How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation

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Fortunately, there's an alternative model to relations with the Clinton White House: the legal and grass-roots campaign to free Haitian refugees at Guantanamo. As soon as Clinton's betrayal was evident, their advocates organized demonstrations, petitions and media blitzes on campuses and in communities around the country. The result: When U.S. District Judge Sterling Johnson Jr. ordered President Clinton to do what candidate Clinton had promised, the administration was left with little alternative but to abandon any appeal.¹

INTRODUCTION

For over a year and a half, from 1991 to 1993, the United States government ran a special detention camp, Camp Bulkely, at its Naval Base in Guantanamo Bay, Cuba. In one sense, the camp represented just another episode in the sad global epic of the denial of refugee rights that fills our century. But the Guantanamo camp was unique; its 310 Haitian men, women, and children were prisoners in the world's first and only detention camp for refugees with HIV.²

As co-counsel,³ I was part of the struggle to free the Haitians and shut down the Guantanamo HIV camp. Our litigation was successful.

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¹ No More Nice Guy, 1992 NATION MAG. 891, 892.
³ Co-counsel included Harold Koh, a professor at Yale Law School and Director of the Schell Center for International Human Rights; Joseph Tringali, a partner at Simpson, Thacher & Bartlett; Lucas Guttentag, Director of the ACLU's Immigrants Rights project; and Robert Rubin
On June 8, 1993, Judge Sterling Johnson, Jr. ordered the closure of the camp and the release of the Haitian refugees imprisoned there. Legal advocacy was crucial in fighting the Guantanamo camp, and the case is relevant to broader issues in refugee and international human rights law.

This Article analyzes the project to close the camp, and does not focus solely on the court decisions and legal arguments. In Part I, I briefly explain how the Guantanamo HIV camp came into being. In Part II, I discuss the development of our legal claims and our attempts to avoid perceived difficulties surrounding the HIV issue. In Part III, I examine the political context surrounding our legal strategy. In particular, I examine how our hope that President Clinton would close the camp after his election in 1992 affected the litigation. In Parts IV and V, I detail the subtle and challenging issues raised by what I term the “inside” lobbying strategy and “outside” organizing and agitation strategy. The victory was not exclusively a legal one, but depended on the intersection of litigation with political action of many different

at the San Francisco Lawyers’ Committee for Civil Rights. The students working with the Lowenstein Human Rights Clinic at Yale Law School played a major role in the litigation.


5. A number of law review articles have discussed the legal aspects of the victory. See, e.g., Harold H. Koh, The “Haiti Paradigm” in United States Human Rights Policy, 103 Yale L.J. 2391 (1994); Victoria Clawson et al., Litigating as Law Students: An Inside Look at Haitian Centers Council, 103 Yale L.J. 2337 (1994). Subsequent to our litigation to close the HIV camp, another series of cases brought in the Eleventh Circuit challenged the treatment of Cubans and Haitians granted safe-haven at Guantanamo Bay, Cuba. This series of cases addressed the refugees’ constitutional and statutory rights. The court decided, inter alia, that the granting of safe-haven did not implicate any due process rights and, therefore, the refugees had no right to counsel. Haitian Refugee Center, Inc. v. Christopher, 43 F.3d 1431, 1432 (11th Cir. 1995); Cuban American Bar Assoc. v. Christopher, 43 F.3d 1412, 1427 (11th Cir. 1995). However, the Eleventh Circuit acknowledged that the situation of the plaintiffs in the Guantanamo HIV cases, who had been “screened-in” or otherwise processed for asylum, was different than that of the safe-haven plaintiffs. Cuban American Bar Assoc., 43 F.3d at 1427. For this reason the Eleventh Circuit said it “need not decide whether any such putative liberty interest arises from being ‘screened-in.’” Id. at 1426.
kinds. I do not mean to suggest, however, that we had a carefully preplanned political "strategy"; a great deal of our political work happened under crisis conditions. Internal debates about tactics—and about the relative advantages of an inside versus an outside strategy—continued vigorously throughout the process. Finally, in Part VI, I discuss some of the lessons learned and express my hope that human rights advocates benefit from a careful analysis of our strategies, our mistakes, and our process.

I. THE DEVELOPMENT OF THE GUANTANAMO HIV CAMP

On September 30, 1991, a military coup overthrew Haiti's first democratically elected President, Jean Bertrand Aristide. In the bloodbath that followed, the military may have killed as many as three thousand Haitians. Under the new regime, supporters of the overthrown President and those expressing opposition to the coup were killed, tortured, jailed, and beaten. The coup and its subsequent terror created a wave of refugees. In vessels barely seaworthy, thousands sailed into the high seas hoping to make the 600-mile journey to southern Florida or other landfall where they would be safe. The majority, however, were stopped at sea by United States Coast Guard cutters patrolling the passage between Haiti and Cuba. These Haitians were taken aboard the Coast Guard ships and placed in custody for processing by the Immigration and Naturalization Service (INS).

6. I need to make clear, here, that the "we" I use, referring to our team, should not be read to imply that all of the opinions I express. The "we" includes all of the counsel and the many law students at Yale who devoted considerable time to the case. While we did, over and over, reach functional consensus, I and a few others certainly often had political and strategic opinions that all team members did not fully share. This Article and its conclusions reflect my own biases and political judgments about the case.

7. Estimates of the number killed in the months after the coup range from 1000 to 3000. See AMERICAS WATCH ET AL., RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE Coup 2 (1991); IRWIN P. STOTZKY, SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY 221 n.54 (1997). Stotzky writes that as many as 6000 were killed between the 1991 coup and Aristide's reinstatement in October 1994. Id.


