cuban American Bar Ass'n, Inc., et al. v. Christopher, et al.*, 43 F.3d 1412 (11th Cir. 1995). App. at 1a. The court dissolved the preliminary injunctions in Case Nos. 94-5138, 94-5231, and 94-5234, and remanded the cases to the district court with instructions to dismiss the action. The panel also issued the mandate forthwith. The district court orders giving rise to this appeal, not reported, were issued on November 22, 1994, Appendix ("App.") at 32a, and November 28, 1994. App. at 34a.

On October 23, 1994, the Cuban American Bar Association, Inc. ("CABA"), a Florida not-for-profit corporation and others filed suit (Docket No. 94-2183) for injunctive relief, seeking meaningful access to their clients, Cuban refugees detained in the U.S. Naval Base at Guantanamo Bay, Cuba. On October 31, Petitioners, who sought injunctive relief on behalf of similarly-situated Haitian detainees, were granted the status of provisional plaintiff-intervenors in the action that CABA had commenced. Also on October 31, the district court granted a temporary restraining order ("TRO") sought by CABA. The Government filed an emergency appeal from the October 31 order obtained by CABA on November 1, seeking summary reversal. The Court of Appeals also invited briefing on the appeal from HRC, which HRC provided. By order of November 7, the Court of Appeals upheld that portion of the district court's order that required the Government to allow CABA reasonable access to their clients, while staying only that portion that enjoined voluntary repatriations. App. at 37a.

On November 22, by an order similar to the one granted to CABA, the district court granted the TRO sought by HRC, requiring that the Government provide HRC with access to the

Haitian detainees on Guantanamo and a list of the names of all Haitian detainees. It also directed the Government to parole unaccompanied Haitian minors into the United States in the same manner allowed for unaccompanied Cuban minors who had been detained there in Safe Haven. On November 28, the district court then stayed that portion of its order regarding parole of the Haitian minors and the release of a list of names, but it did not stay the provisions regarding access to the Haitian detainees. App. at 34a. Moreover, the district court, in an oral ruling, converted the TRO into a preliminary injunction, so that it could be immediately appealed. After expedited briefing and argument on appeal on December 19, 1994, a panel of the Eleventh Circuit stayed the district court's orders of October 31, November 22, and November 28. App. at 37a. On January 18, 1995, the panel issued an opinion and dissolved its own December 19 stay, as well as the district court's orders of October 31, November 22, and November 28, and remanded the case with instructions to dismiss.[1]

JURISDICTIONAL STATEMENT

This Petition seeks review of the order of the U.S. Court of Appeals for the Eleventh Circuit of January 18, 1995, dissolving the injunctive relief entered by the district court and instructing the district court to dismiss Petitioners' claims. Petitioner's

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[1] On January 5, 1995, upon learning that the Government had begun involuntary repatriation of the Haitian detainees at Guantanamo, Petitioner HRC had filed, as a separate action, (Docket No. 95-22), a complaint and motion for a TRO in the United States District Court for the Southern District of Florida. That motion was denied by oral order of the district court the same day, and on January 9, 1995, HRC appealed that ruling to the Eleventh Circuit Court of Appeals, seeking summary reversal. On January 11, 1995, the court consolidated that appeal with the cases from which this Petition seeks certiorari. On January 18, 1995, the Eleventh Circuit vacated its order of consolidation and affirmed the district court's denial of a TRO in that separate action. *HRC v. Christopher*, 43 F.3d 1431 (11th Cir. 1995). HRC is not seeking certiorari with respect to that decision.

Verified Complaint had alleged violations of the First and Fifth Amendments to the United States Constitution, the Immigration and Nationality Act, the Administrative Procedure Act, and Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the First and Fifth Amendments to the United States Constitution, and the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5)(A). The text of these provisions is set forth below.

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1182(d)(5)(A):

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion 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 to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT OF FACTS AND OF THE CASE

The case before this Court turns upon the Government's nakedly discriminatory decisions, dressed in the guise of political expediency. Unaccompanied Haitian refugee children, who have been detained by the Government for several months in the United States Naval Base at Guantanamo Bay ("Guantanamo") under harsh living conditions, without access to legal counsel, upon the Government's promise of Safe Haven, are now being forcibly and involuntarily repatriated. By contrast, similarly situated unaccompanied Cuban refugee children have long since been paroled because of "extraordinary hardship" into this country from Guantanamo. This sharp disparity in the treatment of the Haitian children is in direct violation of prior decisions of this Court and federal statutory law, and this Court should not allow it to continue.

A. Disparate Treatment Of The Cuban And Haitian Refugee Children

Despite State Department concessions that both Cuban and Haitian minors in Safe Haven at Guantanamo were similarly vulnerable, App. at 55a-56a, none of the parole policies instituted for Cuban minors have been extended to the detained Haitian children. Parole into the United States of all unaccompanied Cuban minors detained at Guantanamo was announced by the Immigration and Naturalization Service ("INS") on October 14, 1994. Subsequently, the INS announced a policy providing for parole into the United States of accompanied Cuban minors in Guantanamo and Panama, for whom detention would constitute an "extraordinary hardship," and who have sponsors in the United States, along with accompanying immediate family members. App. at 39a. Even though approximately 230 unaccompanied Haitian children had been held in precisely the same camps as the Cuban minors were held, for at least as long a time, and had endured precisely the same "extraordinary hardship," parole was not extended to the Haitian children. Instead, they have been continually and almost uniformly denied parole.[2] In effect, the Government's December announcement amounted to a statement that those same camps that constituted an "extraordinary hardship" for the Cuban white children nonetheless were good enough for the Haitian black children.

The Haitian children, brought to Guantanamo by U.S. authorities under a grant of Safe Haven warranting parole, had fled, at least since early 1994, a widely publicized and increasing reign of terror perpetrated in Haiti against supporters of ousted President Jean-Bertrand Aristide and their families, largely at

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[2] Reportedly, a very small number of the unaccompanied Haitian children have been granted parole on an individual basis. This stands in sharp contrast to the announcement of a sweeping class grant of parole awarded to the Cuban minors.

the hands of section chiefs appointed by the usurper military regime. App. at 38a. Indeed, the Government has admitted that some of these minors fled "very difficult, traumatic situations," App. at 54a, and life in the camps is yet another harrowing experience for these children. At least one Haitian girl who has relatives in Florida has attempted suicide. App. at 43a. So-called schooling of the minors is "just to keep them occupied and give them something to do." App. at 56a. Although the military's psychological units have influenced adult Haitian decisions to stay or return, App. at 47a, child psychiatrists have not been consulted regarding appropriate means by which the children's needs can be met. "Teachers" and supervisors for the children do not receive special training with respect to their roles. App. at 55a.

In addition, according to reliable press reports after the decision below, the Government has begun involuntary repatriation of these unaccompanied children, children legally incapable of making a voluntary and informed decision to return to Haiti from Safe Haven. With at least eight of these children reportedly having been returned to Haiti, still more enforced repatriations are apparently planned for the immediate future.[3]

B. Safe Haven Status At Guantanamo

The Haitian children detained in Guantanamo were granted Safe Haven status pursuant to a new policy announced by the Government in July, 1994, whereby selected Haitians interdicted at sea by the U.S. Coast Guard were offered Safe Haven at Guantanamo. App. at 66a. A "term of art," "Safe Haven" is a status informed by international law and human rights standards. App. at 60a-61a. It was not automatically awarded to new arrivals at Guantanamo. Screening questions were in place to identify any basis for exclusion, such as criminal behavior. App. at 60a. According to State Department officials, persons in Safe Haven are guaranteed protection and care for so long as they

[3] Some of these children have relatives in the United States. App. at 43a.

wish to remain. *Id.* It offers "equal protection to all comers who want it. That is what Safe Haven is." App. at 59a. Repatriation from Safe Haven should be made only on a voluntary and informed basis. App. at 66a.

Although there were at one time thousands of Haitian refugees in Safe Haven at Guantanamo, that number has decreased to approximately 500 since the Government began returning them to Haiti, first under the challenged but purportedly "voluntary" repatriation program that deprived Haitians of material information about conditions in Haiti needed for an informed decision, App. at 46a-47a, and then by the repatriation operation which Petitioners were advised had been instituted in December, 1994, after argument below but while this case was pending before the panel below.

C. Access By Petitioner HRC To Haitian Refugees At Guantanamo

The Government not only has detained the Haitian children without the parole awarded to the Cuban children, it also has sought to hold them incommunicado. The record evidence establishes the Government's continued denial of the right of Petitioner Haitian Refugee Center, Inc. ("HRC"),[4] to meet with Haitian refugee clients at Guantanamo.[5] Only after numerous

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[4] HRC is an organization of United States citizens, resident aliens and non-resident aliens, including the individual Haitian refugee petitioners and the parents, relatives, and representatives of some of the unaccompanied minors detained at Guantanamo. App. at 38a.

[5] The Government also has refused to release the names of the Haitian children. At the request of representatives of the Cuban detainees at Guantanamo, the Government released a list identifying all of the more than twenty thousand Cuban detainees. Despite repeated requests by their relatives and friends, as well as by their counsel both informally and by this action, the names of the Haitian detainees have never been provided so that HRC could identify relatives in the U.S. and Haiti and fulfill its counseling function. This refusal prevents the remaining detained Haitian children from even notifying their relatives in Haiti that they survived their treacherous journey at sea and keeps their identity secret from likely relatives in the U.S. App. at 57a.

requests and the threat of a lawsuit were a limited number of HRC attorneys allowed once to visit Guantanamo to meet with Haitian refugees in Safe Haven. The visit was limited to one three-hour period of access; no other visits with Haitian refugees by HRC attorneys were allowed until after this lawsuit was filed. App. at 46a-47a. Also, during the short period of time allowed for the first HRC visit, petty harassment by the Government denied HRC-sponsored attorneys any privacy. INS officials purposely accompanied those lawyers over objection throughout their visit and intruded into meetings with the refugees, thus "nullifying any possibility of meaningful private interaction." *Id.* Worse, meetings between refugees and their counsel were voice videotaped by the Government. Even after the District Court ordered HRC and the Cuban American Bar Association, Inc. ("CABA") meaningful access, the Government continued to "play hardball" and tried to pit CABA and HRC against each other by requiring the attorneys for the Cuban refugees and those for the Haitian refugees to split their narrowly circumscribed time, and to plan visits to their respective clients at their own transportation expense on alternate weeks. App. at 72a.

Finally, the Government has denied HRC the same access to Guantanamo that it has extended freely to other organizations. Amnesty International, for example, was allowed private unsupervised interviews with refugees, and World Relief has been allowed long-term access to the refugees. *See* App. at 70a. Amnesty's favored treatment was the result of the Government's determination that Amnesty is an "objective" organization.

The Government purports to justify the decision to withhold these names on two grounds: (i) alleged security concerns, and (ii) an alleged logistical burden in obtaining Haitian detainees' waivers. App. at 58a. As to the Government's claim that there would be a logistical burden in obtaining waivers from the detainees, Government witnesses are entirely unable to identify or describe what that burden would be. *See, e.g.*, App. at 57a. This claim of burden is particularly insupportable now, since only a few hundred detainees remain at the base.

App. at 62a-63a. The Government's grant of access to other perceived viewpoint "neutral" organizations, while at the same time imposing strict access restrictions on HRC, is compelling evidence of the viewpoint discrimination by the Government.

D. The Government's Untenable Court Rationale For Its Discrimination Against The Haitian Minors

The rationale that the U.S. has put forth in court in this case for the disparate treatment of Haitian and Cuban minors collapses upon examination. It is nothing more than a post-hoc rationalization crafted in order to attempt to salvage the Government's current legal position. In contrast to the "extreme hardship" that the Executive stated as its basis for the parole decisions when they were made, the Government's lawyers now claim to justify discrimination against the detained Haitian children upon purported differences in political climate in the country from which they fled -- between a supposedly harsh and hostile totalitarian Cuba and a Haiti that is supposedly safe, secure, and free of human rights abuses or political repression since the October 15, 1994 return of President Aristide under armed guard. App. at 64a. This belated rationalization, first adopted in court in November, is totally absent from the policy announcements paroling the Cuban minors and from the Government's discriminatory maltreatment of the Haitian children. App. at 39a.

The differences in political climate that the Government claims to perceive, moreover, are illusory. Hundreds of Cuban refugees proved they do not regard Cuba as the dangerous and retaliatory prison state that the Government claims it to be; with U.S. blessing, they voluntarily chose to return from Safe Haven at Guantanamo to sovereign Cuba, preferring conditions there too those of detention at Guantanamo. App. at 67a-68a. Moreover, State Department officials concede that there is *no* evidence of reprisals being carried out against those who returned to Cuba. App. at 66a-67a.

In Haiti, by contrast, the danger of retaliation against repatriated refugees remains all too real. The statements of the Government's own personnel, as well as the Government's own evidence, establish that politically motivated violence against Aristide supporters continues in Haiti, notwithstanding the high-level and hard-won governmental changes that have only recently occurred there. Gregg Beyer, Director of the INS's Asylum Division, advised his agency's asylum adjudicators in an instructional memorandum that:

> the structures that supported and effected the September, 1991 military coup are still present, if currently under wraps. Those elements involved in controversial past practices include but are not limited to, the small wealthy elite, the military, the police, the section chiefs, the attaches (heirs to the tontons macoutes) the Front for the Advancement and Progress of Haiti ("FRAPH"), and other paramilitary structures.

App. at 41a.

In stark contrast to the Government's optimistic courtroom portrait of conditions in Haiti, the Beyer operational memorandum candidly discusses the continued "accounts of ongoing violations and killings," even after President Aristide's return to power, *id.*, and that individuals and groups that have been guilty of past human rights violations in Haiti "have simply and probably only temporarily retreated into the background." App. at 41a-42a. Corroborating Mr. Beyer's concerns, Brunson McKinley, Deputy Assistant Secretary of State for Population, Migration, and Refugees, stated in his deposition that he has knowledge of ongoing political violence in Haiti against supporters of Aristide and democracy.[6] App. at 59a. Secretary

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[6] Still another official, Kenneth Leutbecker, a Justice Department Community Relations official with responsibility for humanitarian assistance to Guantanamo, opposed the release of names of the Haitians (prior to the intervention of the Multi-National Force ("MNF") and the return of Aristide) because "of the potential for violence and retaliation which could be directed

McKinley also confirmed that "I have heard that in parts of the countryside there is still trouble and agitation and the possibility of political pressures, persecution."[7] *Id.*

In addition to the Government's own damaging evidence about the dangerous conditions in Haiti, respected human rights organizations and commentators further confirm Haiti's continuing political instability. William O'Neill, Legal Director of the United Nations/Organization of American States International Civilian Mission to Haiti from June 1993 to March 1994, and Consultant to the National Coalition for Haitian Refugees, personally observed the circumstances in Haiti upon the return of President Aristide. Mr. O'Neill testified that "huge obstacles remain" to the return of the rule of law and respect for human rights in Haiti. App. at 48a. Mr. O'Neill also described the presence of the Multi-National Force ("MNF") in rural Haiti as "extremely limited." App. at 50a. Approximately 70 percent of Haitians live in isolated, rural areas and MNF troops have not

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against all Haitians connected with the migrants." App. at 52a. Mr. Leutbecker's assessment did *not* change after the MNF intervened in Haiti.

> Since the original decision was made not to release Haitian migrant names, the issue has been reconsidered several times.... Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remains.

Id.

[7] The Government below put emphasis on the affidavit of Michael Skol to support its position that conditions in Haiti had improved so dramatically since the return of President Aristide that Guantanamo refugees can safely return to that country. However, Skol's deposition demonstrated that he cannot speak definitively on these issues. Indeed, Mr. Skol admitted that he was unfamiliar with any specific facts as to the current security conditions in Haiti. App. at 68a-69a. When asked to support with any example his statement that members of the Haitian military with "demonstrably unacceptable human rights reputations are being removed," Skol stated, "I simply don't know." App. at 66a. Indeed, Mr. Skol conceded at deposition that human rights violations in Haiti have not ceased, App. at 65a, and that the multi-national force has not been deployed to all areas of the country. *Id.*

been deployed in the numbers necessary to provide even "minimal security in the countryside."[8] *Id.* Further, the MNF's attitude toward the Haitian military and other paramilitary forces, such as FRAPH, "undermines the effort to create a safe and secure environment which is a necessary prerequisite to insuring respect for human rights."[9] *Id.* It is undisputed that FRAPH operates a repressive and violent force against Aristide supporters. *Id.*

The December 8, 1994 briefing paper of the respected Human Rights Watch/Americas similarly confirmed that human rights violations in Haiti continue.[10] App. at 80a. Haitian military, paramilitary forces (attachés) and FRAPH members have continued to assassinate or beat Aristide supporters subsequent to the deployment of U.S. troops and the MNF. The reason for the continued disturbing human rights situation in Haiti is the failure of the MNF to collect and seize weapons which remain in the hands of the army, FRAPH and other paramilitary forces and military supporters. *Id.* Though the

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[8] Even as of last November, U.S. forces remained in only 27 of the 500 towns and villages that they had claimed to visit. App. at 65a. Petitioner advises this Court that that presence has been reduced even further.

[9] Mr. O'Neill affirms:

> Haitians still on Guantanamo have reason to fear persecution based on their political opinion if forced to return to Haiti. Large parts of the countryside and key urban neighborhoods are under the sway of the Haitian military and paramilitary where the MNF is not present and where the MNF's presence, while benign, remains limited and its mandate restricted.

App. at 50a-51a.

[10] News accounts of continuing violence in Haiti corroborate this perception that that country, in particular outside Port-au-Prince, remains not yet stable or safe. *See, e.g., Beheading Sows Terror In Rural Haiti*, Miami Herald, Nov. 19, 1994, App. at 73a; *Two Slain by Attaches on Aristide's First Full Day Back*, N.Y. Times, Oct. 17, 1994, App. at 76a; *Grenade Kills Five in Haitian Crowd*, Wash. Post, Sept. 30, 1994, App. at 78a.

MNF has detained certain paramilitary agents, "the majority of these appear to have been released without any legal proceedings." *Id.*

This accumulation of reliable reports of ongoing human rights violations in Haiti shows that even the Government's courtroom justifications were either erroneous in fact or legitimately in dispute and that dismissal without a plenary hearing was legal error. Indeed, the Government's ostensible reason for the denial of equal treatment to the Haitian children was shown solely to be a post-hoc rationalization. Living in no less risky a situation than were the paroled Cuban children, the Haitian children continue to face an unstable and dangerous future if repatriated to the country they fled, rather than paroled, for no reason other than their national origin and the color of their skin.

ARGUMENT

I. The Opinion Below Directly Contradicts The Decision Of This Court In *Jean v. Nelson*, Which Ruled That The INA, 8 U.S.C. § 1182(d)(5)(A), Prohibits Discrimination Based On Race Or National Origin.

The opinion of the panel in this case is deserving of review because, in its interpretation of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1503, the panel baldly ignored the decision of this Court in *Jean v. Nelson*, 472 U.S. 846 (1985) ("*Jean II*"), *aff'g* 727 F.2d 957 (11th Cir. 1984) ("*Jean I*"), and rested its opinion on grounds that squarely contradict this Court's *Jean II* holding. This Court in *Jean II* explicitly ruled that § 1182(d)(5)(A) of the INA bars the Government from discrimination on the basis of race or national origin in granting or denying aliens parole into the United States, *Jean II*, 472 U.S. at 855, but the panel below nonetheless reached precisely the opposite holding, without even mentioning that its decision was in direct conflict with this Court's prior holding. This misapplication of binding precedent, moreover, occurs in a case of

inescapable national importance, affecting the liberty and fate of several hundred stranded refugee children in Safe Haven. It also flouts the obligation of the Executive Branch, conceded in *Jean II*, to obey duly-enacted laws and regulations and not to utilize race or national origin factors in decisions under the parole statute and regulations.

The Petitioners in the case at bar squarely challenged the Government's discriminatory exercise of the statutory parole powers awarded to the Attorney General pursuant to the INA. In *Jean II*, this Court ruled explicitly that the INA and its implementing regulations, 8 C.F.R. § 212.5, specifically forbid the Executive Branch from invidiously discriminating on the basis of race or national origin in its parole decisions. "[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." *Jean II*, 472 U.S. at 855. Circuit courts have also agreed that the Executive may not exercise its power in a manner which gives "effect to considerations which Congress could not have intended to make relevant." *Doherty v. INS*, 908 F.2d 1108, 1117-18 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992); *accord Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982). Indeed, the Government expressly conceded this point at oral argument in *Jean II*, admitting that the parole statute and its implementing regulations make discrimination based on race or national origin impermissible.[11] *Jean II*, 472 U.S. at 872. The Government's litigation stance in the instant case therefore is not only willfully contrary to Su-

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[11] In light of this Court's ruling, and the Government's concession, that § 1182(d)(5)(A) forbids discrimination based on race or national origin, the result under that section is the same as it would be under a section, such as § 1152(a), where the language of the statute itself explicitly bars such discrimination. *See Legal Assistance For Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469, 473 (D.C. Cir. 1995) (nationality-based discrimination in the granting of immigrant visas held impermissible under 8 U.S.C. § 1152(a)).

preme Court precedent, it also disregards the Government's own admitted statement of the law. The Government's flouting of *Jean II* and refusal to extend parole to the black Haitian children on the same terms as to the white Cubans is indefensible.

In an unprecedented interpretation of Executive power, and in defiance of this Court's holding in *Jean II*, the panel perceived the Government's authority under the INA to grant or deny parole as unbounded, standardless, and essentially unreviewable. According to the panel, "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility." App. at 22a, citing to *Jean I*. The panel thus incorrectly concluded that the INA permitted the Government forcibly to repatriate the unaccompanied Haitian minors on the basis of their race and national origin, while granting parole to similarly-situated Cuban refugees, since parole in the panel's view may be denied "on grounds that might be suspect in the context of domestic legislation."[12] *Id.*, citing to *Jean I*.

The panel decision inexplicably ignores this Court's opinion in *Jean II* and distorts the *en banc* holding of its own Circuit in *Jean I*. Nowhere does the opinion below mention this Court's recognition in *Jean II* of the strict statutory and regulatory limits on the Executive's discretion to discriminate invidiously in its parole decisions.[13] Nowhere does the panel note that the Gov-

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[12] " '[T]here is little question that the Executive has the power to draw distinctions among aliens based on nationality.'" App. at 22a, citing to *Jean I*.

[13] Perhaps recognizing that its opinion conflicted with this Court's previous ruling, the panel explained in a footnote that this Court's ruling in *Jean II* had dealt with "low-level . . . government officials," whereas in the case below the panel was passing upon "the extensive authority of the Attorney General and the President." App. at 22a. This distinction is plainly insupportable. The prohibition on Government discrimination on the basis of race or national origin does not arise from "superior orders" but rather

ernment itself acknowledged in *Jean II* that discrimination based on race or national origin was impermissible under the parole statute and regulations invoked there and in this case. Likewise, nowhere is it mentioned that the Eleventh Circuit in *Jean I* had reached essentially the same conclusion, ruling as binding Circuit precedent, *en banc,* that the INA and its regulations strictly circumscribed the Executive's parole discretion. Unlike the panel below, the *Jean I* court held that the parole power of the Executive Branch was not standardless or unreviewable; rather, it required that there be "a facially legitimate and bona fide reason for the government's decision to deny parole." *Jean I* at 978. This test, though not as strict as the standard adopted by this Court in *Jean II*, is nonetheless a reviewable standard. By contrast, the panel below applied no test at all. It neglected to address the judgment of the *en banc Jean I* court which had remanded that case to the district judge to determine whether or not the Government's parole power had been exercised properly within the limits of the statute and regulations. Indeed, in affirming the judgment, this Court specifically directed the lower court to determine whether the Government had properly exercised its authority in that case *without* regard to race or national origin. This Court should accept review of this case in order to reverse the ruling of the panel below and enforce its holding in *Jean II*.[14]

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from a duly-enacted statutory and regulatory framework that binds the entire Executive Branch. The Attorney General may not set aside properly-constituted federal regulations restraining the conduct of the INS merely for political expediency. She remains bound by them until they are properly repealed or modified.

[14] Although the panel subsequently went on to discuss the Haitian detainees' rights under this statute, App. at 21a, it first held that the statute was inapplicable here since it had no application "extraterritorially." App. at 18a. This finding of extraterritoriality, however, is based upon the fundamental misconception that Guantanamo is not in any way U.S. territory. For all of the reasons set forth *infra*, a proper interpretation of the facts of this case and of prior precedent indicates that, for purposes of this statute as well as for constitutional purposes, Guantanamo is U.S. territory.

II. The Opinion Below Directly Conflicts With This Court's Prior Interpretation Of The First Amendment And The Equal Protection Clause Of The Constitution.

The panel's opinion is also deserving of review because of its unprecedentedly broad evisceration of several basic constitutional guarantees raising a substantial and recurring question of constitutional law. Indeed, according to the panel's crabbed reading of the Constitution, the federal officials at Guantanamo may act essentially above the law in their treatment of the detained Haitian children since their actions would be completely free of any constitutional restraint or judicial scrutiny. Not since the long-discredited *Dred Scott v. Sandford*, 60 U.S. 393 (1857), has a court ruled so broadly as thus to deny the personhood of an entire class of bereft individuals. The panel stripped away from the detained Haitian children all rights under the First Amendment, and even stretched its ruling further to deny to HRC its First Amendment rights to associate with its clients, the detained Haitian children. The panel also denied to the Haitian children any rights under the equal protection clause of the Fifth Amendment, thereby allowing Government officials to invidiously discriminate against the Haitian children, and in favor of the similarly-situated Cuban refugees, based upon their race and national origin. Because of the disturbingly broad reach of the panel's decision, and the violence that it does to the

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This status of Guantanamo as U.S. territory distinguishes the case at bar from *Sale v. Haitian Ctrs. Council*, ___ U.S. ___, 113 S. Ct. 2549 (1993). In *Sale*, the plaintiffs were interdictees who had been detained by the Coast Guard on the high seas and never brought to any U.S. territory, and those plaintiffs could not claim the protection of the INA, since it was found to be inapplicable extraterritorially. *Id.* at ___, 113 S. Ct. at 2560. Here, there is no problem of extraterritoriality because the Haitian detainees were selectively brought into U.S. jurisdiction at Guantanamo and the exceptional hardship finding supporting the exercise of parole authority was made in Washington, D.C.

deepest of this nation's constitutional principles, it raises substantial questions deserving of review by this Court.

A. The Opinion Below Directly Conflicts With This Court's Settled First Amendment Jurisprudence By Engaging In Content-Based Discrimination In Denying HRC Access To The Haitian Children.

The panel erroneously impinged upon the rights of Petitioner HRC, preventing HRC from exercising its First Amendment right to associate with its members and potential clients among the Haitian children and to advise them regarding their current situation. App. at 25a. The Government's denial of access applies only to HRC and CABA; other groups such as Amnesty International are permitted wide access. As such, the Government officials here violate the settled principle that persons and organizations may not be selectively excluded from a forum based on the political or legal content of their message. The Government, in precluding HRC from meeting with the Haitian children, has barred access only to those whom they determine carry a particular legal and political message, one the Government assumed it would not like -- namely, the giving of legal advice that might fully inform the detainees of their legal rights in Safe Haven and of current conditions in all of Haiti which might affect a voluntary return decision or other course of conduct.

This Court has definitively ruled that such content-based discrimination is impermissible because, even with regard to a non-public forum, any controls over access that the Government imposes must be viewpoint-neutral. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, __ U.S. __, 113 S. Ct. 2141, 2147 (1993). Whatever the authority the Executive may have to regulate speech in a public or non-public forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def.*

& Educ. Fund, 473 U.S. 788, 806 (1985). *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (citation omitted)).

Nonetheless, the Government undertook a total ban on speech by HRC, a legal/political association seeking to exercise its First Amendment rights to have its attorneys associate with and communicate to individuals held in Safe Haven custody by the Government. The panel's decision leaves in place the Government's heretofore successful efforts selectively to prevent HRC and CABA -- and them alone -- from visiting, meeting with and counseling the detained Haitian children. Indeed, the ramifications of the panel's holding are far-reaching: lawyers representing multinational corporations could be barred from consulting their clients, a non-American citizen charged with a crime on a military base abroad could be held incommunicado and prevented from seeing a lawyer, and a foreign leader kidnapped and detained by U.S. authorities could be cut off from counsel completely. Indeed, under the panel's holding, the Government could lawfully bar American citizens on Guantanamo from writing open letters, criticizing the President, or engaging in religious worship.

To reach its conclusion, the panel below conditioned HRC's exercise of its First Amendment rights upon the existence *vel non* of the Haitian children's underlying legal claims.[15] App. at 25a. As Judge Hatchett noted in dissent in *Haitian*

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[15] In its complete rejection of the Haitian children's rights of access to counsel under the First Amendment, the panel mischaracterized the Haitian children's legal and factual ties to the United States arising from the legal status of Guantanamo and the legal significance of Safe Haven. *See infra.* HRC does not concede that the panel was correct in ruling that the Haitian children do not have First Amendment rights, but even if it is assumed, *arguendo*, that they do not, the panel's rejection of HRC's First Amendment rights is constitutionally flawed.

Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 1245 (1992) ("*HRC II*") the illogic of this reasoning is transparent:

> Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforceable in American courts and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interest, because of a prior determination that they have no rights that justify meeting with American lawyers. Obviously, such a determination should be made only after they have received the benefit of counsel.

HRC II, 953 F.2d at 1517 (Hatchett, J., dissenting). Those words are all the more true in the case at bar, where the remaining Haitians whose fundamental rights are at stake are underage and thus incapable of competently pursuing those rights themselves.[16] Moreover, the panel's ruling contradicts the prior holding of the Eleventh Circuit *en banc*. In *Jean I*, the *en banc*

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[16] As a feebly attempted justification for its action, the Government complained of the costs associated with granting access to counsel. Yet, as they have been throughout this litigation, and the Court below knew, CABA and HRC stand ready to arrange and pay for their own transportation to meet with the detainees, without any financial or logistical assistance from the Government. While the panel below noted that "assistance is necessarily required in providing access to the base, meeting areas, accommodations and security," App. at 25a, the undisputed fact remains that the Government willingly undertook all of this "assistance" on behalf of Amnesty International and each of the other groups to whom it allowed entry. It was only CABA and HRC, because of the presumed content of their message, that were denied such access.

court recognized that this Court "has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights." *Jean I*, 727 F.2d at 983 (citing cases). Nowhere in *Jean I* does the *en banc* court condition counsel's rights upon the existence of his client's rights, and for the panel below to do so is improper. Nowhere does the panel seek to explain its rejection of binding *en banc* Circuit precedent involving the very petitioner in this case.

B. The Panel's Decision Violates This Court's Settled Equal Protection Jurisprudence.

The panel's denial of the Haitian children's constitutional rights to equal protection is plainly insupportable. Because of its fundamental nature and potential for recurrence, it raises a substantial question deserving of review. The disparity in the treatment of the detained Haitian children, who face forcible repatriation to a country still seriously threatened by internal political violence, when compared with the similarly situated Cuban refugees, who have been able to obtain parole into the United States on generous terms, is in direct conflict with the non-discrimination principle fundamental to the constitutional values enunciated by this Court. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Whatever may be the power of Congress or the President to make distinctions pursuant to duly-enacted statutes and regulations in the admission of excludable aliens, this Court has never held that agency and military officials, in this case instructed from Washington, D.C., may invidiously discriminate in granting and denying parole.[17] The decision amounts to a

[17] Even in *Korematsu v. United States*, 323 U.S. 214 (1944), in the midst of a world war, where there was fear of sabotage and the survival of our nation was at stake, this Court did not abandon the non-discrimination principle. Indeed, it subjected the discrimination by the President, which had been sanctioned by Congress, to strict scrutiny. *Id.* at 216. The panel's refusal to subject the Government's discriminatory actions to any scrutiny at all in the absence of a national security threat is thus wholly inexplicable.

broad holding that the Constitution can afford no protection whatsoever to detained aliens subjected as a class to invidious discrimination and that such aliens are, in effect, constitutional non-persons. *Cf. Dred Scott v. Sandford*, 60 U.S. 393 (1857), (black plaintiff's action dismissed; those of his race were ruled not to be "persons" under the Constitution and thus were barred from bringing suit). If not reversed, the panel's decision would constitutionally sanction arbitrary denial of parole by INS officials, based solely upon race, national origin, or religion. Thus, INS enforcement officials may tomorrow deny parole to all Russian Jews simply because they *are* Jewish, or all Bosnian refugees simply because they *are* Bosnian, just as in this case where parole was denied to the detained Haitian children simply because they were black or from Haiti. Such an unprecedented distortion of this nation's constitutional values should not be allowed to escape review by this Court.[18]

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[18] The Government's courtroom justification for its unequal treatment of the Haitian children was by advocating that political conditions in Haiti are in some way better than in Cuba. As Petitioner's factual statement sets forth, however, this illusory rationale, unsupported in fact in the record and untested at a plenary hearing, is nothing more than a post-hoc rationalization for forensic purposes. As this Court has previously made clear, such a justification should have been disregarded below. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

When the Attorney General granted parole to the Cuban minors (and left the Haitian children behind), the stated reason for this action was the "extraordinary hardship" of the detention camps. App. at 39a. The political differences between Haiti and Cuba that the Government in its court statements apparently finds so important were nowhere mentioned or recorded in respect of the INS decisions at issue, and formed no basis for the decision. That rationale was only adopted long *after* the discriminatory denial of parole to the Haitian children had been carried out, and only as a strategy for this litigation. Moreover, as is also set forth in Petitioner's factual statement, evidence from respected commentators and the Government itself demonstrates that political violence remains a very real threat in Haiti, despite the Government's rosy courtroom pronouncements.

The panel's sweeping denial of all constitutional rights to the detained Haitian children arises from a fundamental error. In spite of contrary persuasive precedent from this Court and other federal appellate courts, the panel ruled erroneously that the Haitian children in Safe Haven could raise no constitutional claims on the grounds that the United States military installation maintained in perpetuity at Guantanamo Bay is outside the reach of the Constitution. App. at 16a. It reached this conclusion despite its own finding that Guantanamo is held under the "complete control and jurisdiction" of the United States,[19] *id.*, and despite the uncontroverted fact that American law governs the conduct of those on the base, App. at 53a, and that the parole decisions were made in the United States, App. at 4a, 39a. By making the scope of the Constitution so dependent upon formalities, while ignoring all of the indicia of United States nexus and control, the panel opinion demeans precedent and fundamental principles of American law. "[T]here has never been a time when United States authorities exercised governmental powers in any geographical area . . . without regard for their own Constitution. (citation omitted). Nor has there ever been a case in which constitutional officers . . . have exercised the powers of their office without constitutional limitations." *United States v. Tiede*, 86 F.R.D. 227, 242 (U.S. Ct. for Berlin 1979).

The Second Circuit has previously addressed the issue of the status of Guantanamo, and it directly reached a conclusion opposite to that of the panel below. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) ("*McNary*"), *vacated as moot on other grounds sub nom. Sale v. Haitian Ctrs. Council*, ___ U.S. ___, 113 S. Ct. 2549 (1993). The *McNary* court held that, because of the complete U.S. control and jurisdiction over the base, Guantanamo was within the ambit of the

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[19] The naval base at Guantanamo Bay is entirely closed off from the rest of Cuba. The perimeter of the base is ringed with minefields and concertina wire to prevent any unauthorized entry onto this U.S.-controlled territory. App. at 4a, 58a.

Constitution. The United States officials thus were barred in that case from arbitrarily violating the due process rights of the detained Haitian refugees as found there. While the *McNary* opinion was subsequently vacated by this Court on unrelated mootness grounds, and clearly did not bind the panel below, its unrefuted reasoning remains in unresolved conflict with the decision of the panel below and the issue is certworthy in this Court.

The panel's opinion below also runs counter to the principles in the *Insular Cases* where this Court stated that "[t]he limitations . . . to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution." *Dorr v. United States*, 195 U.S. 138, 142 (1904). Thus, it is the substance of the United States' relation to Guantanamo, and the power that it exercises there, that should inform the extent to which the protections of the Constitution apply to those the Government has accorded Safe Haven.

Relying upon the principles of the *Insular Cases*, other courts have repeatedly held that fundamental constitutional rights, which include the First and Fifth Amendments, apply to non-citizens of the United States in territories where, as here, the United States lacks formal sovereignty but has full jurisdiction and control. In the Panama Canal Zone, the U.S was granted by treaty "in perpetuity the use, occupation, and control" of the land, without a formal transfer of sovereignty. Isthmian Canal Convention of 1903, T.S. No. 431, Arts. II and III. Courts treated the area as an unincorporated territory of the United States, which meant that fundamental rights of due process applied to protect even non-citizens. *See, e.g., Jimenez v. The Tuna Vessel "Granada,"* 652 F.2d 415 (5th Cir. 1981) (district court held to have impermissibly denied due process to defendant). The same result was reached with regard to the Trust

Territory of the Pacific Islands. In *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (noting that, pursuant to the *Insular Cases*, the locality of the plaintiff, not his nationality, determined the extent of his rights). Finally, it was similarly settled that, in the American sector of Berlin, fundamental constitutional rights extended to non-citizens, even though the United States was an occupying power and not a sovereign. *Tiede*, 86 F.R.D. at 242-43.

Moreover, notwithstanding the panel's ruling, prior practice has consistently extended constitutional protection even to aliens at Guantanamo. For instance, the former Court of Claims assumed that the takings clause of the Fifth Amendment applied to a Cuban contractor at Guantanamo. *Huerta v. United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977). Also, the United States exercised criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law.[20] *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States v. Rogers*, 388 F. Supp. 298 (E.D. Va. 1975) (U.S. citizen). These cases warrant this Court's acceptance of this case for plenary review in order to correct the panel's misreading of the fundamental constitutional protections to be accorded those in Safe Haven and the constitutional limits on Governmental action affecting those in Safe Haven on Guantanamo.