11. Where these refugees were taken after interdiction varied depending on when they were picked up. For a good description of the various changes over the years in U.S. policy toward
This was not the first interdiction of Haitian refugees by the United States Coast Guard, nor the first massive encounter between Haitian refugees and the INS. In 1981, when thousands of Haitians attempted to flee the dictatorship of "Baby Doc" Duvalier, the United States signed an agreement with Haiti allowing United States ships to stop Haitian-flagged vessels and forcibly return the people on board to Haiti. However, under this harsh agreement and the executive order implementing it, the United States agreed to obey its international obligation not to return those refugees "who genuinely flee persecution in their homeland" and to interview the Haitians on board the cutters to determine their status. Those found to have a credible fear of political persecution would be screened in and brought to the United States. These asylum-seekers could win political asylum if they established, in further hearings, a "well-founded fear of persecution."

For ten years the screening procedure was honored in word more than deed. Of the 24,600 Haitians interdicted by the United States Coast Guard between 1981 and 1991, only eleven people were screened in and brought to the United States for asylum hearings. In the immediate aftermath of the 1991 coup, United States policy changed abruptly. For approximately two weeks, the INS brought all interdicted Haitians to the United States, where they could apply for asylum. Then, in mid-November 1991, the practice changed again. Although political violence and terror continued unabated in Haiti, refugees were no longer automatically brought to the United States. The INS resumed on-board screening of Haitians in order to determine who, in its view, had a credible fear of persecution.


15. Initially, the INS employed an unarticulated standard when screening for refugees aboard the cutters; in 1991, however, it adopted the “credible fear” test. See Memorandum from Greg Beyer, Director of Asylum, to Leon Jennings, Chief of Asylum Pre-Screening Unit, and Erich Cauller, Director of Miami Asylum Office (Mar. 1, 1991) (on file with the Harvard Human Rights Journal).
16. The “well-founded fear” standard is found in the Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1998). The “credible fear” standard is easier to meet than the “well-founded fear” standard used to adjudicate asylum claims. See Lowenstein International Human Rights Clinic, supra note 9, at 3.
Almost immediately after the "screen and return" policy went into effect, a well-known refugee advocate, Miami attorney Ira Kurzban, filed suit on behalf of the Haitian Refugee Center against the INS and other United States agencies to enjoin the government from returning any refugees to Haiti. Hasty, on-board interviews of terrified and exhausted survivors pulled from the sea were likely to result in unreliable judgments about who could be safely repatriated. Consequently, Kurzban and other observers believed the latest procedure would result in most of the refugees being forcibly returned to Haiti. The district court in Miami repeatedly enjoined the United States from returning the refugees, but the Eleventh Circuit reversed each injunction.

Coast Guard cutters lacked the space to hold the thousands of refugees while the injunctions were blocking repatriation. Rather than bring the Haitians into the United States, the INS transported all of them—those "screened in" (those who passed the credible fear test) and those "screened out" (those who failed the credible fear test and, but for the injunction, would have been returned to Haiti)—to the United States Naval Station at Guantanamo Bay, Cuba.

From the government's point of view, Guantanamo Bay had a number of advantages over other sites. Its thirty-one square miles of land provided a site large enough for the thousands of refugees. The

21. A refugee taken off a rickety boat and onto a cutter was interviewed immediately even though he or she might be suffering from hunger and sun stroke. The interviews were less than five minutes long, and the refugee, unrepresented, generally did not understand what was being asked. Moreover, any Haitian returned to Haiti faced dire consequences, as the coup leaders did not look kindly upon Haitians fleeing the country. See Laurence H. Tribe & Jonathan S. Massey, Haiti's Refugees: The Administration Adopts Lawless Policy, MIAMI HERALD, Feb. 9, 1992, at C1.


25. Eventually, the United States transported interdicted Haitians to Guantanamo for processing and screening. The United States gained possession of the Naval Station at Guantanamo Bay in 1903 shortly after the end of the Spanish-American war. It obtained a lease from Cuba giving the United States "complete jurisdiction and control over and within" the base. Agreement for the Lease of Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. This lease was continued by a 1934 treaty, which required the consent of both parties for abrogation. Treaty Between the United States of America and Cuba Defining their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

location of the base would avoid many political problems the admin-
istration might otherwise have faced if it brought thousands of Haitians
to the United States, particularly in an election year. Guantanamo was
outside the United States, and it was only accessible with the permis-
ion of United States military authorities. The inaccessibility of the
base would prevent news reporters and others from scrutinizing the
treatment of the Haitians. Additionally, the government could argue
that the refugees would have no legal rights on Guantanamo. It could
claim that the United States Constitution did not protect foreign
nationals outside the country and that refugees could not apply for
the protection of political asylum until they set foot in the United
States.

Ira Kurzban's attempt to win better processing for the refugees came
to an end on February 24, 1992, when the Supreme Court refused to
hear an appeal from the Eleventh Circuit decision dismissing his case,
Haitian Refugee Center v. Baker. The INS now had a free hand to
repatriate thousands of Haitian refugees who had been held on Guan-
tanamo. It began to do so immediately, returning screened-out refugees
to Haiti and bringing screened-in refugees to the United States—or so
the government said at the time, and so we believed.