Furthermore, and quite independently, the Haitian children detained in Guantanamo are entitled to constitutional protection because the United States itself selected them for a grant of Safe Haven status in allowing them entry into the protection of the United States at Guantanamo. As this Court has recognized, an

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[20] Indeed, prior to the Government's mass repatriation of the Haitian adult refugees "voluntarily," at least one Haitian reportedly was charged with a criminal assault upon another refugee and was taken, consistent with statutory law, to the mainland United States for prosecution pursuant to American law. App. at 53a.

alien's entitlement to constitutional protection rises in accordance with his connection to this country. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950). The Government admits that Safe Haven status, which is reserved for eligible persons fleeing repressive regimes, is not automatic and that eligibility criteria had to be satisfied. Haitian refugees who were intercepted on the high seas by the United States military were questioned to determine if they were eligible for Safe Haven status. Only those who met the necessary criteria were officially granted Safe Haven status at Guantanamo. This eligibility or "weeding" process is essentially the same as the "screening-in" process at issue in *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) ("*HCC*").[21] There, the plaintiffs were Haitians at Guantanamo who had been interdicted, interviewed by the INS and found to have a "credible fear of return." That court held that

> it would not be "incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States." Nor would it be either "impracticable" or "anomalous" to apply the Due Process Clause to screened-in Haitians held in U.S. custody on Guantanamo.

Id. at 1042 (quoting *McNary*, 969 F.2d at 1343).

The panel below erred in dismissing Safe Haven as a merely "gratuitous humanitarian act." App. at 20a. Rather, Safe

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[21] Because the Haitian children here have been "screened-in" and granted Safe Haven status, the panel's comparison of this case to *HRC II* is inapposite. *See* App. at 24a. There, the Coast Guard interdicted Haitian refugee vessels on the high seas and, after some questioning of the refugees, repatriated them without affording the refugees the opportunity to apply for any refugee, asylum, or Safe Haven status. *HRC II*, 953 F.2d at 1501-02. *HRC II*, therefore, dealt with aliens who had been "screened out."

Haven is a status which is well-established in international law. *See, e.g.*, Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Va. J. Int'l L. 551, 624 (1986); U.N. Sec. Council Res. 819, U.N. SCOR, 48th Sess. 3199th mtg. at 2 para. 1, U.N. Doc S/Res/819 (1993) (establishing Bosnian safe areas). A senior State Department official responsible for all migration and refugee affairs acknowledged in his deposition in this case that " 'Safe Haven' is a term of art" and that it is defined through accepted standards of international law and human rights. Other Government officials admitted that the Haitians granted Safe Haven status are guaranteed protection for so long as they wish to remain. App. at 60a. Furthermore, the Government's own witnesses concede that Safe Haven status requires "*equal protection* to all comers who want it. That is what Safe Haven is." App. at 59a (emphasis added). Notably, Government officials responsible for formulating and implementing the Safe Haven policy have admitted in this case that the Safe Haven afforded to the Haitians is intended to be equivalent in all respects to the Safe Haven afforded to the Cuban refugees. App. at 53a.

Having granted Safe Haven status to the Haitian refugees at Guantanamo, the United States has granted them a liberty and property interest which should not be taken from them or diminished by invidiously discriminatory action. "If the [Fifth Amendment] does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." *HCC*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (finding screened-in refugees have due process rights under Fifth Amendment). By its affirmative commitment of providing Safe Haven, the Government owes a measure of duty to those in its care.[22]

[22] Certainly in other contexts, the Government, by its affirmative conduct, has created rights where none otherwise existed, and these rights are not treated as "gratuitous humanitarian acts." *See, e.g., Board of Regents v.*

C. The Panel's Refusal To Compel The Government To Disclose The Names Of The Haitian Refugees Conflicts With This Court's Settled Equal Protection And First Amendment Jurisprudence

The panel's opinion further erred in holding that, because the detained Haitian children have been found to have no constitutional rights, they cannot claim that the Government's refusal to disclose their names, while making public the names of the similarly-situated Cuban refugees, is a violation of equal protection. App. at 1430. The flaws underlying this holding have been described above in Petitioner's argument that the protections of the Constitution should be held to be available to the Haitian children in Guantanamo. As a further error, however, the panel's decision fails to recognize that the decision to disclose the names of the Cubans, and the refusal to disclose the names of the Haitians, both took place physically within the United States. App. at 4a, 39a. There is nothing extraterritorial about these acts and this blatant discrimination. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1531 (D.C. Cir. 1984).

In upholding the Government's refusal to disclose the Haitian children's names, the panel also invoked First Amendment case law for the proposition that there is no right to information held by the Government. App. at 27a. This statement is overly simplified, and largely incorrect. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972) (the First Amendment protects

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Roth, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Moreover, equal protection analysis applies to limit governmental discretion even in the absence of a fundamental right. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide [appellate review]. But that is not to say that a State that *does* grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.") (citations omitted); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (applying equal protection analysis to state education financing scheme, while declining to hold that there is a fundamental, constitutionally protected right to education).

a right to "receive information and ideas"). Where there is a willing speaker, there is a right to hear that speaker. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). Several detainees have expressed a willingness to communicate. In isolating the other detainees and preventing any determination of their willingness to speak, the Government is not merely failing to come forward with information, it is blocking the free flow of information. *Cf. Procunier v. Martinez*, 416 U.S. 396 (1974) (preventing the censorship of outgoing prisoner mail as violative of the First Amendment rights of those receiving it). The panel's rejection of the rights of the Haitian children to have their names disclosed thus constitutes still another violation of constitutional principles established by this Court, requiring review and reversal.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners ask that the writ be granted.

Respectfully submitted,

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Index to Appendices

Appendix A

United States Court of Appeals,
For The Eleventh Circuit.

Nos. 94-5138, 94-5231, and 94-5234.

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

Jan. 18, 1995.

Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.
BIRCH, Circuit Judge:

This case requires us to address the following issues: (1) whether Cuban and Haitian migrants temporarily provided safe haven at the United States naval base at Guantanamo Bay, Cuba, and at the United States military installations in Panama, may assert rights under the Immigration and Nationality Act, the 1951 United Nations Convention Relating to the Status of Refugees, the Cuban Adjustment Act, the Cuban Democracy Act and the Constitution of the United States; (2) whether legal organizations can sustain First Amendment claims of freedom of speech and association with these migrants; and (3) whether the First Amendment or the Equal Protection clause of the Fifth Amendment dictates that the United States government must furnish a list of Haitian migrants who are residing at Guantanamo Bay to the Haitian Refugee Center, a legal service organization. The district court has entered preliminary injunctions granting attorneys for the Cuban migrants access to all Cuban migrants provided safe haven prior to voluntary repatria-

tion and attorneys for Haitian migrants access to their clients and any other Haitian migrants who request counsel in writing, barring the government from repatriating any Cuban migrants prior to the migrant's consultation with a lawyer, directing the United States Attorney General to parole unaccompanied minor Haitian migrants into the United States on the same terms that unaccompanied minor Cuban migrants have been or may be paroled, and requiring the government to release the names of all Haitian migrants to the Haitian Refugee Center. After thorough review of authority in this circuit and the Supreme Court, we VACATE the district court's order and REMAND to the district court with direction to dismiss the plaintiffs' claims.

I. BACKGROUND

A. Factual Background

1. *Cuban Migration*

On August 8, 1994, Fidel Castro announced that the Cuban government would no longer forcibly prevent emigration from Cuba by boat. Castro's new policy encouraged thousands of Cubans to board makeshift rafts and boats to escape Cuba and head for the shores of the United States. While many were lost at sea, approximately 8000 Cubans arrived in the United States safely. In an effort to quell this influx of migrants and to save the rafters' lives, on August 19, 1994, the President of the United States ordered the United States Coast Guard to intercept watercraft carrying persons fleeing from Cuba and bound for the United States' border and to transport these persons to the American naval base at Guantanamo Bay, Cuba. The United States leases its military base at Guantanamo Bay from sovereign Cuba under a lease agreement negotiated in 1903.[1]

[1] The Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, reprinted in, 6 Bevans 1113-15 [hereinafter Lease Agreement], provides that the United States has "control and jurisdiction" over the leased land, but that Cuba retains sovereignty over the land. The lease states in pertinent part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased] areas of land and water, on the other hand the Republic of Cuba

In August, 1994, the United States government began negotiating with the Cuban government to halt the flow of migrants to the United States. These diplomatic negotiations culminated on September 9, 1994, in an accord with the Cuban government. In this accord, the United States agreed it would allow Cuban migrants to enter the United States only by applying for immigrant visas or refugee admittance at the United States Interests Section in Havana, Cuba. A minimum of 20,000 persons are to be allowed to migrate legally to the United States each year, not including immediate relatives of United States citizens who are under no numerical restrictions. However, in conjunction with this international agreement, the Attorney General also ordered that no Cuban who had accepted safe haven in Guantanamo Bay or Panama would be allowed to apply for a visa or for asylum in the United States from safe haven.[2]

Currently, Cuban migrants have three options with respect to their residence: (1) they may remain in safe haven; (2) they may repatriate to sovereign Cuba voluntarily; or (3) they may travel to a third country willing to accept them. While more than 1000 Cubans have requested voluntarily to be returned to Cuba, the Cuban government has restricted the return of Cuban nationals and has delayed the voluntary repatriation process. Persons who repatriate to Cuba voluntarily may then apply for asylum through the regular channels commencing at the United States Special Interests Section in Havana, Cuba.

The United States government's expressed desire is not to maintain these migrants for an indefinite period of time or against their will. The government's position is that it could return the migrants to Cuba legally without a migrant's request.

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consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas... Lease Agreement, art. III.

[2] According to Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs at the Department of State, this policy was implemented "to deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the United States a safe alternative to boat departures." Skol Decl. ¶ 9.

However, the government has offered the Cuban migrants safe haven for as long as the migrants wished. All Cuban migrants volunteering to repatriate execute a form approved by the United Nations High Commissioner for Refugees ("UNHCR") and meet with a representative from UNHCR before returning.

UNHCR is an agency of the United Nations specializing in the care and well-being of refugees worldwide. UNHCR was established by the United Nations general assembly on January 1, 1951, "to provide international protection to refugees and to seek permanent solutions for their problems." UNHCR, Handbook for Emergencies § 2.2(1) (1982). The UNHCR "aim[s] ... to secure treatment in accordance with universally recognized humanitarian principles not directly linked to the status [as refugees] of those in need." *Id.* § 2.1(4); *see also id.* § 2.2(1). UNHCR has participated with the United States government in ensuring that any return to Cuba was made on a voluntary basis.

In addition to UNHCR, humanitarian groups such as Amnesty International, Inc., the U.S. Committee for Refugees, and Church World Service (Immigration and Refugee Service) as well as legal organizations such as the Ad Hoc group of Cuban-American Attorneys, have been allowed to visit the migrants at the base. However, as the numbers of migrants and the length of the stay in safe haven have increased, problems have erupted. Many Cuban migrants have climbed over barbed wire and jumped from treacherous cliffs into the bay in attempts to swim the mile or so back to sovereign Cuba. Still others have scaled fences and braved a mine field in order to reach their homeland. During early December, 1994, many were injured during riots at the camps, particularly in Panama. The risk of violence and danger, both to the migrants and to the military personnel charged with their care, has grown. While the United States has begun negotiating with other countries to accept migrants from safe haven and has continued with the voluntary repatriation program, problems continue. Since consummation of the accord, the Attorney General has exercised her discretion to parole into the United States Cuban migrants who have sponsors in the United States and are (1) over the age of 70; (2) who are ill; or

(3) who are unaccompanied minors (under the age of 13). She has also begun to consider, on a case-by-case basis, the possible parole of other Cuban children at Guantanamo Bay who are accompanied, but who may suffer severe hardship if they remain in safe haven. Over 20,000 Cubans currently remain in safe haven at Guantanamo Bay[3] and at military installations in Panama.

2. *Haitian Migration*

In 1991, Haiti's elected leader, Jean-Bertrand Aristide, was ousted from power. As a result, thousands of Haitians departed Haiti and attempted to reach the United States. Between May, 1992, and June, 1994, the United States Coast Guard interdicted on the high seas Haitians bound for the United States and returned them directly to Haiti. In June, 1994, the government began processing some migrants for asylum in the United States. However, in July, 1994, the United States began offering safe haven at Guantanamo Bay to the migrant Haitians; the government was not allowing the Haitian migrants to enter the United States, but was not returning them directly to Haiti. At the peak of emigration in 1994, over 16,800 Haitian migrants were housed at Guantanamo Bay.[4]

On September 19, 1994, the United States led a United Nations-authorized military intervention in Haiti. Through these efforts, Haitian President Jean-Bertrand Aristide was returned to power on October 15, 1994. After his reinstallation, an ever-increasing number of Haitians in safe haven have volunteered to repatriate. Approximately 8000 Haitians remained at Guantanamo Bay on December 19, 1994.

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[3] The base at Guatanamo Bay is divided up into various camps housing families, single men, single women and unaccompanied children. There are two special camps, Camps November I and II, where migrants who have voluntarily requested to be repatriated are housed for their safety.

[4] Haitian migrants are being housed only at Guantanamo Bay; no Haitians are in safe haven in Panama. The camp divisions are similar to those maintained for Cuban migrants; however, there are no special camps for those migrants who have requested repatriation.

B. Procedural Background

1. *The Cuban Migrants' Case*

On October 23, 1994, plaintiffs-appellees, Cuban American Bar Association, Inc., Cuban Legal Alliance, Inc., and Due Process, Inc. (collectively "Cuban Legal Organizations"), some Cuban individuals being held on Guantanamo Bay, and some individuals with family members being held on Guantanamo Bay (collectively "individual Cuban plaintiffs") filed a class action complaint requesting declaratory and injunctive relief under, inter alia, the First and Fifth Amendments, 8 U.S.C. § 1253(h), 8 U.S.C. § 1158(a), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, [hereinafter the Refugee Convention].[5] Specifically, the Cuban Legal Organizations and the individual Cuban plaintiffs requested that the district court enter an injunction preventing the defendants-appellants ("the government") from denying the Cuban Legal Organizations reasonable access to and communication with their Guantanamo Bay clients for legal consultation relative to the Cuban migrants' putative rights regarding asylum petitions and parole decisions. The Cuban Legal Organizations and the individual Cuban plaintiffs also sought an injunction prohibiting the government from "encouraging or coercing, directly or indirectly, the repatriation to Cuba of, and repatriating, any [Cuban migrant] currently being detained by the United States Government." Class Action Compl. at 59, *Cuban Am. Bar Ass'n v. Christopher*, No. 94-2183 (S.D. Fla. Oct. 24, 1994) [hereinafter *CABA I*].

On October 25, 1994, upon learning that at 11:30 a.m. that day the government would return to Cuba, by plane, twenty-

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[5] The United States acceded to the United Nation Protocol Relating to the Status of Refugees on November 6, 1968. The Protocol bound the United States to comply with Articles 2 through 34 of the Refugee Convention. Protocol Relating to the Status of Refugees, opened for accession, Jan. 31, 1967, art. I, § 1, 19 U.S.T. 6223. The United States agreed to the Protocol with the following reservation, "[a]s to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances." 19 U.S.T. at 6257.

three Cuban migrants who had previously volunteered for repatriation, the Cuban Legal Organizations and the individual Cuban plaintiffs filed an emergency motion for a temporary restraining order and request for an emergency hearing to block the repatriation. Approximately one minute before the plane was to take off, the district court verbally ordered the government to halt the repatriation of these migrants. The district court further considered the arguments of the parties, and on October 31, 1994, the court granted the Cuban Legal Organizations' and the individual Cuban plaintiffs' motion for an emergency "temporary restraining order." Order Granting Plaintiffs' Emergency Mot. for T.R.O., *CABA I*, (Oct. 31, 1994) [hereinafter October 31 Order]. The district court specifically granted the Cuban Legal Organizations and the individual Cuban plaintiffs the following relief:

> (a) [The government] shall refrain from denying [Cuban Legal Organizations] and other counsel reasonable and meaningful access to the [Cuban migrants in safe haven]; and
>
> (b) [The government] shall refrain from repatriating any [Cuban migrants in safe haven], including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25, 1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

Id. at 13 (emphasis added). The October 31 Order was put into effect "until further order of the court." *Id.*

On November 1, 1994, the government filed a notice of appeal and a motion requesting the district court to stay its own order. The district court failed to grant this request and the government, on November 2, 1994, pursuant to 28 U.S.C. § 1292(a)(1), filed a motion for summary reversal, or in the alternative, for an emergency stay pending appeal in this court. On November 3, 1994, we granted that request in part, staying that portion of the district court's October 31 Order which

prevented repatriation of Cuban migrants who had requested in writing to be returned. Cuban Am. Bar Ass'n v. Christopher, No. 94-5138 (11th Cir. Nov. 3, 1994) [hereinafter *CABA II*] [hereinafter November 3 Order]. On November 4, 1994, we heard oral argument on an expedited basis and that day modified our November 3 Order verbally. We entered a written order on November 7, 1994, confirming our verbal order. *CABA II*, (Nov. 7, 1994) [hereinafter November 7 Order]. We granted the government's motion in part and denied it in part. Specifically, we instructed the government to allow the Cuban Legal Organizations reasonable access to their clients and to any other Cuban migrants who, in writing, requested legal counsel. We also stayed that portion of the district court's order that prevented the government from arranging repatriation of Cuban migrants in Camp November, who "expressed a desire by written declaration to be returned to sovereign Cuba"; however, we barred the government from repatriating any Cuban migrant who did not "express, by written declaration, a desire to be returned to sovereign Cuba." November 7 Order at 2. After our November 7 Order but prior to oral argument over 241 Cubans were repatriated.

2. *The Haitian Migrants' Case*

On October 31, 1994, the Haitian Refugee Center ("HRC") and some individual Haitian migrants at Guantanamo Bay filed a motion to intervene and a motion for temporary restraining order. HRC requested a temporary restraining order instructing the government to afford HRC access to all Haitian migrants at Guantanamo Bay, barring the government from denying parole to unaccompanied Haitian minors, and ordering the disclosure of the identities of all Haitian migrants in safe haven.

The district court issued two orders granting in part the relief HRC requested in its original motion for a temporary restraining order.[6] The district court issued its preliminary

[6] Prior to the district court's ruling on the original motion for a temporary restraining order, on November 1, 1994, the district court heard an oral motion by HRC for a temporary restraining order blocking the government from repatriating 14 Haitians at Guantanamo Bay who were scheduled for imminent repatriation. The government agreed to delay repatriation until

order on November 22, 1994, granting HRC access to named plaintiffs and any other Haitian migrants who requested counsel in writing, ordering the Attorney General to parole from safe haven unaccompanied Haitian minors in the same manner as unaccompanied Cuban minors, and directing the government to release the names of all Haitian migrants to HRC. Order on Provisional Intervenors' Mot. for T.R.O., *CABA I* (Nov. 22, 1994) [hereinafter November 22 Order]. Upon the government's motion, the district court granted a stay of the November 22 Order as it applied to parole of the minor Haitians and the release of the names of migrants, but continued in force the order allowing HRC access to detained Haitians who requested legal counsel. Omnibus Order, *CABA I* (Nov. 28, 1994) [hereinafter November 28 Order].

Appeals from these orders were filed and on December 1, 1994, the cases filed by the Cuban Legal Organizations and the individual Cuban plaintiffs (No. 94-5138) and HRC and the individual Haitian migrants (Nos. 94-5231 and 94-5234) were consolidated for consideration by this court. On December 19, 1994, after oral argument on the issues presented, we dissolved our November 7 Order and stayed all the relief granted by the district court in its October 31 Order, November 22 Order and November 28 Order. Furthermore, by our December 19 Order, we stayed all further proceedings in the district court, including discovery.

November 3, 1994. The government was planning to repatriate a total of 54 Haitians; 40 of those were returning to seek medical attention and the remaining 14 were the subject of the district court's order. The day after oral argument, November 2, 1994, the district court provisionally granted the HRC's motion to intervene and entered a temporary restraining order preventing the government's scheduled repatriation of the fourteen Haitians. Corrected Order on Mot. to Intervene and Mot. for T.R.O., *CABA I* (Nov. 2, 1994). HRC then requested that the district court bar the government from repatriating Haitians who were scheduled to return to Haiti on November 20, 1994. On November 18, the district court ordered that repatriation could occur as planned under the condition that all Haitians repatriated had requested repatriation in writing. Order on Haitian Refugee Ctr.'s Emergency Mot. for T.R.O. and Request for Emergency Hr'g, *CABA I* (Nov. 18, 1994). That repatriation took place as scheduled.

3. *Issues on Appeal*

We now consider the following issues on appeal:

1. Whether the Cuban or Haitian migrants in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights.
2. Whether the Cuban Legal Organizations or HRC have a First Amendment right to associate with migrants held in safe haven outside the physical borders of the United States for the purposes of engaging in political speech, and if so, whether the government engages in impermissible viewpoint discrimination violative of any First Amendment rights of the individual migrants or the Cuban Legal Organizations or HRC by restricting the legal organizations' access to the migrants for the purposes of legal consultation.
3. Whether the government must disclose to HRC the names of all Haitian migrants in safe haven.

II. DISCUSSION

A. *Jurisdiction*

1. *Appealability of Temporary Restraining Orders*

While temporary restraining orders are not generally subject to appellate review, *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685, 686 (11th Cir.1991) [hereinafter *"HRC I "*]; *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 207, 93 L.Ed.2d 137 (1986), "where the order has the effect of a preliminary injunction this court has jurisdiction to review the order and is not bound by the district court's designation of the order." *HRC I*, 950 F.2d at 686. To determine whether an order denominated as a temporary restraining order is actually a preliminary injunction, we review the duration of the order; "whether it was issued after notice and a hearing"; the extent of evidence submitted to the district court; and the continuing safeguards installed by the district court. *McDougald*, 786 F.2d at 1472. After review of the district court's orders, we conclude that they are in fact appealable

preliminary injunctions. See November 3 Order. With respect to the district court's October 31 Order, the court explicitly referred to the order as "preliminary injunctive relief." October 31 Order at 4. Moreover, the order is of indefinite duration; it was issued after notice and a hearing; the court received evidence and considered declarations from both parties (commenting that no further factual development need be made before ruling); and the court required the parties to report jointly to it every thirty days regarding the status under its order. We conclude that the characteristics of this October 31 Order belie the district court's label as a temporary restraining order; it is in all respects an appealable preliminary injunction.[7] Thus, pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction over an appeal from that order.

With respect to the district court's November 22 Order and November 28 Order granting HRC and the individual Haitian parties relief, but staying portions of that relief during appeal, the district court specifically stated that "pursuant to 28 U.S.C. § 1292(b), the court finds that this Order involves controlling questions of law regarding the rights of [migrants] in Guantanamo Bay which are subject to a difference of opinion and that an immediate appeal may advance the ultimate termination of this case." November 22 Order at 2. On December 1, 1994, we exercised our discretion and permitted appeal from these orders, and accordingly, we take jurisdiction of this appeal under 28 U.S.C. § 1292(b).

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[7] In *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), the Supreme Court observed:

> A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. *Id.* at 86-87, 94 S.Ct. at 951. Such is the case here.

2. *Standing*

In its appeal to this court for emergency relief from the district court's October 31 order, the government raised a question regarding the standing of the Cuban Legal Organizations and the individual Cuban plaintiffs relative to the putative injuries to parties not before the court, specifically all those migrants who expressed a written desire to be repatriated. Appellants' Mot. for Summ. Reversal, or, in the Alternative for An Emergency Stay Pending Appeal (or a Writ of Mandamus), *CABA II*, at 22 n. 65 (filed Nov. 2, 1994). These migrants were prevented from returning to Cuba by the district court's oral order on October 25, 1994, and by the October 31 Order. After our November 7 Order, repatriation of those who had expressed in writing a desire to return to sovereign Cuba was continued as arranged with the Cuban government. Appellant's Brief at 6 n. 2. But for our stay, the remaining Cuban migrants in Camp November who had requested to be returned to Cuba would be affected by the district court's order barring their repatriation.

The principle of standing is "derive[d] from the Article III limits on the jurisdiction of federal courts." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1536 (11th Cir.1994).

> Before rendering a decision ... every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based; and this obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party raises the jurisdictional issue and both parties are prepared to concede it.

Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759 (11th Cir.1991). We recognize two components to the standing doctrine: the minimum constitutional requirements of Article III and the prudential considerations of judicial self-government. *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994); *F.D.I.C. v. Morley*, 867

F.2d 1381, 1386 (11th Cir.), *cert. denied*, 493 U.S. 819, 110 S.Ct. 75, 107 L.Ed.2d 41 (1989). To meet the irreducible minimum constitutional requirements, the plaintiff must show "(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." *Harris*, 20 F.3d at 1121; *accord Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Jackson*, 21 F.3d at 1537; *Morley*, 867 F.2d at 1386. The party must also show that prudential considerations do not weigh against consideration of the claims. Harris, 20 F.3d at 1121; *Morley*, 867 F.2d at 1386. We have identified three particular situations in which we will decline to address a party's claim for prudential reasons: "(1) assertion of a third party's [putative] rights rather than individual legal rights; (2) allegation of a generalized grievance rather than an injury peculiar to such litigant; or (3) assertion of an injury outside the statute's or constitutional provision's zone of interests." *Morley*, 867 F.2d at 1386.

For each claim stated in a complaint, there must be a plaintiff who will achieve some redress by the court's actions. *Jackson*, 21 F.3d at 1536. As of this interlocutory appeal, the classes sought have not been certified; neither the Cuban Legal Organizations nor the individual Cuban plaintiffs represent the approximate 1000 Cuban residents of Camp November who expressed their desire in writing to be returned to sovereign Cuba as soon as possible. "Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); *accord Church v. City of Huntsville*, 30 F.3d 1332, 1340 (11th Cir.1994) ("[U]nless ... one of the named plaintiffs is in real and immediate danger of being personally injured ... the plaintiff class lacks standing...."); *Jones v. Firestone Tire and Rubber Co.*, 977 F.2d 527, 531 (11th Cir.1992) (holding

that a party may only represent a class to "the extent that he has standing to bring individual claims"), *cert. denied*, — U.S. —, 113 S.Ct. 2932, 124 L.Ed.2d 682 (1993). We conclude that the plaintiffs in this case are not suffering any real or threatened injury by the repatriation of any migrant who has expressed, in writing, his or her desire to be returned to sovereign Cuba. None of the individual Cuban plaintiffs claims to have requested repatriation. Therefore, all of the individual Cuban plaintiffs are outside the group who is being affected directly by the district court's October 31 Order barring repatriation without prior consultation with a lawyer. However, the individual Cuban migrants may properly challenge the United States' repatriation policies to the extent that they allege that they may suffer imminent injury by being coerced in the future into signing declarations of desire to repatriate or being wrongly repatriated to sovereign Cuba, whether or not they may succeed on the merits of those claims. *See Morley*, 867 F.2d at 1387 (holding that standing is determined without considering the party's likelihood of ultimately succeeding on the merits of their claims).

B. *Standard of Review*

"Ordinarily, the grant of a preliminary injunction is reviewed for abuse of discretion; however, if the trial court misapplies the law we will review and correct the error without deference to that court's determination." *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir.1991) (per curiam) [hereinafter "*Baker*"], *cert. denied*, — U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992). As discussed below, the district court misapplied the law governing the issues presented in this case. Thus, we accord no deference to the district court's determinations in granting the preliminary injunctions in this case.

C. *The Merits*

A preliminary injunction is extraordinary relief. *Church*, 30 F.3d at 1342. Because of the nature of a preliminary injunction, before relief can be granted, the party requesting the injunction must show: "(1) a substantial likelihood of success

on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; and (4) the injunction would not disserve the public interest." *Baker*, 949 F.2d at 1110 (emphasis added); *accord Church*, 30 F.3d at 1342. The district court misapplied the law in this case; thus, we accord no deference to the court's decision.[8] Under the precedent of this circuit and the Supreme Court,[9] we conclude that the Cuban Legal Organizations, HRC, the individual Cuban plaintiffs and the individual Haitian migrants cannot meet the first prerequisite to the grant of a preliminary injunction, a showing of "substantial likelihood of success on the merits [of their claims]," and thus are not entitled to injunctive relief. *See Church*, 30 F.3d at 1342.

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[8] Despite controlling precedent in this circuit, the district court relied upon *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y.1993) vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], to support its grant of the preliminary injunction as to the Cuban migrants. Whatever may be the effect in the Eastern District of New York of this now vacated district court decision in *HCC*, it has no precedential value in this circuit. Much of the reasoning in that decision is contrary to binding precedent in this circuit.

[9] We are bound by precedent established by this court, by the Fifth Circuit prior to October 1, 1981, and by the Supreme Court of the United States. *See C.G. Willis, Inc. v. Director, Office of Workers' Compensation Programs*, 31 F.3d 1112, 1115 n. 8 (11th Cir.1994) ("Only the en banc court or the Supreme Court may overrule the settled law of this circuit."); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209, 1210 (11th Cir.1981) (en banc) (adopting the decisions of the Fifth Circuit handed down on or before September 30, 1981, as precedent in the Eleventh Circuit, reasoning that "[s]tability and predictability are essential factors in the proper operation of the rule of law."). We recognize no other legally binding precedent. While other circuit and district courts may have considered similar issues, it is the case law of this circuit which governs our decisions. Specifically, *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, — U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter *HRC II*], *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (en banc) [hereinafter *Jean I*], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter *Jean II*], and the Supreme Court's decision in *Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), guide and bind us here.

1. *Statutory and Constitutional Rights of Migrants in Safe Haven*

The Cuban migrants and the Haitian migrants are asserting statutory rights under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 ("INA") and the Refugee Convention. The individual Cuban plaintiffs in safe haven also assert rights under the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010. The individual Haitian unaccompanied minor plaintiffs assert rights against discriminatory parole decisions under 8 U.S.C. § 1182. Additionally, the individual Cuban plaintiffs advance claims to Fifth Amendment rights of due process, and the individual Haitian migrants are asserting Fifth Amendment rights to due process and equal protection of the laws.

a. *Status of Guantanamo Bay*

The district court in this case relied upon *Haitian Ctrs. Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y.1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994) [hereinafter *HCC*], in entering its order granting the Cuban migrants meetings with lawyers upon request and barring repatriation of migrants without prior legal consultation. In the *HCC* case, the New York district court found that lawyers had a First Amendment right to free speech and association for engaging in legal consultation[10] at Guantanamo Bay because it was a naval base over which the United States has "complete control and jurisdiction" and "where the government exercises complete control over all means of delivering communication." *Id.* at 1040. The district court here erred in concluding that Guantanamo Bay was a "United States territory." October 31 Order at 9. We disagree that "control and jurisdiction" is equivalent to sovereignty. *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 26, 1903, U.S.-Cuba, T.S. No. 418 (distinguishing between sovereignty of the Republic of Cuba over the

[10] The Eastern District of New York declined to decide whether the migrants at Guantanamo Bay themselves had any First Amendment rights. *HCC*, 823 F.Supp. at 1041.

leased land and the "control and jurisdiction" granted the United States), reprinted in 6 Bevans 1113-15; *cf. United States v. Spelar*, 338 U.S. 217, 221-22, 70 S.Ct. 10, 12, 94 L.Ed.3 (1949) (construing the Federal Tort Claims Act not to apply to an American military air base in Newfoundland because the lease between Newfoundland and the United States "effected no transfer of sovereignty with respect to the military bases concerned").

The Cuban Legal Organizations and HRC attempt to circumvent precedent in this circuit by arguing that *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (per curiam), *cert. denied*, —U.S. —, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992) [hereinafter "HRC II "], in contrast with the instant case, dealt solely with Haitians who were interdicted on the high seas and returned to Haiti by United States Coast Guard cutters. However, we also addressed the claims of Haitians who were interdicted on the high seas and then transported to Guantanamo Bay. *See HRC II*, 953 F.2d at 1514; *id.* at 1516-17 (Hatchett, J., dissenting). Based upon our holding in HRC II, 953 F.2d at 1510, we again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functional[ly] equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.[11] Therefore, any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision.

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[11] Panama regained sovereignty over the Panama Canal Zone and the area where the United States maintains military installations by the Panama Canal Treaty of 1977. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., art. III § 1, art. IV, § 2, 33 U.S.T. 39; Panama Canal Treaty, Implementation of Article IV, Sept. 7, 1977, U.S.-Pan., art. I, annex A, 33 U.S.T. 307.

b. *Extraterritorial Application of Legislation and the Constitution*

If the migrants have been provided rights by statute,[12] we need not reach the constitutional questions urged upon us. However, because the Cuban Legal Organizations and HRC struggle to re-assert statutory claims foreclosed by *HRC II* and *Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993), and fail to assert new meritorious statutory claims, we reach the constitutional issues as well.

We decided in *HRC II*, 953 F.2d at 1510, and the Supreme Court agreed in *Sale*, — U.S. at —, —, 113 S.Ct. at 2557-58, 2563, that the very same statutes and treaties regarding repatriation, Article 33 of the Refugee Convention,[13] and the INA, specifically, 8 U.S.C. § 1253(h)[14] and 8 U.S.C. § 1158(a)[15] do

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[12] Domestic legislation is not presumed to apply extraterritorially absent express Congressional authorization. *See Sale*, — U.S. at —, —, —, 113 S.Ct. at 2561, 2562, 2567 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has responsibility.").

[13] Article 33 of the Refugee Convention states in pertinent part that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality ... or political opinion." Refugee Convention, *supra*, art. 33, 19 U.S.T. at 6276. We have held that this article is not self-executing, but must be given force by enactment of domestic legislation. *Baker*, 949 F.2d at 1110.

[14] Section 1253(h)(1), the domestic legislation implementing Article 33, provides that "[t]he Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality ... or political opinion." Nothing in this statute extends its application "beyond the borders of the United States." *HRC II*, 953 F.2d at 1509-10. The individual Cuban plaintiffs also assert rights under 8 U.S.C. §§ 1101(a)(42), 1157(c), 1182, 1225, 1226, and 1362; however, because these provisions merely supplement rather than address the questions presented to us, we consider their claims as being made under § 1253(h) and § 1158(a).

[15] Section 1158(a) provides that:

not apply extraterritorially. In *HRC II*, we unequivocally held that the interdicted Haitians could not claim any rights under sections 1253(h) or 1158(a). We further concluded that:

> the interdicted Haitians [on Coast Guard cutters and at Guantanamo Bay] have none of the substantive rights–under ... the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law–that they claim for themselves or that the HRC claims for them.

HRC II, 953 F.2d at 1513 n. 8 (emphasis added). These laws, which govern repatriation of refugees, bind the government only when the refugees are at or within the borders of the United States. *See id.* at 1509-10. Therefore, the claims asserted by the migrants under the INA and under Article 33 continue to be untenable.

The individual Cuban plaintiffs attempt to utilize the Cuban Refugee Adjustment Act, 8 U.S.C. § 1255, and the Cuban Democracy Act, 22 U.S.C. §§ 6001-6010, to assert the right of the Cuban migrants to seek parole and asylum in the United States. While these acts acknowledge the political climate in Cuba, provide for economic sanctions for dealing with Cuba, and allow for certain rights for Cubans who reach the United States, they do not address the rights of Cuban migrants to enter or to seek entry to the United States initially, nor do they confer directly any rights upon the Cuban migrants outside the United States. Hence, neither of these acts can be relied upon by the

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> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. § 1158(a). We have found that the "clear meaning of this language" is that persons interdicted before reaching the United States cannot base a right to asylum or asylum processing on this provision. *HRC II*, 953 F.2d at 1510.

individual Cuban plaintiffs to assert a right against repatriation or to seek parole or asylum in the United States from safe haven.

Right to Counsel

The individual Cuban plaintiffs and the individual Haitian migrants claim a due process right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven. In order for the migrants to have a right to counsel, they must first have a protectable liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-572, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). The Executive Branch has made the policy decision not to offer preliminary refugee determination interviews, or "screening"[16] to the Cuban or Haitian migrants. In previous Haitian migrant cases, migrants who had been held to have a liberty interest to which due process could attach were "screened-in" by the government. *See HCC*, 823 F.Supp. at 1042; *Haitians Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom. Sale v. Haitians Centers Council, Inc.*, — U.S. —, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). In this case we need not decide whether any such putative liberty interest arises from being "screened-in." As discussed below, no such procedure was undertaken.

The individual Cuban and Haitian plaintiffs have argued that the processing which occurs when migrants are brought into safe haven is similar to the screening procedure which takes place when the government attempts to discern if a migrant is a refugee. However, providing safe haven residency is a gratuitous humanitarian act which does not in any way create even the

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[16] "Screening" is a preliminary process during which a determination may be made that the migrant has a well-founded fear of persecution if repatriated. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, — U.S. —, 113 S.Ct. 3028, 125 L.Ed.2d 716 (1993). If the migrant is preliminarily ascertained to have a well-founded fear of persecution if repatriated, the migrant is "screened-in." *See id.* If after an interview, the determination is made that the migrant does not have such a fear, then the migrant is "screened-out" and repatriated.

putative liberty interest in securing asylum processing that the Second Circuit found that initial screening creates. *See McNary*, 969 F.2d at 1345 ("By these humanitarian actions alone [(rescuing the migrants from the sea and bringing them to Guantanamo Bay)], it does not appear that the legal status of the aliens was altered. However, once the interdicted persons have been 'screened in' the appellants[ ] ... can fairly be said to have established a reasonable expectation in the 'screened in' plaintiffs in not being wrongly repatriated...."). We also note that the district court mistakenly relied upon the *HCC* case, because that case addressed only the plight of Haitian migrants who had been "screened in" as possible refugees. *HCC*, 823 F.Supp. at 1041 ("Here, the Haitian Service Organizations have been retained by the Screened In Plaintiffs and have asserted a right to speak with their clients, the screened-in Haitians." (emphasis added)). The migrants in this case have not been "screened in" or otherwise processed for asylum. By bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause.

Unaccompanied Minor Haitians' Right to Parole

The individual unaccompanied minor Haitian migrants are asserting statutory and constitutional equal protection claims to be paroled into the United States on the same basis that unaccompanied minor Cubans have been or may be paroled into the United States.[17] The unaccompanied minor Haitian migrants claim that the Attorney General has abused her discretion under the INA, 8 U.S.C. § 1182,[18] by paroling in Cuban unaccompa-

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[17] "Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter...." *Jean I*, 727 F.2d at 972.