27. The government, in fact, made this argument relying on Johnson v. Eisentrager, 339 U.S.
763 (1950) (rejecting claim that aliens outside the sovereign territory of the United States have
Fifth Amendment rights to search and seizure) and United States v. Verdugo-Urquidez, 494 U.S.
259, 264-275 (1990) (rejecting the application of the Fourth Amendment to the search and
seizure of property owned by a non-resident alien conducted by U.S. agents in Mexico). Professor
Gerald Neuman states the contrary argument that the naval base at Guantanamo is an "anomalous
zone" where fundamental norms of the constitution ought to apply. Neuman, supra note 26, at
1197. As Neuman points out, the Eleventh Circuit in Haitian Refugee Ctr. v. Baker, 953 F.2d
1498, 1513 n.8 (11th Cir. 1992), ultimately accepted the argument that "the Bill of Rights does
not bind the federal government in its dealings with aliens at Guantanamo." Neuman at 1200.
This outcome is contrary to court rulings in our litigation in the Second Circuit, where the courts
found "that the United States' 'complete jurisdiction and control' over the Guantanamo Bay Naval
Base vested aliens with certain constitutional rights while on the base." Id.

28. The asylum procedure provisions of the Immigration and Naturalization Act apply to "any
alien who is physically present in the United States or who arrives in the United States (whether
or not at a designated port of arrival and including an alien who is brought to the United States
after having been interdicted in international or United States waters)." Immigration and Natu-
definition of the "United States" contained in Immigration and Naturalization Act § 101(a)(38),
8 U.S.C. § 1101(a)(38) (1998) (explaining that the term "United States" means the continental


30. See Solicitor General's Response to Petition for Certiorari at 3, Haitian Refugee Ctr. v.
Baker, 953 F.2d 1498 (11th Cir. 1991), cert. denied, 502 U.S. 1122 (1992), as quoted in Haitian
II. LEGAL STRATEGY AND THE IMPACT OF HIV

At the Lowenstein Human Rights Clinic at Yale, we had an ongoing interest in Haiti and the plight of the refugees. We had brought an earlier case against the former Haitian dictator, Prosper Avril, under the Alien Tort Claims Act, 28 U.S.C. § 1350, in which we sued him for the torture of a number of Haitian opposition figures and recovered a substantial judgment. As a result, we were quite familiar with the Haitian political landscape. We had personal ties to a number of the democratic leaders endangered by the coup, and we were anxious to help. Most of us did not look at the litigation as a test case; we simply wanted to save as many refugees as possible by protecting them from forced repatriation.

When we began planning litigation in February 1992, our plan was to assert that the United Nations Protocol on Refugees, which the United States had ratified, applied to Haitians picked up on the high seas. The Protocol mandated that persons fleeing political persecution could not be returned to a country where they faced such persecution. Although Ira Kurzban had raised and lost a similar issue in the Eleventh Circuit, we hoped to get a different result in the Second Circuit. This result would create a split in two federal appeals courts and practically require the Supreme Court to review the case.

The members of our legal team had different expectations about the ultimate result of our efforts. Some of us actually expected to get the case to the Supreme Court and to win. I thought we might get it to the Court, but I was sure we would lose. Still, I felt it was important to litigate the case, since it would keep the issue of Haitian refugees in the news. Under this "spotlight" strategy, the precise legal issues raised and legal theories used were not as important as judicial and public scrutiny of the government's treatment of Haitian refugees. One of our concerns was to keep the screen-in rate high and to raise the percentage of Haitians interviewed at Guantanamo who would be permitted to come to the United States. We knew that, while litigation was pending in the Eleventh Circuit, the screen-in rate had increased dramatically. Our fear, which proved justified, was that without such litigation and consequent public attention, the screen-in rate would drop significantly. We wanted to get into court on any justifiable claim in order to keep the spotlight shining.

33. See Lowenstein Human Rights Clinic, supra note 9, at 5 n.11 (citing NATIONAL ASYLUM PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 42 (1992)).
At this time, we did not know that the INS was starting to single out HIV-positive Haitian refugees, and thus we had not focused our attention on this particular section of the refugee population. We were concerned with the rights of all Haitian refugees, and we wanted to prevent as many as possible from being forcibly repatriated to Haiti. We soon realized, however, that we could not raise the same issues that were decided in *Haitian Refugee Center v. Baker*\(^{34}\) without serious, if not insurmountable, *res judicata* problems. *Baker* had been brought as a class action on behalf of all Haitian refugees who, now or in the future, would flee Haiti. Consequently, all Haitian refugees similarly situated to those in *Baker* were bound by the Eleventh Circuit's judgment. If we had litigated a similar suit on behalf of the same plaintiffs, we would have not only faced dismissal but the possibility of sanctions from the court.

We did, however, have some claims that were not foreclosed by the *Baker* case. A number of the claims raised in *Baker* were not brought as class actions. These included a claim of a First Amendment right of association by United States relatives of the Haitians on Guantanamo, a claim of a right of United States-based Haitian organizations to associate with and counsel their clients, and a claim of a right of attorneys in the United States to counsel Haitian clients. With different plaintiffs we could again litigate these claims. While the *Baker* case was an unfavorable precedent, it did not seem to raise a *res judicata* obstacle for our new set of plaintiffs.\(^{35}\) Although favorable outcomes on these claims would not alone have stopped repatriation, litigation would end some of the secrecy surrounding the refugees' treatment at Guantanamo and could also have a salutary effect on the screen-in rate.

As we were preparing our papers in early March 1992, we became aware of a new issue that allowed us to seek immediate injunctive relief and which became the bedrock of our litigation for almost eighteen months. Certain refugees at Guantanamo were being treated differently than the others. Some of them, as had been the case during the *Baker* litigation, were allowed to enter into the United States as asylum-seekers if they met the credible fear standard. However, other refugees—we did not know exactly which ones—were being required to undergo a second interview in order to determine whether or not they

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35. We had already determined that we would bring our case in a Federal District Court in Brooklyn, part of the Second Circuit which covers New York and Connecticut. Brooklyn was a highly ethnic community where over 350,000 Haitians lived along with hundreds of thousands of other West Indians. New York City was well known as a city of immigrants, and we correctly believed that judges would be favorable to our case for this, among other, reasons. Therefore, we were not very concerned by the *Baker* precedent.
met a higher well-founded fear standard after being screened in. It was unclear if this second group of refugees would be allowed into the United States even after passing the second screening.

The requirement that certain refugees had to undergo a second interview on Guantanamo was contrary to what the United States government had represented to the Supreme Court in opposing a grant of certiorari in Baker. Although the government had said that all screened-in Haitians would be brought to the United States where they could pursue asylum claims, it was now reneging on its promise. Thus, a class of Haitians emerged which was different than those represented in Baker—the screened-in Haitians who were not taken to the United States but were forced to undergo a second interview. While this issue would not attack repatriation in general, it seemed an effective way to get into court and focus attention on the treatment of the refugees.

A few days before we were to go to court we found out whom the INS was processing differently. All screened-in Haitian refugees were being tested for HIV. Those who tested positive were interviewed again and required to meet the higher standard before being permitted to enter the United States. These allegedly HIV-positive "immigrants" and their children were separated from the rest to await further processing. Thus was established the world's first HIV detention camp.

The evening prior to filing our case we obtained a copy of the government memorandum explaining the claimed legal basis for its differential treatment of allegedly HIV-positive Haitians. The government justified differential treatment by pointing to regulations that barred HIV-positive immigrants from applying for admission to the United States from third countries unless the immigrants first obtained a waiver of the HIV exclusion. This HIV exclusion, however, did not

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36. In the Solicitor General's Response to Petition for Certiorari in Baker, the government told the court: "Under current practice any aliens who satisfy the threshold standard [i.e., a credible fear of persecution resulting in a screened-in status] are to be brought to the United States so that they can file an application for asylum under Section 208.2 of the Immigration and Nationality Act, 80 SL sec. 128(a)," as quoted in Haitian Ctrs. Council, Inc. v. McNary, 547 F. Supp. 541, 546 (E.D.N.Y. 1992).

37. In retrospect it seems unlikely that, but for our litigation, any of the HIV-positive refugees would have been permitted to enter the United States. The government not only required a second interview, but individual waivers from the Attorney General for each such refugee in order to gain entry. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1336 n.6 (2d Cir. 1992). In my opinion, the ultimate plan was to keep the alleged HIV-positive refugees in a separate camp on Guantanamo until the time, if ever, when it would be safe to return them to Haiti.

38. I say "alleged" HIV-positive refugees because, in fact, the government testing was not always accurate, and we found a number of errors.

39. See HIV "Concentration" Camp Holding 277 Haitians, RECORD, Dec. 13, 1992, at 22 ("Some Haitian refugees are entering their second year at what critics call the world's first HIV concentration camp despite complaints from U.S. health officials and military officers.").

40. See Clawson et al., supra note 5, at 2353 (describing INS General Counsel Grover Rees' memorandum stating this policy).
apply to immigrants who reached the shores of the United States and then applied for asylum.\footnote{1} The INS had always followed this rule and treated screened-in, interdicted Haitians as applicants for asylum regardless of their HIV status.\footnote{2} Such immigrants were not applying from third countries. They had been interdicted by the United States, were in custody at a military base under the exclusive control of the United States, and had passed a credible fear test. In our view, there was no legal basis for treating them as immigrant applicants from a third country.

The question, at this point, was which legal strategy would be best for us to adopt. Our main fear was that HIV-positive Haitians who did not meet the higher standard would be returned to persecution in Haiti. Our priority was to prevent their return. We also wanted the INS to allow the Haitians to enter the United States, but this would be harder to accomplish. We knew that, legally, it would be difficult to argue for admission since the law generally denied judicial review of the government’s power to exclude aliens.\footnote{3}

The entire situation was fraught with risk. The hysteria that swirled around HIV, AIDS, immigrants, and Haitians could easily overshadow our legal arguments. We were nervous, both politically and tactically, about arguing that the HIV exclusion of immigrants was illegal. The law barred entry to immigrants with communicable diseases, unless a waiver was obtained, and, unfortunately, HIV was deemed by the Surgeon General to be a communicable disease.\footnote{4} We also knew that, since the beginning of the AIDS epidemic, Haitians had been stigmatized unfairly as carriers of the disease.\footnote{5} It would not make the refugees’ cause popular now if we emphasized their HIV status.


\footnote{2}{Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1333 (2d Cir. 1992).}

\footnote{3}{See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953).}


Virtually all health professionals disagreed with the classification of HIV as a communicable disease; in fact, the United States was one of the few countries in the world with an HIV exclusion. The World Health Organization, the Center for Disease Control, and a host of public-health experts all concurred that HIV was not communicable in the same way as, for example, tuberculosis, and that the public health risks from the immigration of HIV-positive individuals were negligible.}

\footnote{5}{One recent commentator noted that North Americans had an image of Haitians as...}
A struggle to change the law regarding the HIV exclusion had been going on for a number of years.\textsuperscript{46} Advocates for the change, attempting to get Congress to override the exclusion, had refrained from suing to overturn the law. They recommended that we do the same. They felt that a court challenge was risky; if we lost, the legislative battle might be fruitless. I disagreed, believing that a legislative solution was unlikely on an inflammatory issue poorly understood by the public. We did, however, defer to our colleagues fighting the exclusion, and we did not raise the illegality of the HIV exclusion directly in our brief.

Initially, our highest priority was to develop a strategy that would prevent the United States from returning the Haitians to Haiti. A plan to get them into the United States would come later.\textsuperscript{47} We employed what I label the "due process/lawyer" strategy. We argued that the due process clause of the Constitution applied on Guantanamo, a territory subject to exclusive United States jurisdiction and control, and particularly to the Haitians in United States custody who had been screened in and found to have legitimate fears of returning to Haiti. We asserted that returning the Haitians to Haiti could deprive them of their liberty or lives without due process of law. The Haitians' due process rights, we argued, could best be protected by giving them access to lawyers who would help prepare their refugee claims. This sounded reasonable to us, and we thought a judge would agree. After all, didn't everyone have a right to a lawyer? We, of course, said we would supply the lawyers at our own expense.