[18] Section 1182(d)(5)(A) provides in part:

> The Attorney General may ... in his discretion 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.... § 1182(d)(5)(A).

nied minors but not Haitian unaccompanied minors. While this claim is not dependent upon the extraterritorial application of the statute, it fails nonetheless. We agree with our en banc court's statement in *Jean v. Nelson*, 727 F.2d 957, 981-82 (11th Cir.1984) (en banc) [hereinafter "*Jean I*"], *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) [hereinafter "*Jean II*"], that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." *Jean I*, 727 F.2d at 978 n. 30; *see* generally, Exec. Order No. 12,711, 55 Fed.Reg. 13,897 (1990), reprinted in 8 U.S.C. § 1157. This authority extends both to the President of the United States and to the Attorney General.[19] *Jean I*, 727 F.2d at 978. Aliens may be excluded or denied parole on grounds that might be "suspect in the context of domestic legislation," because "there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility." *Id.* at 965 n. 5. Here, the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other. *See Garcia-Mir v. Smith*, 766 F.2d 1478, 1492 (11th Cir.1985) (per curiam) (holding Attorney General need only assert a " 'facially legitimate and bona fide' " reason for a parole decision (*quoting Jean I*, 727 F.2d at 977)), cert. denied, 475 U.S. 1022, 106 S.Ct. 1213, 89 L.Ed.2d 325

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[19] We note, however, that in the Supreme Court's affirmance of Jean I, its holding was limited to whether " 'low-level ... government officials [may] act in such a manner which is contrary to federal statutes ... and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.' " *Jean II*, 472 U.S. at 853, 105 S.Ct. at 2996 (first omission added) (quoting Brief for Pet'rs at 37). While we held in *Jean I* that lower-level Immigration and Naturalization Service officials could not disregard the orders of their superiors, here we are faced with the extensive authority of the Attorney General and the President to make distinctions on the basis of citizenship and the political climate of the alien's homeland.

(1986). Thus, we hold that the statutory claims made by the unaccompanied minor Haitian migrants are without merit and cannot justify an injunction directing the government to parole them into the United States. Because we conclude that the statute alleged does not protect the unaccompanied Haitian minors, we address their constitutional equal protection claim.

In *Jean I*, we held that unadmitted and excludable aliens "cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion." 727 F.2d at 970 (emphasis added).[20] The plaintiffs in *Jean I* could not "challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole, on the basis of the rights guaranteed by the United States Constitution," *id.* at 984, because they had "no constitutional rights with regard to their applications," *id.* at 968; *accord Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *cf. Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) ("The world is not entitled to enter the United States as a matter of right."). The individual unaccompanied Haitian migrants here, who are outside the borders of the United States, can have no greater rights than aliens in Jean I who were physically present in the United States. *See Landon*, 459 U.S. at 32, 103 S.Ct. at 329 ("[H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

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[20] Although the Supreme Court held that we should not have reached the constitutional issue in that case because "the current statutes and regulations provide petitioners with nondiscriminatory parole consideration--which is all they seek to obtain by virtue of their constitutional argument," *Jean II*, 472 U.S. at 854-55, 105 S.Ct. at 2997, our en banc holding in that case regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds. *See also Perez-Perez v. Hanberry*, 781 F.2d 1477, 1479 (11th Cir.1986) (dictum); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir.1985) (per curiam) (dictum); *Jean v. Nelson* 863 F.2d 759, 770 (11th Cir.1988) (dictum), *aff'd*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990).

In *HRC II*, we concluded that the interdicted Haitians on Coast Guard cutters and at Guantanamo Bay did not possess any of the statutory rights they claimed under the INA and the Refugee Convention, or the constitutional rights they claimed under the due process clause of the Fifth Amendment, and the First Amendment. *HRC II*, 953 F.2d at 1503, 1511 n. 6 (agreeing with the district court that the Haitian migrants had no "correlative First Amendment rights of their own"). Our decision that the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court's decisions declining to apply extraterritorially either the Fourth Amendment, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75, 110 S.Ct. 1056, 1066, 108 L.Ed.2d 222 (1990) (rejecting Fourth Amendment limits to search and seizure of property owned by a non-resident alien conducted in Mexico by United States agents), or the Fifth Amendment, *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 947, 94 L.Ed. 1255 (1950) (rejecting claim that aliens outside the sovereign territory of the United States are entitled to Fifth Amendment rights). *Cf. Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion) (holding the right to a jury trial applies to an American citizen abroad being tried by a United States military court (narrowest holding)). Clearly, aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.

Therefore, any right to equal protection of the laws, due process, or rights under the INA or the Refugee Convention now asserted by the Haitian and Cuban migrants are not cognizable. Thus, neither group of migrants could have a "substantial likelihood of success on the merits" which is a necessary predicate to the grant of injunctive relief. The district court erred in granting relief to the individual Cuban and Haitian migrants.

2. *First Amendment Rights of the Cuban Legal Organizations and HRC*

Both the Cuban Legal Organizations and HRC claim a First Amendment right to freedom of association with the migrants

and free speech such that the government must provide the lawyers access to clients and any other migrants who request counsel. In *HRC II*, we held that the two primary First Amendment cases recognizing a First Amendment right for a lawyer to solicit a client for the purpose of engaging in litigation as a form of political expression, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), "recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression." *HRC II*, 953 F.2d at 1513 (emphasis added). However, we concluded that "[t]his right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant...." *Id.* (emphasis added).[21]

Neither the Cuban nor the Haitian migrants have any of the statutory or constitutional rights claimed here that might sustain the attorneys' claims to right of association, and "associational freedom in no way implies a right to compel the Government to provide access to those with whom one wishes to associate." *Id.* Hence, it would be not only improper, but also "nonsensical," for us to hold today that attorneys for either migrant group suddenly possess "a right of access to the interdicted [migrants] for the purpose of advising them of their legal rights." *Id.*

Because, under precedent of this circuit, neither the migrants nor the lawyers may assert First Amendment rights of association and speech in this context, we need not determine whether the government engaged in any viewpoint-based discrimination in denying the Cuban Legal Organizations and HRC access while granting humanitarian organizations access. Pro-

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[21] *Button* and *In re Primus* "do not recognize a right of access to persons properly in government custody," *HRC II*, 953 F.2d at 1512, which is what the Cuban Legal Organizations and HRC have requested. The lawyers' claims under the First Amendment do not require that the government assist it in communicating with clients or potential clients in safe haven. *Id.* at 1513. Although the attorneys argue that they require no financial assistance or transportation from the government, for the lawyers to meet with their clients, assistance is necessarily required in providing access to the base, meeting areas, accommodations and security.

viding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for the Cuban Legal Organizations and HRC. If the First Amendment does not apply to the migrants or to the lawyers at Guantanamo Bay, the government cannot be engaging in impermissible viewpoint-based discrimination by restricting association between the migrants and counsel. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 46, 103 S.Ct. 948, 954, 955, 74 L.Ed.2d 794 (1983) (holding first that the First Amendment applied to teachers' mailboxes in a public school, but that the " 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government,' " and that there was no First Amendment right to access to the mailboxes (*quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981))).[22]

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[22] We recognize that the *HCC* court found that "First Amendment [is] applicable to U.S. conduct on a military base." 823 F.Supp. at 1040. The court cited *Flower v. United States*, 407 U.S. 197, 198-99, 92 S.Ct. 1842, 1843-44, 32 L.Ed.2d 653 (1972) (*per curiam*) for this proposition. From our reading of Flower we find it is clearly distinguishable. The military base in question in Flower was Fort Sam Houston in San Antonio, Texas; not Guantanamo Bay or an installation in Panama. There, a civilian (an American citizen) was arrested for distributing leaflets on an road within the fort. The Supreme Court found that the road was essentially a public one as there was "no sentry post or guard at either entrance or anywhere along the route," *Flower*, 407 U.S. at 198, 92 S.Ct. at 1843 (*quoting United States v. Flower*, 452 F.2d 80, 90 (5th Cir.1972) (Simpson, J. dissenting)), and more than 15,000 cars travelled through the fort each day via this road. These are facts not remotely analogous to the access policies at Guantanamo Bay, Cuba, or presumably at the installations in Panama. Moreover, the Supreme Court has recognized the limited nature of its holding in Flower. *See Greer v. Spock*, 424 U.S. 828, 835, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *U.S. v. Albertini*, 472 U.S. 675, 684-86, 105 S.Ct. 2897, 2904-05, 86 L.Ed.2d 536 (1985); *see also M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense*, 791 F.2d 1466, 1473 n. 3 (11th Cir.1986). Hence, we are of the opinion that this case does not stand for the proposition that the First Amendment necessarily applies at American military bases located in foreign countries.

For the above reasons, an injunction requiring the government to provide reasonable and meaningful access of legal counsel to the migrants in the safe haven, based on First Amendment rights of the attorneys is not justified.

3. *Disclosure of Haitian Migrants' Identities*

HRC contends that the government's refusal to disclose the identities of Haitian migrants at Guantanamo Bay violates HRC's First Amendment rights to freedom of association and violates the Haitian migrants' rights to equal protection of the laws and rights under the INA and international law. The district court, without stating its reasons, ordered that the government provide HRC a list of all Haitian migrants in safe haven. As decided above, the Haitian migrants in safe haven cannot claim the rights and privileges of the statutes enumerated or of the Constitution with respect to a right to counsel, their repatriation or parole into the United States. Thus, they cannot succeed on any claim that they have rights that are being violated by failure to disclose their identities to HRC. What remains then is a request by HRC that the government release information. Such a claim is typically made under the Freedom of Information Act; however, no claim has been made under the Act here. Instead, this claim is constitutional in nature. The Supreme Court has held that there is "no discernible basis for a constitutional duty [on the government] to disclose, or for standards governing disclosure of or access to information." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978) (plurality opinion). "This Court has never intimated a First Amendment guarantee of access to all sources of information within government control." *Id.* at 9, 98 S.Ct. at 2593-94. Because there is no authority for us to compel disclosure of the Haitian migrants' identities, we cannot force the government to provide HRC with access to the list of Haitian migrants in safe haven. *See id.*

III. CONCLUSION

While we have determined that these migrants are without legal rights that are cognizable in the courts of the United States,

we observe that they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. In the context of the refugees' world of today (e.g., Bosnia and Rwanda) this is significant. While these migrants are faced with difficult conditions, the demonstrated concern of groups like the Cuban Legal Organizations and HRC and the goodwill of their military rescuers and caretakers will hopefully sustain and reassure them in their quest for a better life.

Nevertheless, we cannot contravene the law of this circuit and of the Supreme Court of the United States in order to frame a legal answer to what is traditionally and properly a problem to be addressed by the legislative and executive branches of our government. *See Perez-Perez*, 781 F.2d at 1479. "Although the human crisis is compelling, there is no solution to be found in a judicial remedy." *Sale*, — U.S. at —, 113 S.Ct. at 2567 (*quoting Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C.Cir. 1987) (Edwards, J., concurring)). For the foregoing reasons, the preliminary injunctions issued by the district court and dated October 31, 1994, November 22, 1994, and November 28, 1994, together with our December 19 Order, are hereby DISSOLVED, and these cases are REMANDED to the district court with direction to dismiss the plaintiffs' claims.

Appendix B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.

BY THE COURT:

The court denies the appellants' motion for summary reversal with respect to the order of the district court entered on October 31, 1994 denominated "Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order" ("the Injunction"). The parties are instructed to file briefs on the schedule set out below.

This court hereby stays all of the district court's injunctive relief set out in the Injunction except as hereafter provided:

(a) defendants shall afford reasonable and meaningful access for legal counsel (i.e., officers of the court) to only the named detained plaintiffs and any other detainees who in the future request counsel by written declaration;

(b) plaintiff organizations and counsel need not be afforded access to any other detainees pending the resolution of this appeal;

(c) the defendants may repatriate all current detainees in "Camp November" who have expressed a desire, by written declaration, to be returned to sovereign Cuba;

(d) the defendants may repatriate any other detainees who express a desire by written declaration to be returned to sovereign Cuba; and

(e) the defendants shall not repatriate any detainees who do not express, by written declaration, a desire to be returned to sovereign Cuba.

The briefing schedule is as follows: the government's opening brief is due November 21, 1994; the appellees' answer brief is due December 7, 1994; and the government's reply brief, if it chooses to file one, will be due December 14, 1994. These dates are the date that the briefs must be received in the Clerk's Office and in the office of opposing counsel.

Counsel are advised that all Eleventh Circuit rules relating to the length and format of the brief, including type size and margins and footnotes must be strictly adhered to. Counsel are further advised that that court will not grant any motion to file a brief exceeding the page limitations or any motions for an extension of time to file a brief.

Oral argument will be held on Monday, December 19, 1994 at 10:00 a.m. at 56 Forsyth Street, Atlanta, Georgia. Each side shall be allotted 45 minutes for argument.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the order of the Court denying Appellants' Motion for Summary Reversal. I also concur in that portion of the stay relating to the District Court's injunctive relief except as to paragraph (b) of this Court's order, from which I dissent. I would permit legal counsel, pending the resolution of this appeal, to have access to any detainee, who has not expressed

the desire to be returned to sovereign Cuba, under such reasonable conditions as would be set by the District Court.

Date: November 7, 1994

Appendix C

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs,

and

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants.

Case No. 94-2183-CIV-ATKINS

ORDER ON PROVISIONAL INTERVENORS' MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Haitian Refugee Center's (HRC) Motion for Temporary Restraining Order (d.e. 32). HRC asks the court to enter an order enjoining the defendants from denying HRC access to its clients at Guantanamo Bay, requiring the defendants to release names of Haitians detained at Guantanamo Bay, requiring the defendants to parole unaccompanied Haitian minors in a manner similar to the process used for paroling unaccompanied Cuban minors and to grant HRC the right to expedited discovery.

The court heard arguments on the subject motion on November 21, 1994. Upon consideration of the record and the arguments before the court, it is

ORDERED AND ADJUDGED that Provisional Intervenors' Motion for Temporary Restraining Order (d.e. 32) is hereby *GRANTED in part, DENIED in part* as follows:

1) defendants shall afford legal counsel for HRC reasonable and meaningful access to all named plaintiffs and any other Haitian detainees who request counsel in writing;

2) defendants shall provide unaccompanied Haitian minors equal protection and allow them parole in the same manner allowed for unaccompanied Cuban minors;

3) defendants shall release the names of all Haitian detainees at Guantanamo Bay to HRC;

4) HRC shall only release the names of the detained Haitians to their individual families or counsel upon request;

5) in light of the fact that HRC has joint-noticed all depositions the plaintiffs are taking, HRC's request for expedited discovery is denied;

6) HRC's Motion to Exceed Page Limit for Memorandum of Law-in Support of Temporary Restraining Order (d.e. 33) is hereby *GRANTED nunc pro tunc* October 31, 1994.

7) HRC shall post a bond in the amount of $500 by 5:00 p.m., November 22, 1994. Furthermore, it is

ORDERED AND ADJUDGED that pursuant TO 28 U.S.C. § 1292 (b), the court finds that this order involves controlling questions of law regarding the rights of detainees in Guantanamo Bay which are subject to a difference of opinion and that an immediate appeal may advance the ultimate termination of this case.

DONE AND ORDERED at Miami, Florida, this 22nd day of November, 1994 at 12:15 p.m.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix D

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, et al.,
Plaintiffs,

v.

WARREN CHRISTOPHER, et al.,
Defendants,

and

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors.

Case No. 94-2183-CIV-ATKINS

OMNIBUS ORDER

THIS CAUSE is before the court on Defendants' November 25, 1994 Motion to Vacate Injunction or Alternatively to Stay Injunction Pending Appeal and on Provisional Intervenor's November 25, 1994 Motion for Expedited Discovery. This Court heard argument on both motions on November 28, 1994.

I. Motion to Vacate or Stay Injunction

In their motion, defendants ask this court to vacate, or in the alternative stay, its November 22, 1994 Order on Provisional Intervenors' Motion for Temporary Restraining Order. In that order, the court (1) granted legal counsel for HRC access to named plaintiffs and any other Haitian detainees requesting counsel in writing; (2) ordered defendants to parole unaccompanied Haitian minors in the same manner followed for Cuban minors; (3) ordered defendants to release the names of Haitians detained at Guantanamo and (4) denied HRC's request for expedited discovery. Additionally, the court recognized the appealability of its Order under 28 U.S.C. § 1292(b).

The court agrees with the defendants' contention that one of the key underlying issues in this case is whether the detainees in Guantanamo, both Cuban and Haitian, have any rights under United States laws. Therefore, the court finds that a stay of its November 22, 1994 Order is warranted with respect to the equal protection issues of parole and name dissemination.

II. Motion for Expedited Discovery

In support of its Motion to Vacate or Stay Injunction Pending Appeal, the defendants attached five (5) affidavits touching on varying factual issues. Consequently, HRC filed a Motion for Expedited Discovery, seeking to depose the five affiants in order to respond to the defendants' motion. In opposition to HRC's Motion for Expedited Discovery, the government argued, *inter alia*, that the court should deny the motion because the appeal involves only legal issues. However, at the hearing, the defendants additionally stated that the purpose of the affidavits is to give a background for appeal. The court finds that in order for the Eleventh Circuit to have a complete record, should the defendants choose to appeal the November 22, 1994 Order, HRC should have the opportunity to depose the five affiants and supplement such background if necessary.

Therefore, for the above-mentioned reasons, it is

ORDERED AND ADJUDGED that the Defendants' November 25, 1994 Motion to Vacate Injunction or Alternatively to Stay the November 22, 1994 Injunction Pending Appeal is hereby *GRANTED IN PART; DENIED IN PART* as follows:

1) that portion of the Order granting legal counsel access to named plaintiffs and any other Haitian detainees who request counsel in writing is hereby *AFFIRMED*;

2) that portion of the Order requiring defendants to parole unaccompanied minors is hereby *STAYED* pending appeal;

3) that portion of the Order requiring defendants to disseminate the names of Haitian detainees is hereby *STAYED* pending appeal; and

4) that portion of the Order denying HRC expedited discovery is hereby *AFFIRMED* except as delineated below. Accordingly, it is further

ORDERED AND ADJUDGED that Provisional Intervenors November 25, 1994 Motion for Expedited Discovery is hereby *GRANTED* to the extent that provisional intervenors may depose John C. Harris, Michael Skol, Jay E. Laroche, Kenneth Leutbecker and Colonel Michael A. Pearson regarding the subject matter of their respective affidavits filed in conjunction with the Defendants' Motion to Vacate or Stay Injunction.

DONE AND ORDERED at Miami, Florida, this 28th day of November, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138
No. 94-5231 and 94-5234

CUBAN AMERICAN BAR ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

HAITIAN REFUGEE CENTER, INC., et al.,
Provisional Intervenors-Appellees,

v.

WARREN CHRISTOPHER, Secretary of State, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.

BY THE COURT:

Pending decision of this court, the following is ordered:

(1) This court's order of November 7, 1994 is hereby dissolved;

(2) All injunctions and orders of the district court in these cases are hereby stayed; and

(3) All further proceedings, including discovery, in the district court in these cases are hereby stayed.

Date: December 19, 1994

Appendix F

Excerpts From
Plaintiff-Intervenor HRC's Verified Complaint
October 31, 1994

13. The HRC's membership includes United States citizens, resident aliens and non-resident aliens, including the individual Haitian refugee intervenor-plaintiffs and the class they represent, as well as the parents, relatives and representatives of some of the unaccompanied minors detained at Guantanamo. HRC's membership interests, including its financial support, is directly affected by the policy of discriminatory detention and forced repatriation by making HRC's work of assisting the refugee community more difficult. This results in the diversion of HRC's limited resources away from members and clients having other needs.