This strategy had a number of positive aspects. It was asking for something "as American as apple pie"—the right to counsel and due process. It was not asking that all the Haitians on Guantanamo be brought to the United States—only that all of them be given a fair chance to make their claims. Additionally, it would prevent any more refugees from being forcibly returned to Haiti until we had a chance to consult with them.

\textsuperscript{46} For example, on January 23, 1991, the Department of Health and Human Services ("HHS") published a proposed regulation removing HIV from the list of "communicable disease[s] of public health significance." Medical Examination of Aliens, 56 Fed. Reg. 2484 (1991). HHS received thousands of comments opposing the regulation as a result of a right-wing effort led by Congressman Dannemeyer. It received a number of comments in support as well. See Malcolm Gladwell, Reversal of AIDS Exclusion Is Said to Be Shelved; 4-Year Bar to Immigration Criticized as Discriminatory and Medically Unjustified, \textsc{Wash. Post}, May 25, 1991, at A6.

\textsuperscript{47} There was a difference between our initial legal strategy—when the goal was to maintain the status quo, prevent returns, and keep the spotlight on the Haitians—and our subsequent legal strategy when the goal was to bring the Haitians to the United States. To achieve the closing of the camp, we had to adopt different legal arguments concerning indefinite detention and inadequate medical care—arguments that were not available when the litigation began.
It was not a perfect strategy. Access to lawyers and second interviews in which the HIV-positive Haitians still had to meet a higher standard was not what we or our clients really wanted. Winning would not eliminate discrimination against the HIV-positive Haitians, nor close the camp. We were not even initially litigating the legality of the camp. We really wanted the HIV-positive Haitians treated equally, and ultimately we wanted them admitted into the United States. However, without challenging the HIV exclusion directly we had no means to accomplish our ultimate objective.

I was one of several members of our legal team who was never fully comfortable with the goal of obtaining lawyers for the Haitians. I thought that the worst thing that could happen for our clients, other than being returned immediately to Haiti, was to win the right to counsel. If the government complied, it could still repatriate our clients either because the INS decided our clients did not have a well-founded fear of persecution or because the Attorney General did not grant HIV waivers. I did, however, see the demand for lawyers as a good way of preventing the Haitians' return in the immediate future.48

Some of our legal team considered winning the due process/lawyers argument to be very important. In their view, Guantanamo was a critical test case for whether the government could eliminate all constitutional and procedural protections available to aliens in the United States by setting up a processing camp outside the country. If the government could use this tactic with the Haitians, they reasoned, it could do the same to any other asylum-seeker.49

In mid-March 1992, we filed our case requesting immediate injunctive relief. We decided to emphasize the screened-in Haitians' Fifth Amendment right to due process of law. We argued that due process includes the right to counsel prior to an INS determination that could

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48. Some of us, Lisa Daugaard, a Yale student, in particular, wanted to emphasize an equal protection claim contending that it was racism and AIDS prejudice that motivated the government policy at Guantanamo. Others of us felt that while this might be true, it was an impossible legal argument. The unequal treatment of Cubans was arguably authorized by statute, e.g., the Cuban Refugee Adjustment Act, Immigration and Naturalization Act § 245, 8 U.S.C. § 1255 (1998). Moreover, those with AIDS had never been recognized as a "suspect class" demanding greater constitutional scrutiny. While we alleged such discrimination in the initial legal papers, we de-emphasized it. This served to mute our characterization of the case, stressing to Judge Johnson that the case concerned lawyers and clients, not HIV-positive Haitians. In fact, Lisa Daugaard turned out to be right. Although our ultimate victory was not phrased in terms of a denial of equal protection, the government did not apply an HIV exclusion to Cuban refugees interdicted on the high seas, and this was the result of political considerations. Such differing treatment was not authorized by law. Ultimately, the District Court found that the Attorney General had abused her discretion to grant parole by requiring the Haitians to remain in detention, but not others. Haitian Ctrs. Council v. Sale, 823 E Supp. at 1048.

49. The government went on to intern Cuban refugees at Guantanamo and won its argument denying them due process and other constitutional and statutory rights. Cuban American Bar Association, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995).
return our clients to possible death in Haiti. By April 6, we had won a preliminary injunction enjoining repatriation of screened-in Haitians detained on Guantanamo unless they were provided access to counsel. The government filed an immediate appeal to the Second Circuit. On June 10, 1992, the Court of Appeals affirmed, as modified, the district court order enjoining the government from "processing any further at Guantanamo Bay those Haitians who have already been 'screened-in'" and "enjoining the appellants from repatriating any such 'screened-in' Haitians without, in each instance, providing them access to attorneys . . . ."52

We had won an important victory for the Haitians and established a significant precedent regarding the applicability of the due process clause outside the United States. Nonetheless, the injunction was still problematic. It only required access to counsel if the government wanted to continue the repatriation process. If the government were to decide that it did not want to pursue the repatriation process, the refugees would have no right to counsel, the Haitians would remain in custody on Guantanamo, and we would have no access to them. Moreover, if the government were to decide to continue the repatriation process, the majority of Haitians would likely be repatriated to Haiti, even if they were allowed counsel during the second well-founded fear interview stage. We had won a procedural right for our clients, but it was a procedure that could have simply greased the wheels of repatriation.

III. OUR LEGAL STRATEGY AND THE 1992 ELECTIONS

Over the summer of 1992 there was little legal movement in the case. The government did not go forward with second interviews, and we were not given access to our clients. We were at a standoff. However, fortunately for us, the government could not live with a circuit court precedent that applied the due process clause to aliens held at Guantanamo Bay. It was not willing to let a court decision stand that would permit those aliens access to attorneys. Presumably, it was worried not just about the present case, but about future cases.


51. Shortly prior to the Second Circuit decision, President Bush issued an Executive Order dramatically changing his policy toward Haitian refugees. This order, issued on May 24, 1992, required that any Haitian interdicted outside the territorial waters of the United States be immediately returned to Haiti without undergoing INS screening. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). We filed a separate series of cases, distinct from the Guantanamo cases, challenging this order. Ultimately, the Supreme Court upheld the Executive Order. Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993); see supra note 4.

It wanted Guantanamo available as a refugee-processing center, where the United States Constitution did not apply, and where aliens had no claims to due process.\textsuperscript{53} In October 1992, the government made us an offer. Lawyers for the Bush administration, emphasizing that they could never allow the Second Circuit decision applying the due process clause to the Haitians on Guantanamo to stand, said they would agree to process the Haitians with lawyers if we agreed to vacate the court order and drop the case. The government was giving us what we had asked for in the lawsuit. However, since the result was bound to be the return of most of the Haitians—a fact the government admitted to us in the negotiations—we did not want it.

It was relevant that 1992 was an election year, and the upcoming election was very influential on our strategy in the case. In retrospect, it was too influential. We had great hopes that Democratic candidate Bill Clinton would beat President Bush, and we believed that, if elected, he would close the Guantanamo camp. The big donors and high-profile leaders of the gay and lesbian community had thrown their support behind Clinton, and as part of his campaign promises to them, he had agreed to end the HIV exclusion. In the book \textit{Putting People First}, which Clinton and vice-presidential candidate Al Gore coauthored, they wrote that they would "[l]ift the current ban on travel and immigration to the United States by foreign nationals with HIV" and "[g]ive fleeing Haitians refuge and consideration for political asylum ...."\textsuperscript{54} Clinton also had made very encouraging statements about the rights of Haitian refugees. He had condemned the Bush administration's May 1992 Executive Order that summarily returned all Haitians interdicted on the high seas, and he had lauded the victory we had in the Second Circuit.\textsuperscript{55} He promised that when he was President he

\begin{itemize}
  \item \textsuperscript{53} See supra notes 27 and 49.
  \item \textsuperscript{54} BILL CLINTON \& AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 41, 120 (1992). Clinton also stated in his speech accepting the Democratic nomination that he would implement the recommendations of the National Commission on AIDS, one of which was an end to the HIV exclusion. Peter Honey, \textit{Promises, Promises}, PLAIN DEALER, Jan. 24, 1993, at 1C.
  \item \textsuperscript{55} A number of candidate Clinton's statements are collected in Koh, supra note 11, at 148 n.44. For example, three days after President Bush announced that all interdicted Haitians would be summarily returned to Haiti, Clinton sharply criticized the policy:
    I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. It was bad enough when there were failures to offer them due process in making such a claim. Now they are offered no process at all before being returned .... This process must nor stand. It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world.
\end{itemize}

\textit{Id.}
would not continue forcible summary return. We had no reason not to take Clinton at his word.

Although we believed that our clients would reject the government's offer, we could not make the decision without consulting them. Consultations would finally give us an opportunity to meet our clients, find out about the conditions on Guantanamo, and determine the next step in our strategy. The government, hoping we could convince our clients to accept their offer, agreed to let us go to Guantanamo. This resulted in our first meeting with our clients on Guantanamo.

The meeting at the detention camp was intense, fraught with emotion, and full of challenges. It would have a huge impact on our political work. The Haitians were desperate to get out of the camp, but saw only death if they were sent back to Haiti. Conditions at Guantanamo were abominable. People were getting sicker, children were suffering, and they had little to do except peer out from barbed wire fences.

Our meeting forced us to take a new tack with our legal strategy. We knew immediately that the Haitians would reject the government offer out of hand. We told the refugees honestly that we were skeptical about the Bush administration's offer. Even the most optimistic of us could not imagine more than one-half of the Haitians meeting the well-founded fear standard and obtaining a waiver. I felt the number would be even lower—not because of the lack of merit in our clients' cases, but because I could not envision the Bush administration letting 300 HIV-positive Haitians into the United States.

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56. In Judge Johnson's opinion releasing the Haitians he described the camp as follows:
They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to predawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions.


In a fax I sent back to Yale after one of my trips to Guantanamo, I described the camp as follows:

The conditions under which they are living, if you can call it that, are out of Dante's inferno—the ninth circle of Hell. For 14 months they have used portable toilets that are rarely cleaned, that are filled with feces and urine. The camp is bleak—no grass, hardscrabble ground and temporary wooden barracks on concrete slabs. Within those "homes" 15 to 20 Haitians are huddled with only sheets hanging from the rafters. Rain, vermin and rats are the other occupants.

The discussion of whether or not to accept the offer was largely academic. The majority of the Haitians did not ultimately care about whether they had lawyers during processing or not. They wanted to get out of the camp and go anywhere but Haiti. In other words, they did not want the mere formal trappings of due process, but a guarantee of substance—a guarantee that the camp would be closed and that they would be released. They also believed, based on our expectations, that Clinton’s election would free them. We even brought Putting People First with us and showed it to our clients. The upcoming election also allowed us to persuade our clients that an immediate trial was not necessary or in their best interests. While they were not happy waiting for the election, it would be only a few months, and then Clinton would free them. We were practically certain.