28. President Aristide was elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years. Shortly thereafter, President Aristide was overthrown by a military-led coup and forced into exile in the United States. The coup reulted in a widely publicized reign of terror in Haiti in which supporters (and suspected supporters) of the Aristide government and democracy were killed or subjected to violence and destruction of their property, producing fear and desperation throughout the country.

29. In the wake of this chaos and mass violence, thousands of Haitians sought to escape by sea. Many of the Haitians who fled in the 1991-92 time frame were interdicted by the United States Coast Guard and detained at the U.S. military installation at Guantanamo Bay, Cuba.

Appendix G

Department of Justice Press Release, December 2, 1994

DEPARTMENT OF JUSTICE TO REVIEW CUBAN CHILDREN'S CASES INDIVIDUALLY

Attorney General Janet Reno announced today that at the direction of the President, she will consider the humanitarian parole, on a case-by-case basis, Cuban children for whom long-term presence in the safe havens at Guantanamo or Panama would constitute an extraordinary hardship, together with such immediate family members as humanitarian needs require.

Only families for whom there is full financial sponsorship in the United States will be paroled.

Appendix H

Memorandum from Gregg A. Beyer,
Director, Asylum Division, INS
to Asylum Office Directors, October 27, 1994

Subject: Adjudication of Haitian Asylum Applications Following President Aristide's Return to Haiti

HQASM has received several requests for guidance on the adjudication of Haitian asylum claims following the return of President Jean-Bertrand Aristide to Haiti. While this development represents the beginning of potentially significant changes in country conditions, there is no guarantee at the present time that they will produce fundamental changes which are durable over time.

Existing INS policy on asylum adjudications during changing country conditions was established in January 1990 in then Commissioner Gene McNary's memorandum entitled, *Adjudication of Asylum and Refugee Claims of Eastern European and Soviet Applicants Under the Uniform Worldwide Adjudication Standard During Times of Evolving Country Conditions.* The key points of that memorandum state that in countries with long histories of severe political repression and serious violations of fundamental human rights, the possibility of abuse and persecution continues at local levels even when official policies and/or composition of governments at the top have changed. Actual improvements at the local levels of government and society undoubtedly lag behind the legal and/or rhetorical potential for improvements articulated at the national level. In these situations, it is important to note that much of the potential for change is more significantly manifested at the top than at the bottom, and in the urban centers of a country rather than in the rural areas. Many "old line" officials, their supporters, and some of the more conservative elements of the general population have not necessarily kept pace with or approved of the changes being articulated.

The 1990 memo also states that, "[r]ather than simplifying the work of INS, these changes will make the job of the INS adjudicator during their case-by-case interviews with refugee [and asylum] applicants more challenging. Officers must keep in mind not only the possibility of a reasonabl[y] well-founded fear of [future] persecution based on evidence, or past persecution, as the basis for asylum or refugee status . . ., but also the possibility that evolving conditions in refugee-producing countries of origin will result in applicants with new and potentially valid claims of persecution or a reasonable fear thereof . . ."

This policy guidance on evolving country conditions in Eastern Europe and the former Soviet Union is especially relevant to Haiti, a country that emerged from nearly two centuries of relentless repression for a brief experiment with democracy in 1991 only to have it curtailed by a coup which, for the past three years, has plunged the country into one of its most repressive eras. Although repressive activities have been sharply reduced by the presence of the U.S. military, the structures that supported and effected the September 1991 military coup are still present, if currently under wraps. These elements involved in controversial past practices include, but are not limited to, the small wealthy elite, the military, the police, the section chiefs, the attaches (heirs of the Tontons Macoutes), the Front for the Advancement and Progress of Haiti (FRAPH), and other paramilitary structures. While the immediate threat of serious human rights violations perpetrated and tolerated by various repressive sectors of Haitian society is clearly reduced as long as U.S. troops are in Haiti, there are accounts of ongoing violations and killings.[1] More significant is the continuing, often "invisible," presence of these perpetrators of past viola-

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[1] Farah, Douglas and Booth, William, "Grenade Kills 5 in Haitian Crowd," *Washington Post* (Washington, D.C.: 30 September 1994), p.A34/Rohter, Larry, "2 Slain by Attaches on Aristide's First Full Day Back," *New York Times* (New York: 17 October 1994) p.A3 - as reported on NEXIS database./Coughlin, Dan, "Haiti: Refugee Repatriation and Political Violence Surge," *Inter Press Service* (New York: 12 October 1994) - as reported on NEXIS database./"14 Haitians Die in Attack with Truck," *Los Angeles Times*(Los Angeles: 10 October 1994), p.A6 - as reported on NEXIS database.

tions who have simply, and probably only temporarily, retreated into the background. Efforts to completely disarm the police, attaches, former Tontons Macoutes and members of FRAPH are still of limited success, leaving them with the potential for future abuse. This potential has continued domestic and international concerns about both the short and long-term prognoses for a fundamental and durable development of the rule of law and democracy in Haiti.[2]

In view of these concerns and the general policy regarding changing country conditions established in 1990, Asylum Officers are advised to continue to adjudicate Haitian claims based on the March 1993 *Considerations* issued by John W. Cummings, Acting Director of the Office of International Affairs (copy attached) and the INS Resource Information Center Information packet, *Haiti: Country Conditions Documents for Adjudicating Haitian Asylum/Refugee Claims* [IP/HTI/94.001], May 1994. An updated Information Packet is currently being compiled.

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[2] Bray, Jeff, "Aristide Faces Uphill Battle in Haiti," *United Press International*(New York: 11 October 1994) - as reported on NEXIS database./Todd, Dave, "Sitting on a Powder Keg . . ." *The Gazette* (Montreal: 14 October 1994), p.B3 - as reported on NEXIS database./O'Connor, Anne-Marie, "Can Thugs Be Refitted Guardians of Liberty?" *The Palm Beach Post* (Palm Beach, FL: 18 October 1994) p. IA - as reported on NEXIS database./Lowthwaite, Gilbert A., "U.S. Basks Success, But Isn't Out of Woods Yet," *The Baltimore Sun* (Baltimore, MD: 18 October 1994), p.4A - as reported on NEXIS database./Preston, Julia "U.N./U.S. Clash on Disarming Haitians . . .," *Washington Post* (Washington, D.C.: 20 October 1994), p.A31 - as reported on NEXIS database./Robberson, Tod, "U.S. Writ Runs Short of Some Haitians 'Attaches,'" *Washington Post* (Washington,D.C.: 24 October 1994). p.A13.

Appendix I

Affidavit of Esther Deristile
December 8, 1994

My name is Esther Deristile. I am detained at the U.S. Naval Base at Guantànamo Bay, Cuba. I am 14 years old. I just turned 14 on December 5. I am in Camp 9, tent C-4. I have been here at Guantànamo since July 2. I came from Delma in Haiti. My father lives in Boyton Beach, Florida, but I don't know where my mother is because she was taken away in Haiti on June 29 and hasn't been seen since. Also my brother was killed on March 26. He was 27 years old and working for a radio station. I am very afraid to go back to Haiti because I have no family there now and because of what happened to my family there I am still very scared.

Until today, I still don't feel normal being here at Guantànamo. I often feel sick and very weak mentally. I am very depressed to be here like this, not knowing what will happen to me. Today I am going to visit with a psychologist. All of the children I think are sad. I have tried to end my life twice because I am so sad. I just started seeing the psychologist on Monday. The last time I tried to end my life was about 22 days ago, I drank Clorox. I went to the hospital because as soon as I drank it I felt like the inside of my stomach was coming to my mouth, and my mouth was foaming so people around me called the doctor. I didn't tell the doctor why I drank the Clorox, because I was afraid it was something personal and I didn't want them to know I was suffering mentally within myself, so I said I drank the Clorox by mistake. And I don't want to worry my sister who is living here with me.

I cannot eat a lot of the time, and I don't sleep well because I am so anxious about my situation. I wake up around 4:00 in the morning and I walk around until its light. I go to school after breakfast but I don't really hear or see anything that's going on because I am so said. After school they give me an apple and I go and sit under a tree, trying to imagine different ways I can

get out of this situation. It is difficult for me to get involved in any of the things going on here because I feel so terrible all the time.

There was a hunger strike that the children went on, about 2 weeks ago, because the children said they spent too long here and they wanted to know what the military was going to do with them. We had heard the Cuban children were going to the United States.

There are many children here who are not 14 years old yet. We feel so helpless and alone, not knowing what will happen to us. And there is no phone in our camp, camp 9. For two months we haven't been able to speak to our families. They used to allow us phones but not anymore.

I really need to see a doctor because I haven't been able to urinate correctly like everyone else for several days. The doctor inserted a tube in me on 2 times so I could urinate. On November 30 and December 1 I saw a doctor about my problem. The doctors here though really mistreat you when you go see them. They really don't help you a lot. Sometimes I get stomach pains because I can't urinate properly. Could you please help me see a doctor it is very difficult for us to arrange to see a doctor here.

At the camp they give us a couple of T-shirts but often they don't fit us.

My father who lives in the U.S. is a legal resident there. I last spoke to him two months ago. He wants me to be with him in the U.S. My brother wrote my father and gave it to the Red Cross but my father never received the letter. It is not easy at all to communicate with your family when you are in here.

I haven't heard anything about the political situation in Haiti since I've been in camp 9.

I feel helpless. Please help me obtain my release from here.

CRS people about 1 week ago told us during a meeting that maybe we might be able to come to the U.S. but also that we might go back to Haiti. Living in this state of confusion is very upsetting.

I heard that a person - Bernard - abused a 14 year old girl in camp 9. This scares us all. Bernard was the president of the house parents. Bernard I think was put in jail and the abused girl is still at the camp.

When I was in Haiti I was sexually abused. This happened on March 26, the same day my brother was killed. He was killed in our house, where I was abused by the same people (men) who killed him. I haven't received any counseling here about my sexual abuse in Haiti.

I didn't see anything in our camp about the lawyers being here to meet with us. I am only here speaking with a lawyer because someone heard rumors from camp four that the lawyers were here and so my brother wrote a note saying we wanted to see a lawyer. And I want more access to the lawyers so they can try to help me.

I hereby swear under penalty of perjury on this 8th day of December, 1994, that the above is true and correct to the best of my knowledge. The above has been read to me in Creole and I agree with and affirm its contents.

/s/ ESTHER DERISTILE

Appendix J

Affidavit of Steven Forester
November 2, 1994

I, Steven Forester, hereby state as follows:

1. My name is Steven Forester. I am Supervising Attorney at the Haitian Refugee Center ("HRC") in Miami, Florida. I was HRC staff attorney from 1979 to 1985, an HRC board member from 1985 to 1992, and began as Supervising Attorney in August 1992. I am the author of "Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation," New York Law School Journal of Human Rights, Vol. X Part II, Spring, 1993.

2. I am submitting this affidavit, as a supplement to my October 31 affidavit, on the importance of HRC access to Haitian detainees on Guantanamo to determine the "volunariness" of their repatriation.

3. On July 27, 1994, during the Guantanamo visit described in paragraphs 5 and 6 of my earlier affidavit, I made a presentation in Creole to Haitian detainees who had supposedly "chosen voluntarily" to return to Haiti. Authorities informed us that all of them had previously received UNHCR screening to determine the "voluntariness" of their decision to return to Haiti and that they were all to be repatriated by the Coast Guard within or in twenty-four (24) hours. The authorities had therefore physically separated them in a separate camp enclosure from the other Haitians on Guantanamo. I made my presentation, referred to in paragraph 6 of my October 31 affidavit, to them in this separate camp.

4. Immediately after my presentation, seven (7) to nine (9) of these supposed would-be returnees informed military authorities that they did *not* wish to return to Haiti but instead wished to remain on Guantanamo. Therefore, and in my presence, military authorities immediately separated and removed all of these seven to nine Haitians from the separate camp

enclosure for would-be returnees and returned them to rejoin the rest of Guantanamo's detainee population.

5. The events described in the preceding two paragraphs occurred in the presence of INS Deputy Counsel Paul Virtue and military personnel including our military escort (whose name I believe was Colonel Johnson), were acknowledged subsequently by Immigration and Naturalization Service officials in Washington, D.C., and presumably are not in dispute.

6. United States military Psychological Operations personnel are reportedly operating among the Haitian detainees on Guantanamo. HRC has received information indicating that authorities intend to remove the remaining Haitians from Guantanamo by about November 15 regardless of their wishes.

7. In July, 1994, the United States established and engaged in a process on Guantanamo of determining, on an individual basis, whether each Haitian detainee was eligible or ineligible for "safe haven." Using interpreters, authorities asked each Haitian a series of questions which appeared on a written form, and sometimes questions were asked which were not on the form. A determination was eventually made as to whether the Haitian was eligible or ineligible for safe haven. Most were found eligible for safe haven, but some were found ineligible for safe haven through the eligibility process. Some of the interpreters on Guantanamo were intimidating and hostile to the detainees.

8. I hereby declare under penalty of perjury on this date of November 2, 1994 that the foregoing is true and correct.

/s/ STEVEN FORESTER
Steven Forester

Appendix K

Affidavit of William O'Neill
October 28, 1994

WILLIAM G. O'NEILL, being duly sworn, deposes and says:

1. My name is William G. O'Neill and I am an attorney admitted to practice law in the State of New York. I served as the Legal Director of the United Nations/Organization of American States International Civilian Mission to Haiti (the "Mission") from June 1993 to March 1994. Before joining the Mission I was the Deputy Director of the Lawyers Committee for Human Rights where one of my principal duties was monitoring the human rights situation in Haiti. I have written two book-length reports on human rights and the justice system in Haiti. I have also written numerous published articles on these subjects and I have testified before various committees of the U.S. Congress, the United Nations' Commission on Human Rights (Geneva) and the Inter-American Commission on Human Rights (Washington D.C.) concerning the human rights situation in Haiti. Since April 1994 I have been a full-time consultant to the National Coalition for Haitian Refugees and I recently spent five days in Haiti to observe the return of President Jean-Bertrand Aristide.

2. With the return of President Aristide and constitutional government to Haiti, the prospects for creating the rule of law and respect for human rights have never been greater. Huge obstacles remain, however, and I continue to receive reliable reports of on-going human rights violations by members of the Haitian armed forces against Aristide supporters, both in the Haitian countryside and in certain neighborhoods in Port-au-Prince known as Aristide strongholds.

3. The arrival on September 19, 1994 of the Multi-National Force ("MNF") under UN Security Council Resolution 940 (July 31, 1994) has deterred that Haitian military and their paramilitary forces from committing abuses in certain areas and

at certain times, but the MNF has not been deployed in large swaths of rural Haiti and its commanders have repeatedly asserted that the MNF is not a police force so that at night, especially in the Port-au-Prince neighborhoods of Cité Soleil, Carrefour, La Saline and Bel-Air, the MNF is simply not present.

4. For example, on October 12 in Montagne Terrible, which is a rural area in central Haiti, the section chief, who is a member of the Haitian armed forces responsible for rural policing, and five members of the Haitian army fired on a crowd that was having a public rally to celebrate the imminent return of President Aristide. Two people in the crowd were killed immediately and a third died on October 24 from his wounds. Eight other people were wounded and all are members of the local peasants' organization. These are precisely the type of people who have been targeted by the military over the past three years.

5. In the town of Grand Goâve, about 40 miles west of Port-au-Prince, Haitian soldiers continue to threaten and beat Aristide supporters. On October 13, as people were cleaning the street to prepare for Aristide's return, two soldiers beat and insulted Lobens Samuel and Angela Poliniste. Mr. Samuel still had a bandage on his head one week after the incident when he was interviewed by a representative of the National Coalition for Haitian Refugees. In another recent incident, Sheila Benjamin, an Aristide supporter who had been in hiding since October 1991 returned home to Grand Goâve following President Aristide's return on October 15, 1994. When a soldier saw her on the street on October 22, he beat her. Grand Goâve has been tightly in the military's grip since the coup and many local Aristide supporters are still hesitant to return. Given Sheila Benjamin's reception, this is most understandable.

6. On October 16, the day after President Aristide's return, the bodies of two young men who had been in hiding in Jacmel for most of the past three years were found in the Cité Soleil section of Port-au-Prince. They had recently returned home believing it was safe to do so. Also, Stephenson Magloire, a well-known artist and Aristide supporter, was killed in Cité Soleil shortly before Aristide's return. Mr. Magloire's family and friends

begged him not to come out of hiding because they believed it was still too dangerous; tragically, they turned out to be right.

7. The MNF's presence in rural Haiti is extremely limited. Only 1,200 U.S. army Special Forces are assigned to 30 localities. This does not even approximate the number and deployment necessary to provide minimal security in the countryside. Many Haitians live in isolated, mountain-top hamlets and 70% overall live in rural areas. Moreover, the MNF's attitude toward the Haitian military and their paramilitary force as embodied in FRAPH ("Front for the Advancement and Progress of Haiti") sometimes undermines the effort to create a safe and secure environment which is a necessary prerequisite to insuring respect for human rights. One member of the MFN recently stated that "FRAPH is a legitimate political party and we have to be neutral arbiters." For the most part, the MNF has refused to occupy or close down FRAPH offices in the countryside. Yet FRAPH's role in the brutal repression is well known and established in official reports from the Organization of American States/United Nations International Civilian Mission and other human rights monitors. Many section chiefs and their deputies remain in their posts.

8. The MNF does not patrol Cité Soleil or other urban neighborhoods at night and generally only responds to emergencies during the day. This holds true for other pro-Aristide neighborhoods in Port-au-Prince. If a soldier or member of FRAPH or the paramilitary forces is turned over to the MNF by the Haitian people, the MNF usually release the person shortly after. Thus many people who have been central to the repressive structure remain in place or nearby, heightening tension and maintaining the potential to persecute Aristide supporters once the backs of the MNF are turned. As the cases described above show, they have already turned this potential into deadly reality.

9. It is my opinion based on my knowledge of the sources and patterns of repression in Haiti, that those Haitians still in Guantànamo have reason to fear persecution based on their political opinion if forced to return to a Haiti where large parts of the countryside and key urban neighborhoods are under the sway of

the Haitian military and paramilitary where the MNF is not present and where the MNF's presence, while benign, remains limited and its mandate restricted.

/s/ WILLIAM G. O'NEILL
William G. O'Neill

Sworn to before me this
28th day of October, 1994

/s/ Patricia Armstrong
NOTARY PUBLIC

Appendix L

Excerpts From
Declaration of Kenneth Leutbecker, Associate Director for the Office of Immigration and Refugee Affairs, Community Relations Service, Department of Justice
November 4, 1994

8. CRS officials, myself included, and the UNHCR, among others, opposed releasing the names of Haitian migrants because of the potential for violence or retaliation which could be directed against all Haitians connected with the migrants. We believe that releasing the names of Haitian migrants would endanger the lives and safety of non-migrant Haitians. There was no way to guarantee the safety of the migrants' relatives and friends in either the United States or in Haiti from such retaliation. For this reason, we agreed that for the safety of the migrants, their families and friends that the names should not be disclosed.

. . .

11. Since the original decision was made not to release Haitian migrant names, the issue has been reconsidered several times because of continuing inquiries from, among others, the media, various community organizations, and members of the public. Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remain. Therefore, we have not changed our original decision. Additionally, we cannot release the names of the Haitian migrants who have returned to Haiti because we are unable to obtain their consent since they are no longer at GTMO.

. . .

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of November, 1994.

/s / Kenneth Leutbecker
Kenneth Leutbecker
Associate Director
Office of Immigration and
Refugee Affairs
Community Relations Service
U.S. Department of Justice

Appendix M

Excerpts From
Declaration of Colonel Michael A. Pearson,
Commander, Haitian
Operations, Guantanamo Bay
November 3, 1994

24. Administrative segregation is conducted in accordance with the rules and procedures promulgated by Commander, Joint Task Force 160 dated 11 October 1994. My personal approval is required before a Haitian migrant can be placed in administrative segregation for a period in excess of 30 days. Thus far, no Haitian migrant has been placed in administrative segregation indefinitely and only one Haitian migrant has been in administrative segregation for over 30 days and that migrant is now in pretrial confiinement in Charleston, South Carolina awaiting trial for the rape of a 6 year old migrant girl.

. . .

26. The principle that has guided this operation since Cubans joined our GTMO "migrant population has been that of equal treatment. This principle is evident in absolutely every facet of the operation whether it's the distribution of donated goods or providing logistical support for camp programs. If we do it for the Cubans then we'll do it for the Haitians. . . .

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of November, 1994.

/s/ MICHAEL A. PEARSON
Colonel Michael A. Pearson

Appendix N

Excerpts From
Deposition of Jay LaRoche, Community Relations Service,
Department of Justice
December 1, 1994

Page 32:

Q. It sounds to me like from your testimony that there have been occasions where unaccompanied Haitian minors have related to CRS instances in which they have experienced traumatic experiences in Haiti.

A. In the general sense. I don't have any numbers with me, if that is what you're asking me.

Q. But there are such minors?

A. Yes. There are some minors who have expressed some very difficult traumatic situations.

Q. Other than the minor coming out on his own, his or her own, and telling you, is any further effort made to identify those minors who may have suffered traumatic situations in Haiti?

A. Usually what we would do is in the course of our operation, the routines, if minors express some concerns to us or minors act out or exhibit some behavior that perhaps would require some medical intervention, then we would look at that.

Pages 70-72:

Q. What is a house parent?

A. A house parent is a Haitian migrant or house parent. It could be a family, husband and a wife, who have a child or children and who have volunteered to care for these kids.

Q. Are they given any specialized training to be house parents?

A. They are not given specialized training, but they are generally talked to about how to address the needs of those children, the unaccompanied minors.

Q. And who teaches them that?

A. CRS staff generally will talk with them in Guantanamo.

MS. DORNELL: Mr. Baruch, please let him finish his responses.

THE WITNESS: CRS staff in Guantanamo would tell them that.

BY MR. BARUCH:

Q. Is there some type of class that these house parents take?

A. Not in a formal sense of a class, but they are talked with by CRS staff explaining to them certain dos and don'ts, that they are to assist the children with their daily needs, daily activities. The house parents also are the instructors for those children during classes. The house parents assist them, which is one of the requirements that they would assist them to get up and go and eat and take their food back to the tents, assist them in taking showers, indicating to them if the clothes are dirty. These are general things that the CRS staff would talk to them about and, of course, clearly that house parents should be very understanding of the children and not push them and things of this sort.

Pages 78-79:

Q. What is the difference between a 70 year old Cuban and a 70 year old Haitian in terms of their special needs as a vulnerable group?

A. My sense is that individuals in that age bracket have the same needs.

Q. Whether or not they are Cuban or Haitian, correct?

A. I do not think that nationality has anything to do with it.

Q. And it's the same with those who have urgent medical conditions, right, nationality has nothing to do with the character of their needs; is that correct?

A. Are you asking me as a personal --

Q. I am asking based on your experience.

A. No. I do not think that there is a difference.

Q. And there's nothing to distinguish the special needs of an unaccompanied minor whether they be Cuban or Haitian; isn't that correct?

A. That is correct. I don't know if I should attempt to clarify something here.

Q. If you feel the need.

Page 91:

Q. In your opinion, having had vast experience with children, refugee children and unaccompanied minors, what is the adequacy of the education that is provided by the migrants in the camps to their children?

A. We understand that this is basic general education. This is not something that is really structured to provide specific education in specific areas at different levels. It just provides some general education just to keep them occupied and give them something to do.

Appendix O

Excerpts From
Deposition of Kenneth Leutbecker, Associate Director for the Office of Immigration and Refugee Affairs, Community Relations Service, Department of Justice
December 2, 1994

Page 67:

Q. Have you taken any steps to ensure that relatives and friends in Haiti could know whether or not the refugees are, in fact, alive or dead?

A. No.

Q. Would you deem these phone calling and postcard systems as steps to ensure that?

A. To ensure what?

Pages 97-98:

Q. How many resources would be required to accumulate the waivers?

A. I do not know.

MR. PAZAR: For how many people?

MR. ABENSOHN: The waivers for 6,000 Haitians.

MS. BYRD: When you use the word "resources," Counsel, what are you referring to?

MR. ABENSOHN: Whatever resources he is referring to himself in terms of how the department would be stretched thin.

THE WITNESS: I don't know. I mean, I haven't given it any consideration.

BY MR. ABENSOHN:

Q. So you haven't considered it in any quantified way; is that correct?

A. Correct.

Q. You at no time addressed the issue of how much more work and personnel would be needed to accomplish this?

A. I don't know what the process would be, so I can't speculate on what resources are going to be necessary.

Pages 110-11:

Q. As I understand your affidavit, there were logistical and security concerns that prompted the decision not to release the Haitian names; is that right?

A. Yes.

Q. In the eighth paragraph of your affidavit, you say, "There was no way to guarantee the safety of the migrants' relatives and friends in either the United States or in Haiti from such retaliation." Was there any way to guarantee the safety of the relatives and friends of the Cubans whose names had been released?

A. I don't know.

Q. And in the eleventh paragraph of your affidavit you say that, "Our conclusions concerning the threat of retaliation and concern for the Haitians' safety remain." What are the continuing threats to Haitian safety?

A. The last time I visited this issue substantively was late October, and I have not since.

Pages 207-08:

Q. There is a standing objection as to our use of the word "detention." Can you tell me why you do not perceive there to be detention in Guantanamo?

A. My understanding of detention is when people are apprehended upon entering the United States and detained in the illegal custody of the Immigration and Naturalization Service, and that is not the case at Guantanamo.

Q. Are you aware that the camps are surrounded by barbed wire and patrolled by armed security?

A. Yes.

Appendix P

Excerpts From
Deposition of Brunson McKinley, Deputy Assistant Secretary of State for Population, Migration, and Refugees
November 29, 1994

Page 119:

Q. Are you aware of any recent reports of violence directed at Aristide supporters or pro-democracy supporters in Haiti?

A. I am trying to think of specific recent instances and by recent you mean since mid-September, when the intervention occurred?

Q. Let's start by that.

A. I am searching my memory for a particular instance and nothing comes to me, although I have heard that in parts of the countryside there is still trouble and agitation and the possibility of political pressures, persecution.

Q. And by countryside, you mean rural areas of Haiti?

A. Yes.

Page 125:

Q. You don't know one way or another whether the Haitians at Guantanamo are refugees?

A.That's right, because we have never put them to the test.

Q. And in your position as Deputy Secretary of State with responsibility for migrants, refugees and population, it doesn't matter to you whether the Haitians detained at Guantanamo are refugees?

A. That is right. It doesn't matter to the safe haven policy. We have adopted a policy which gives equal protection to all comers who want it. That is what safe haven is.

Page 146:

Q. Once the policy was implemented, was there some procedure in place to screen the Haitians that were fleeing from Haiti, in order to determine whether they qualified for safe haven status?

A. When they were brought to Guantanamo, they were interviewed and asked whether they wanted safe haven. There were also some questions put to them to try to determine whether they might be excludable. That is, they might be guilty of crimes or otherwise not qualified under international standards.

Q. Who were they interviewed by?

A. It was an INS responsibility. INS worked closely with UNHCR that was present in an advisory capacity, and with IOM, which was the organization that hired the interpreters. So IOM --

Q. What is that?

A. International Organization for Migration. They were the ones who, in Kingston and then afterwards at Guantanamo, had hired the interpreters. So all of those organizations were involved in the process.

Page 149-50:

Q. Now, with respect to current policy with respect to those Haitians on Guantanamo, is it the current policy to maintain safe haven status for the Haitians as long as they desire to have safe haven?

A. Yes. We haven't changed the policy. You have your choice of safe haven or return.

Q. And that safe haven status can be continued indefinitely at the request of the Haitians?

A. Well, I would say not necessarily. That depends on the future. Safe haven is designed as a form of temporary protection. It is not thought of as something that would last forever.

Q. What is the genesis of the term "safe haven," in this case, in connection with the policy toward the Cubans and Haitians on Guantanamo? Does it arise from this suggestion by the UNHCR of conferring safe haven status?

A. Yes.

Q. Or is it some other?

A. No. That is it. Safe haven is a term of art, a form of protection that is offered to people who are fleeing a country which is troubled, civil war, violence, human rights abuses. It is a very frequent form of protection that is offered to people who believe they have to take flight.

Appendix Q

Excerpts From
Deposition of Stewart Moneymaker, Former Deputy Staff Judge Advocate General, United States Naval Base, Guantanamo Bay, Cuba
November 22, 1994

Pages 22-23:

Q. Do you know on what basis it was made to discriminate against the Lutheran Immigration and Refugee Service, the Church World Service Immigration and Refugee program and the U.S. Committee for Refugees as opposed to Amnesty International in conferring the one-on-one interview privilege with camp detainees?

MR. HOWARD: Objection to the word "discriminate."

BY MR. DIAZ:

Q. You can answer?

A. Can you restate it?

(The reporter read the requested portion of the record.)

BY MR. DIAZ:

Q. Do you know on what basis the decision was made to discriminate against the Lutheran Immigration and Refugee Service, the Church World Service Immigration and Refugee Program, and the U.S. Committee for Refugees versus Amnesty International in granting the one-on-one interview privilege?

A. It was actually the reverse. The procedure used for the Lutheran, the Church World Service and the U.S. Committee for Refugees was the standard access. The decision to allow an Amnesty International team to have one-on-one interviews was the exception to the rule.

Q. My question still stands. Do you know why the decision was made to discriminate in favor of Amnesty International in granting them the one-on-one interview privilege?

A. Yes. It was — my understanding was that it was determined that Amnesty International was a well-recognized organization that had a particular purpose — they were an excellent vehicle for the Joint Task Force to continue with our open and transparent policy with regard to the operations. The Amnesty International is world reknown. They are world-respected. It was to the benefit of the operation to allow them additional access and be able to report. We were able to grant that particular access because we had made arrangements for operational security such that the extra access they were granted was done on a limited basis. They were at one particular part of the installation that was well secured. There was a limited number of migrants in this particular facility, so the ability to safeguard both the migrant population and the Amnesty International people during the one-on-one interview process was improved. So combining those together, we were told by our headquarters, "Okay, this is a change, let Amnesty International have one-on-one interviews, they can report on the operation as they always did," and we did it.

Appendix R

Excerpts From
Deposition of Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs
December 1, 1994

Pages 51-52:

Q. My question then is: What information do you know for a fact that the Haitians on Guantanamo have access to regarding conditions in Haiti?

A. I know as a fact that they have access to the type of description of what has happened in Haiti, what the situation is on the ground today, that is, in my opinion, sufficient to make a reasonable judgment that return to Haiti is justified.

Q. You say they have access to — I think your words were the type of description of the situation in Haiti. What do you mean? What information do you know for a fact is getting to the Haitians on Guantanamo regarding conditions in Haiti?

A. That President Aristide has returned. That by all judgment, he is conducting himself and his new government is conducting itself in all appropriate human ways. That the levels of violence have decreased dramatically since his return. That human rights violations have all but disappeared. That the process of government, the movement toward elections, the entire process of making Haiti a decent place to live, both politically and economically, is well under way. And, for a fact, I know that that kind of information is available to the Haitians in Guantanamo.

Pages 69-71:

Q. As a multinational force that intervened in Haiti in September, have they fanned out throughout Haiti and do they occupy — strike that. Let me start over. The multinational force that intervened in Haiti in September, do you know whether they are regularly patrolling all of the rural areas of Haiti?

A. All of the rural areas, no. They have visited a large number of areas. The combination of the international police monitors, the members of the multinational force and of the vetted police personnel of the Haitian government, are conducting this kind of fanning out. But it would be impossible to say that the multinational force is patrolling all rural areas.

Q. In your declaration in paragraph 6, you state, "U.S. Special Forces have visited nearly 500 towns in the countryside and are in place at 27 sites outside the capital." What do you mean in that statement by the term "visited"?

A. They have been there and they are not necessarily permanently — they are not permanently stationed in all 500 towns in the countryside.

Q. They are permanently stationed in 27?

A. They are in place for the next period of time and stationed at the moment at 27 sites.

Q. Do you know how many towns there are in Haiti?

A. No, I do not.

Q. Do you have any idea at all whether the 500 towns would include all of the towns in Haiti?

A. I frankly do not know, but I have to assume that it's a large portion, a significant portion of the towns of any size in Haiti.

Page 76:

Q. Can you tell me, Ambassador, what progress has been made in the vetting, what percentage of those who have been identified as having demonstrably unacceptable human rights reputations have been removed?

A. I cannot give you a percentage. It is a process that is ongoing. We are satisfied with the progress that has been made so far and are confident that it will continue.

Q. Can you give me a ballpark? Are there hundreds of people who have demonstrably unacceptable human rights records who remain as a member of FAd'H today?

A. I cannot give you a figure.

Q. You can't quantify it in any way?

A. No.

Q. It could be 1,000?

A. I simply don't know.

Pages 90-91:

Q. Were you also planning on dismantling the camps? Is that part of your plan?

A. The fact is that since the situation has changed in Haiti and has not changed in Cuba, one of the assumptions is that when camp facilities are empty, let's say in Guantanamo, then the best of the facilities would be used, if open, for the remaining refugees. For the Cubans who came second to the Guantanamo area, the area where the Haitians are now may prove to be a better area for some of the Cuban migrants to be settled in.

Q. Do you know if the government is actively encouraging Haitians to return to Haiti?

A. We are providing the information which we assume will give them the basis on which to decide voluntarily to return to Haiti.

Q. Are you familiar with the term PSYCH/OPS?

A. Yes, I am.

Q. And you are aware that that is a term used to refer to personnel from the United States Army or other services who engage in psychological operations?

A. Yes.

Pages 149-152:

Q. The policies, or the variation and the change and the shift in Cuban policy that you are referencing relates to the ability of Cubans to leave, do you have knowledge of or are you aware of whether the policy has changed as it relates to Cubans returning to Cuba who have fled Cuba?

A. As far as we know the people who voluntarily return to Cuba, having originally fled, are not being prosecuted or otherwise harassed by the Cuban government for having violated the law still on the books against unauthorized departure.

Q. What is the basis of that acknowledge? [sic]

A. We have heard no complaints. We have had no evidence that would indicate that the situation is otherwise.

Q. When you indicate that you have heard no complaints, do you have a mechanism in Cuba by which you receive complaints of people who have been persecuted by the government for various reasons?

A. It is not a formal mechanism, but we are automatically a recipient of people who one way or another want to complain to let the outside world know what is happening. This can happen in various ways, including people directly communicating with us in Havanna, or through intermediaries such as family in the Miami area or elsewhere in the United States or in the world.

Our knowledge is not complete, but our awareness of human rights and other violations of harassment that goes on in Cuba is well documented and we are confident that we know an awful lot and we are privy to an awful lot of what does, in fact, go on in Cuba in the area of human rights violations and repression of other sorts by the Cuban government.

Q. Are you saying then that you would hear of or that you would know of any reprisals taken against returning Cubans who have voluntarily repatriated to Cuba?

A. I cannot be categoric about our necessarily knowing about everything that might or that does happen. But we have heard nothing and we are fairly confident that we would likely hear if this was a pattern.

Q. How many people approximately do you know of that have been repatriated back to Cuba from Guantanamo?

And, for the record, when I refer to Guantanamo, I am referring in general to both the detention camps at Guantanamo and elsewhere, such as in the Panama Canal zone.

A. I don't have the exact figure, but it is in the neighborhood of, I believe, 100 — it's under 200.

Q. The relative proportion then of people who have gone back is significantly small in relation to the number that are still at Guantanamo?

A. Yes.

Q. In general in society do you have any information as to how people who are returned, people who return from other countries back to Cuba, how they are treated in society?

Pages 304-05:

Q. You have not heard about the decapitation of the mayor in that town recently?

A. I do not recall.

Q. Is it possible that there have been human rights abuses in these areas that were not brought to your attention?

A. Human rights — individual human rights abuses are not individually brought to my attention. So the answer, of course, is yes.

Q. I am not sure I understand why you would not expect that human rights violations in these areas to be brought to your attention.

A. The general situation, the level of human rights violations or respect for human rights, is regularly brought to my attention.

Q. But only in a general sense, not with reference to specifics?

A. Yes.

Q. So although you are satisfied that things are generally good in Haiti and you do not know the particulars of what areas are safe and what areas are unsafe; is that right?

A. I'm quite satisfied with those people who are reporting within the U.S. Government the status of human rights throughout Haiti are doing so honestly and accurately.

Appendix S

Excerpts From
Deposition of Ronald Zaperach, Former Current Operations Officer, United States Naval Base, Guantanamo Bay, Cuba
November 22, 1994

Page 56:

Q. Other than the World Relief Organization, do you know the names of any of the other Non-Governmental Organizations that were afforded long-term access — strike that. Other than the World Relief Organization, do you know of the names of any of the other Non-Governmental Organizations that have been afforded long-term access to the Guantanamo Bay facilities by the United States Government?

A. World Relief is the only one I am aware of.

Q. By your response, you didn't mean to suggest that there might not be others that you are not aware of?

A. There could be. I am only aware of the World Relief ones.

Q. Did you process those requests for long-term access?

A. For the World Relief people, yes, sir.

Appendix T

Letter from Seth Waxman,
Office of the Deputy Attorney General,
To Roberto Martinez and Ira J. Kurzban, December 2, 1994

Dear Messrs. Martinez and Kurzban:

In light of the District Court's November 22 and 28 orders granting counsel for provisional intervenors reasonable and meaningful access to certain eligible migrants, it is necessary to establish a protocol for access by attorneys for both groups. To guarantee fair access to the limited resources at Guantanamo Bay Naval Base, the following procedures have been developed, consistent with the Principles of Access previously filed with the Court. Requests for access not consistent with these procedures likely will be declined.

To ensure that attorneys from both groups obtain reasonable and meaningful access consistent with the base's limited facilities and personnel, attorneys for plaintiffs and provisional intervenors will be granted visiting time on alternate weeks. For example, attorneys for the Cuban migrants are scheduled to visit Guantanamo Bay during the week of November 28, 1994. Attorneys for the Haitian migrants, therefore, will have access to the base during the week of December 5, 1994. This arrangement will remain in effect until such time as one group of attorneys has met privately with each individual who has requested such a meeting in writing, or until such time as counsel for the two groups establish an alternate time-sharing arrangement consistent with the following parameters, or until a court decision no longer requires the government to provide access to Guantanamo.

1. All attorney visits will last for no longer than three (3) consecutive days (although attorneys may arrive the evening before the first day of visiting). No more than six (6) attorneys representing one group of plaintiffs (*i.e.* Cubans or Haitians) — will be permitted to visit the base during any given week.