When we returned from Guantanamo, we informed the government that our clients did not want to accept the offer. The government understood, as did we, that Clinton’s likely election would make processing and even another trial unnecessary. Consequently, we reached an understanding with the government that all legal proceedings would remain at a standstill until the elections. Trial preparation on both sides slowed or stopped. The government also agreed to give us more regular access to the camp. In the interim, we continued to work on getting the sickest individuals out of the camp and into the United States, as the government had admitted it could not adequately care for them. Although our legal work slowed, as I describe in Parts IV and V, our lobbying and organizing efforts did not.

Ultimately, to our shock and amazement, President Clinton refused to do what candidate Clinton had promised. The Haitians had been kept in a barbed-wire camp for over a year, and it appeared more likely than ever that they would remain there indefinitely solely because they were HIV-positive. On March 8, 1992, we were forced to go to trial, where we finally challenged the legality of what had become an HIV detention camp where refugees were detained indefinitely.

At trial we made numerous claims. We argued that: (1) the medical care was inadequate; (2) the Haitians were entitled to due process protections prior to any determination that could send them back to Haiti; (3) continued confinement constituted indefinite detention; (4) requiring the second well-founded fear determination on Guantanamo

57. Despite our repeated lobbying efforts and contacts with President Clinton, he never did anything to free the Haitians. In addition, a week prior to his inauguration he broke his oft-repeated campaign promise to end the interdiction and summary return of all Haitians to Haiti. Al Kamen & Ruth Marcus, Clinton to Continue Forcible Repatriation of Fleeing Haitians, WASH. POST, Jan. 15, 1993, at A16. In retrospect, it might appear that we were naive in believing that Clinton would adhere to promises he made in order to get elected. But at the time, he appeared liberal, sincere, and honest. Unfortunately, he turned out to be otherwise.
was unauthorized by law; (5) the Attorney General had abused her parole authority; and (6) barring lawyers from the Haitian Service Organizations from the camp violated the First Amendment. On June 8, 1993, we won a resounding victory upholding all of our claims. The District Court found that the “humanitarian camp,” as the defendants referred to it, was “nothing more than an HIV prison camp presenting potential public health risks to the Haitians held there.” Protesting that the “Haitians remain in detention solely because they are Haitian and have tested HIV-positive,” the District Court ordered the Haitians released to anywhere but Haiti. The government did not appeal the judgment for a variety of reasons, primarily because we had done so much effective political work on the issue. Since there was nowhere else to send the Haitians except the United States, the government finally freed them from the camp and bought them to the United States.

One question I still have is whether we should have sued on the more substantive issues earlier, possibly saving our clients a lot of suffering on Guantanamo. Although I do not think the overall decision to fight the HIV ban in Congress instead of the courts was correct, in retrospect, I think we followed the correct strategy by deciding to litigate the due process/attorney issue first rather than directly attacking the HIV exclusion and the very existence of the camp. The right to an attorney was the most winnable of the issues, and it immediately stopped the return of our HIV-positive clients. Perhaps because the argument was a lateral attack on the government's practices, rather than a direct one, it worked. However, it was always important to keep our eyes on the prize—closing the camp—instead of winning the right to counsel.

What is right morally does not always translate directly into litigation. For example, attacking the existence of the camp early on would have foreclosed the indefinite detention issue, since the period of time our clients had spent in the camp was too short. Nor could we have demonstrated the inadequacy of the medical and camp conditions. Frankly, our clients would not have been as likely to inspire sympathy in the judge as they were after spending a year and a half in the camp. However, I am not sure our clients would have made the same choice.

59. Id. at 1038-39.
60. Id. at 1048.
61. Releasing the Haitians from custody would remedy or render moot most of our claims. Obviously, the Haitians could not be sent back to potential persecution in Haiti. By court order, the Haitians could not remain at Guantanamo, but no other country would take them. The judge was quite clever by not ordering them brought to the United States. The government might well have appealed such a direct order.
had we been able to communicate with them earlier and more directly. Certainly by October 1992, they did not want to hear any more about the right to counsel. Only the hope of a Clinton victory and his promised support allowed us to postpone trial on the ultimate issue of closing the camp. In the meantime, while we litigated the counsel issue, over 300 men, women, and children suffered tremendously; some got sicker and some died.62

In hindsight, we can see that we were wrong to allow our trust in Clinton and his election promise to dictate legal strategy. Clinton sorely disappointed us, and our belief in him caused our clients to spend more time in the inhuman camp conditions. But for our belief in Clinton, we could have tried the case four of five months earlier and ended the horror of the camp that much sooner. If there ever is a next time and I am faced with a similar situation and must choose a legal strategy, I will disregard the promises of politicians. Clinton's promises and our reliance on them seriously jeopardized our relationships with our clients. We wrongly believed and persuaded our clients to believe that Clinton would change their circumstances. Regaining the trust of our clients was not easy.

Our approach to the litigation changed over time. The key point is that our legal strategy did not develop in isolation in a law library. Our debates about the right approach to litigation took place in the real world, literally with the lives of our clients at stake. Our legal strategy, particularly after we met with our clients, was guided by the conditions under which they were living and the political beliefs they held. Our strategy developed in response to an ever-changing landscape of events, conditions, and actions in different levels of the political realm. I discuss these factors below.