2. To obtain theater and country clearance onto the base, at lease five (5) working days before the desired arrival each attorney must provide Lieutenant Colonel Robert Hudson (or other contact we may designate in the future), at (703) 693-9848, with his or her name, organization, Social Security number or passport number, and dates of proposed arrival and departure.

3. Attorneys must make their own commercial air travel arrangements and, at least two (2) working days prior to arrival, provide Lieutenant Colonel Hudson with the airtime, flight number, and time of arrival and departure. Attorneys will be met at the airfield by local Guantanamo personnel.

4. In order to expedite attorneys' private visits, at least two (2) full working days before arrival each group of attorneys must provide Lieutenant Colonel Hudson with the names of those migrants with whom they wish to speak (and who have requested in writing individual representation). Failure to provide this notice in a timely fashion will likely result in delay or inability to locate and provide access to eligible individuals during the attorneys' visit to the base.

If you have any questions concerning the foregoing, feel free to contact David Kline at the address listed in the pleadings or at (202) 616-4904. Because this matter is under court order, all communications regarding the terms of access (other than routine communications on matters listed in the numbered paragraphs above) should be directed to Mr. Kline or, if they arise during the course of a visit to Guantanamo, to the Department of Justice personnel there.

Yours sincerely,

/S/ SETH P. WAXMAN
Seth P. Waxman

Appendix U

Beheading Sows Terror In Rural Haiti,
Miami Herald, November 19, 1994

By: ASSOCIATED PRESS

MIREBALAIS, Haiti - Someone chopped off the head of Deputy Mayor Cadet Damzal just over a week ago and the murder is sowing confusion and fear among those who would build democracy in Haiti.

Damzal, like many other supporters of democracy in Haiti's central plateau, had only recently ventured out of hiding, encouraged by the presence of U.S. troops and the return from exile of President Jean-Bertrand Aristide

News of the slaying spread a message across the country: Even the U.S. Special Forces can't guarantee safety in Haiti's remote rural communities, long dominated by military commanders and armed civilians known as attaches.

Hundreds of townspeople turned out for Damzal's funeral Sunday. A school band played a dirge as pallbearers carried the casket from the funeral home to the Bethel Haiti Church of God and then to the cemetery.

"We're here to salute a valiant man who was assassinated in a cowardly manner," said Lexander Dorilas, 30, an Aristide activist.

Evangelical Pastor Pierre Jean-Baptiste called for an end to the violence. "The time has come for leaders of the country to assume their responsibilities and take action so that henceforth these acts of violence and banditry stop," he said.

The Aristide government has ordered an investigation. "By killing Damzal, they want to kill what he represented," Mayor Paul Yvelt Millien said on the eve of the funeral.

Millien was among 300,000 pro-Aristide Haitians who went into hiding during much of the president's three-year exile, said the

killers want to intimidate popular pro-democracy leaders who plan to seek public office in next year's elections.

Millien, 33, is certain his deputy was slain by the same paramilitary thugs who terrorized Haiti after Aristide was ousted. The thugs are blamed for at least 3,000 political murders.

An American flag flies over the old yellow army barracks facing the main square in this market town, separated by 40 miles of tortuous road from Port-au-Prince to the south. Nearly every home is decorated with Aristide posters, something not permitted under military rule.

Damzal's beheading was the most brutal example of the continued violence against Aristide supporters in isolated regions of the country. Supporters worry that violance may escalate once the American troops depart.

Damzal was ambushed the night of Nov. 4 as he walked home. His headless body was plucked from a river the next day by Special Forces soldiers who have occupied the town's regional army garrison since early October.

"It was ghastly," said Capt. Tim Baxter, 33, of Menominee, Mich. He said Damzal's arms had machete cuts indicating he tried to fend off the blows.

Damzal's eldest son, Claude, 26, believes his own life is in danger, because he was active in pro Aristide politics with his father.

"Once the funeral is over, I won't be safe," he said. "I'll have to lay low. I'm responsible for the family and they have to go to school and eat."

Millien, the mayor, said quick justice was necessary. "Otherwise, when the Americans' time is up and the troops leave, they are going to leave us in the hands of the criminals."

U.S. troops provide some security by patrolling the streets, but they have failed to disarm the population, Millien said.

The 23 American soldiers stationed at the Mirebalais army garrison patrol the region, but are under orders to intervene only when absolutely necessary.

Millien wanted to display Damzal's headless body in an open casket at the funeral. The family was not in agreement.

"I wanted the people to see how evil these people are. I wanted them to see a man buried without a head," he said.

Appendix V

Excerpts From
2 Slain by Attachés on Aristide's First Full Day Back,
New York Times, October 17, 1994

By Larry Rohter

PORT-AU-PRINCE, Haiti, Oct. 16

At least two people were beaten and hacked to death here today when paramilitary auxiliaries opposed to President Jean-Bertrand Aristide attacked some of his supporters who had just emerged from hiding.

The incident marred the first full day of Father Aristide's second turn as President of Haiti, which he spent quietly and in privacy as his allies took to the pulpit to preach the reconciliation and justice he has promised will be the hallmark of the rest of his term of office.

The two men killed in the midday attack in Cite Soleil, a sprawling slum that is a pro-Aristide stronghold, were identified by neighbors as supporters of Father Aristide who had just returned to the capital after months spent underground. They were said to be helping American soldiers who were trying to identify and detain a pair of paramilitary gunmen, known as attaches, loyal to the military dictatorship that ruled Haiti until Saturday.

American forces were not present during the attack, but returned to the area several hours later to remove the bodies, residents said. One victim appeared to have been beaten to death with a club, while the other had been slashed with a machete. American soldiers said two other people might also have been killed in the area today, but offered no further information.

Tonight, in another demonstration of the volatility here, several thousand people converged on the National Palace, responding to rumors of an assassination attempt against Father Aristide by

the new Armed Forces commander in chief, Maj. Gen. Jean-Claude Duperval.

American officials and advisers to Father Aristide said the rumors stemmed from an incident at the palace, when General Duperval arrived for a meeting with Father Aristide late this afternoon. The general and his four-wheel drive vehicle were searched, and weapons were found and confiscated, but General Duperval was not arrested and the meeting went ahead as scheduled, the officials said.

American officials said a sidearm was taken from General Duperval and returned to him when he left the palace. But the Aristide advisers said that grenades and a grenade launcher were also seized, and that those weapons were not returned.

Radio accounts of the incident drew pro-Aristide forces into the streets. Demonstrators, armed with clubs, sticks, machetes and rocks, set up roadblocks to stop cars and search them for weapons. The crowds dispersed at around 9:30 P.M., after American military vehicles mounted with loudspeakers drove through the streets broadcasting assurances that all was well.

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Appendix W

Excerpts From
Grenade Kills 5 In Haitian Crowd,
Washington Post, September 30, 1994

By: Douglas Farah, William Booth,
Washington Post Foreign Service

PORT-AU-PRINCE, Haiti, Sept. 29, 1994

A hand grenade exploded today in the middle of a jubilant throng marching to show support for president Jean-Bertrand Aristide and his allies, killing at least five people and wounding 47.

The killings, believed caused by Aristide's opponents in the Haitian military and their paramilitary partners, marked the bloodiest violence in the Haitian capital since U.S. troops arrived Sept. 19 to prepare the way for Aristide's resumption of power after three years in Washington exile.

Heavily armed U.S. troops in humvees swiftly took up positions around a warehouse from whose roof the grenade was reportedly thrown. The Americans used M-16 automatic rifles to shoot into the warehouse and also fired .30-caliber machine guns mounted on their vehicles at unknown targets.

The incident left no American casualties, said Col. Barry Willey, the U.S. Army spokesman in Port-au-Prince. Three Haitian men were later seen being taken into custody by the American troops.

The assailants' identities were not immediately known, but the warehouse belongs to Lt. Col. Michel Francois, the Port-au-Prince police chief and one of Aristide's staunchest opponents. Francois led the coup d'etat that overthrew Aristide in September 1991 and commands the notorious "attaches," plainclothes gunmen who have acted as enforcers for the military junta that has ruled Haiti since Aristide was driven out.

"I think it is clear the world can now see the face of evil that has plagued this country for so many years," said U.S. Embassy spokesman Stan Schrager.

Today's violence highlighted the deep polarization here and the difficulty of the U.S. military mission, which is being called upon to maintain law and order in a society undergoing a profound transformation. It took place just hours after Evans Paul, the mayor of Port-au-Prince who was driven from office in the coup three years ago, reopened City Hall under heavy protection of U.S. troops and amid widespread celebration. Paul is one of the most popular figures in Haiti and a resilient Aristide ally.

The marchers hit by the grenade were continuing their joyous, pro-Paul celebration about a mile from City Hall in a slum in the western part of the capital. A U.S. patrol had passed by minutes before the grenade exploded but was not nearby when the blast rang out. The U.S. troops quickly returned after the explosion.

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Appendix X

Briefing Paper of Human Rights Watch/Americas:
Human Rights Concerns in Haiti
December 8, 1994

The US-led September 19 multinational intervention in Haiti brought to a halt the worst military and paramilitary sponsored human rights abuses -- the killings, torture and rape that had been occurring on a daily basis. But although President Aristide has returned and the old military leadership under Gen. Raoul Cédras has been dispersed and disabled, there is a real danger that grave abuses could resume and even imperil the newly established constitutional government -- especially if Haiti's vicious paramilitary networks are not disarmed and dismantled. Although the Aristide government is slowly laying the groundwork for a civilian controlled police force, a scaled-back army and a functioning judiciary, it has neither the resources to carry out security functions itself nor the ability to sway the multinational forces (MNF) on such issues as the need for sweeping disarmament. This paper provides a brief overview of the current human rights situation and related issues that have medium and long-term consequences for democratization and establishing the rule of law. It also points up continuing security concerns that render unwise or at least premature, any blanket rejection of Haitian political asylum claims based on improved conditions in Haiti.

The most pressing security and human rights concerns in Haiti today are: the small number of weapons recovered from the army and civilian sources compared to the quantity of automatic weapons at large; the ill-defined detention policy that has led to the release of hundreds of suspected attachés and army criminals detained by the multinational forces (MNF), while petty thieves or Aristide supporters are kept in prison; reliance on the Haitian military to make up the interim police force; significant instances of inappropriate collaboration between MNF and Haitian civilian and military sectors allied to the old

coup regime, and failure to preserve information that may constitute evidence against abusive military and civilian attachés. In addition, rural areas, where 70% of the population lives, have been virtually unattended to; only some 800 MNF are actually deployed outside of Haiti's two largest cities. Although rural section chiefs were officially dismissed in late October, there is no plan for law enforcement in the countryside. Cases of serious human rights violations in different parts of the country underscore these concerns.

Inadequate disarmament of Haiti's paramilitary forces

Nobody knows how many weapons remain in the hands of the army, FRAPH (Front for the Advancement and Progress of Haiti, the chief paramilitary group) and other military supporters. Fewer than 6,000 weapons have been recovered from non-army sources, as well 8,000 from the military, many of them in poor or non-working condition. Weapons searches were largely suspended by the MNF after Aristide's return. US military leaders say that order has been restored to the country. Yet most Haitians believe that large numbers of guns remain in the hands -- or rather buried in backyard caches -- of groups like FRAPH and the "Ninjas," Cédras' ad hoc elite bodyguards. President Aristide and UN officials have urged the MNF to continue disarmament efforts. The US forces complain that tips provided by most Haitians fail to produce results, so they've stopped looking. But the most successful finds have come from informers who were themselves part of the paramilitary network. What is being done to encourage such informers? Although US embassy officials claim to have extensive intelligence on FRAPH, they have shown an inexplicable reluctance to dismantle its paramilitary structures. Local Haitian military commanders distributed weapons to civilians during the last year and undoubtedly know where the guns are. Are US officials applying appropriate "carrots and sticks" to encourage military officers to reveal weapons caches?

Inconsistent policy on detention of suspected criminals

The MNF is following no consistent or clearly defined policy in detaining or releasing from detention, Haitians accused of serious crimes. The MNF has detained more than 200 alleged paramilitary agents and abusive military, most of whom were arrested by citizens and turned over to them. The majority of these appear to have been released without any legal proceedings. In early November, the MNF was holding approximately forty Haitians, including several notorious criminals considered a risk to the MNF, ostensibly under the authority of Security Council Resolution 940. By early December, half of these had been released, also apparently in the absence of legal proceedings. On November 23, Max Paul, the former head of the port authority, was released from MNF detention, and Romeo Halloum, a Cédras associate, was also reportedly released. At the same time, Emmanuel "Toto" Constant, the leader of FRAPH, the paramilitary group responsible for more killings, disappearances and torture than any other, remains at large and in contact with the US embassy, after making a conciliatory speech. US officials in Haiti respond with shrugs and red faces when asked to explain the discrepancy.

In Cap Haitien, human rights monitors witnessed Corporal Joseph "Magloire" Clemeus being seized by a crowd and beaten on October 30 after he was recognized trying to board a bus to Port-au-Prince. Human rights activists in Cap Haitien charged him with the unprovoked shooting death of two young men eating in a restaurant on election day, November 29, 1987, as well as numerous brutalities during the last three years. Clemeus was rescued by the MNF and later released with no further proceedings. During the same weekend, MNF forces in Cap Haitien arrested more than ten alleged petty criminals. These individuals charged with drug dealing, prostitution, car theft and the like, were brought to court by MNF soldiers on October 31, where their cases were heard.

Guidelines governing MNF detentions and release from detention need to be clearly articulated and follow Haitian and international guidelines regarding due process. Individuals sus-

pected of grave abuses should be arrested, or detained after citizens' arrest, and then presented to judicial authorities to determine if there is sufficient evidence of involvement in serious crime to hold them for trial. The MNF should make every effort to gather and preserve testimony regarding alleged criminals brought to its attention, by questioning them, taking testimony from their accusers, and placing this information, as well as the accused, immediately in the hands of the appropriate legal authorities.

Lack of attention to prisons under Haitian military control

There has been no regular supervision of prisons under the control of Haitian military and several hundred prisoners escaped from the main prison in Cap Haitien on September 24. Another 308 fled the National Penitentiary in Port-au-Prince on October 14-15, and 134 escaped on October 30. While some of these people were undoubtedly imprisoned unjustly, others were condemned criminals or military and attaches arrested since the return of President Aristide. All but a few are still at large.

MNF collaboration in repressive actions

In several parts of the country US Special Forces troops, whether willfully or out of ignorance, have established overly collaborative relationships with the Haitian army. They have resisted communities attempts to be rid of abusive officers, and have accompanied Haitian military on arrests or attempted arrests of pro-democracy activists and searches of their homes.

*In Jérémie, the capitol of the Grande Anse department, the public prosecutor is a member of FRAPH and uses his position to serve warrants on *Lavalas* supporters while ignoring complaints filed by pro-Aristide community members. The MNF assists the Haitian military in serving these warrants, most of them baseless. For instance, the MNF helped arrest four Aristide supporters, including a 74-year-old man, in the Fond Berke neighborhood of Jérémie on October 31. In neighboring Chambellan, MNF collaborating with Jérémie-based Haitian military arbitrarily arrested sixteen people on November 3,

based on a complaint by a FRAPH member. Charged with disorder during a November 2 demonstration, nine of the group were not freed until November 9. On November 24, MNF accompanied Haitian army in the arrest of Father Joachim Samedi, an outspoken supporter of President Aristide.

*In Grand Gôave on November 11, MNF accompanied Haitian soldiers on searches of two houses of members of the popular organization Kombit Komilfo, and tried to serve arrest warrants on three members. The signatures on the warrants were discovered to have been forged by the court clerk in collaboration with the army. Earlier, for many weeks, MNF supported Lieutenant Joseph Weber Milord, the Grand Gôave commander and a FRAPH leader, against community efforts to have him dismissed.

Failure to preserve documents discovered in military posts that may constitute evidence

Monitors have observed hundred of forms, letters, arrest warrants and other documents lying scattered around the floor of military posts in Cap Haitien and Cabaret. In many other areas, the documents had all been removed or destroyed, whether by the military themselves or noncomprehending citizens. At one military post jointly occupied by Special Forces and army, the US commander admitted to us that as part of his efforts to clean up the base, he had ordered Haitian soldiers to trash and burn a roomful of old documents. All such documentation should be preserved because it may contain evidence about human rights violations that would aid the Truth Commission in its work and make possible future prosecutions.

Reliance on the Haitian military as interim police force

The decision to create an Interim Public Security Force (IPSF) composed of half of the Haitian army, screened by a military commission, threatens to leave Haiti with a force mistrusted by the population and capable of continuing brutalities. The Haitian government plans to open a police academy in January 1995 which will offer a four-month course to successive

groups of 400 new recruits but it will be at least a year before the academy's graduates can replace the IPSF. The 3,000 IPSF members are drawn entirely from the ranks of the army, screened by a commission of four colonels headed by commander-in-chief General Bernardin Poisson and by the US embassy, based on lists of alleged human rights abusers and criminal suspects. However, the essential components of citizen input and investigative procedures are absent. Programmed neighborhood investigations by the colonels' commission of soldiers' reputations are rendered ineffective by widescale transfers of soldiers around the country since October. At several army barracks visited by human rights monitors, from one quarter to one third of the soldiers had been transferred within the last month. The recruitment of more than 1,000 Haitian refugees on Guantanamo was an innovative response to the need for an interim security force, however the decision to utilize the refugees as police auxiliaries, subordinating them to the soldiers, negates much of the positive aspect of the project. The recycled army are unpopular, as was shown by the reaction of the Cap Haitien population to the attempted redeployment of soldiers as IPSF. Alarmingly, US officials expect that most of the interim police will be absorbed either as prime candidates for the new civilian police force or as part of a reformed army.

Ongoing violence

Although violent human rights abuse has declined since the multinational operation began, a number of cases are worth citing:

*At least one and possibly four persons were killed in Carrefour Rocher, Chenot, a communal section of Marehand Dessalines, on October 9. Human rights groups reported that Section Chief Onondieu Paul opened fire on a pro-Aristide demonstration, wounding several people, and then finishing them off with a machete. Olius Cenoble was confirmed killed. A fifth person, an attaché, was reportedly killed in retaliation.

*Three civilians and two soldiers died in a confrontation October 12 in Montagne Terrible, a communal section of Saut

d'Lau. Two soldiers from Saut d'Eau, Louisant Semelis and Antenor Jean-Colin, reportedly were serving an arrest warrant on some Aristide supporters and were met by a hostile crowd. Several civilians were badly wounded and one of them, Louis Edner, died of tetanus in the Port-au-Prince State University Hospital on October 24.

*In Anse d'Hainault on October 15, soldiers under the orders of Lieutenant Lom fired at pro-Aristide demonstrators, killing Klarenase Brunache, 15.

*Lieutenant Joseph Mesadieu Pierre, the commander of the army post in Cabaret, opened fire on a crowd of pro-Aristide demonstrators October 15, killing Smith Jean, 22, and wounding a 15-year-old girl.

*The second deputy mayor of Mirebalais, Darnzal Cadet, was killed during the night of November 4. His decapitated body was discovered November 5 in a river outside the town. To date, despite investigation by the MNF, responsibility has not been determined. Darnzal Cadet represented the FNCD, Aristide's electoral coalition, and recently had been assisting victims of abuse to file suits seeking judgments and compensation.