IV. OUR INSIDE STRATEGY

In practice, our political strategy combined both inside and outside approaches to non-legal work. Here I describe our inside strategy, by

62. At trial, government experts admitted that the sickest Haitians were not receiving adequate medical care at Guantanamo. A number of Haitians had developed full-blown AIDS. As a result, and in the midst of the trial, the judge ordered that all such Haitians be given adequate medical care—a care not possible on Guantanamo. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993). These people, 36 in all, were brought to the United States during the course of the litigation; some of the Haitians had gotten so sick that even the government admitted it had to bring them to the United States. At least two died shortly after arriving. See Anna Quindlen, Set Her Free, N.Y. TIMES, Nov. 18, 1992, at A27; Derrick Z. Jackson, Judge, About those Haitians . . ., BOSTON GLOBE, June 13, 1993, at 85. Generally, the government refused to bring the sicker Haitians to the United States, even if it was recommended by their own military doctors. See Philip J. Hils, U.S. Denies Appeal for 4 Ill Haitians, N.Y. TIMES, Dec. 13, 1992, at 9.
which I mean our efforts to convince the executive branch to close the camp.

During the Bush presidency, although we never had the kind of access needed for an inside lobbying strategy, we constantly worked to negotiate freedom for some of the HIV-positive Haitians on a case-by-case basis. Our goal with this lobbying was not to close the camp *per se*, but to win release for individuals imprisoned at Guantanamo, even if it meant slipping them into the United States one at a time. It being unbearable to think about families separated by their HIV status—mothers and children torn apart, positive husbands separated from negative wives, we lobbied to get all members of particular families admitted to the United States. We also tried to admit people with the most pressing medical needs, arguing that Guantanamo was simply not equipped to deal with particular characteristics of HIV infection.

We perceived each release as more than a purely humanitarian goal. We believed that if there were fewer Haitians in the camp, it would be politically easier for the government to close it. Although it was often difficult for our clients to understand why certain people were permitted to leave and others were not, after many discussions with them they agreed with this strategy.

For months I spoke daily with Paul Capuccio, the Assistant Attorney General under Attorney General Barr, who was in charge of the case for the Justice Department. I would plead for an eleven-year-old boy, a pregnant woman with complications, or a man threatened with losing his eyesight. Although I had great ideological differences with Capuccio, he wanted to deal humanely with the refugees, and we developed a warm working relationship.

Negotiating slowly, we established categories of detainees who would be freed. The first category was refugees with medical complications, such as opportunistic eye infections, that could not be treated at Guantanamo. The next category was comprised of HIV-positive, pregnant women who were within a month of giving birth. We had argued that the facilities on Guantanamo were inadequate for handling HIV-positive deliveries. We were also able to persuade the administration to release a few other types of detainees, such as children with relatives in the United States. Finally, through a court order, the government was forced to free seriously ill prisoners with an AIDS diagnosis of less than 200 T cells.63

This entire scheme was impossible to explain logically or morally to our clients. There was no medical reason why a healthy, pregnant, HIV-positive woman should be allowed into the United States, while

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63. *See supra* note 62.
a woman who was not pregnant but had AIDS should be kept in the camp. There was no reason why eye infections were deemed worse than brain infections or liver infections. There was certainly no logic to the T cell rule. Medical opinion holds that T cell counts are relative markers at best, so excluding someone with 220 T cells and admitting someone with 197 was arbitrary in the extreme. Worst were the choices forced on many families by the INS. Repeatedly, a pregnant woman with a husband or young children was told, “You alone may leave, but your two-year-old must remain. Do you choose to stay with your two-year-old or to leave and deliver your baby in the United States?” None of this was easy. I particularly remember our struggle to convince the Justice Department that the young children and husbands of released pregnant women should be allowed to accompany them to the United States. Time and again I watched women faced with the wrenching choice of leaving their children and husbands behind barbed wire for an uncertain future. Yet, I felt we had to continue with these inside negotiations, as flawed as they were, until Clinton took office.

The night Bill Clinton was elected President there was great joy in the Guantanamo refugee camp. The Haitians had a party, believing that Clinton would free them when he took office. In New York we thought the same thing and were elated.

Even before the election we had begun developing and implementing our inside strategy for the Clinton administration. We knew many of the people in the Clinton campaign, and both Bill and Hillary Clinton had gone to Yale Law School. Shortly prior to the election, Hillary visited the school and met with Harold Koh and some of the law school team. They explained the Guantanamo case and handed her a memo on ways to close the camp. She grasped the issues immediately and seemed very sympathetic. We were ecstatic. After the election we wrote her a follow-up letter and received a form response thanking us for our views.

From November until the inauguration, we lobbied various executive transition teams to try to insure that Clinton’s promises to end the HIV exclusion would be carried out. We even received a request

64. Interview with Dr. Victoria Sharpe, Medical Director, Spellman AIDS Center, St. Clare’s Hospital, New York City, N.Y. (Sept. 20, 1994).

65. We had direct or indirect contacts with many Clinton transition officials and appointees. The immigration transition team was headed by an acquaintance, and two of our litigators were on the team. Our contact on the health transition team, Tim Westmoreland, was involved in AIDS policy and was completely sympathetic. Donna Shalala and her aides were known to our team and were as helpful as possible. David Wilhelm, head of the Democratic National Committee, worked with a family member of one of our lawyers. Drew Days, who became Solicitor General, taught with some of us at Yale and had signed our briefs challenging the detention camp. Walter Dellinger, at the Department of Justice, was a friend of one of our lawyers. Bernard
from one of the transition teams for a briefing paper on actions to take with regard to both the Guantanamo camp and the interdiction policy. Our briefing paper for the transition team reflected the views of most of the human rights groups concerned with the plight of Haitian refugees. Supposedly, the contents of the paper, which suggested non-legislative options for closing the camp, went to the top of the transition team and were on a list of twenty-five actions Clinton could take upon assuming the presidency. We also sent a letter directly to both Clintons asking the President-elect to give an immediate indication that he would close the camp when he took office.

We had good connections everywhere.66 The health transition team was particularly responsive. They told us that we were “doing God’s work,” and that they had recommended that the HIV camp be closed and the Haitians brought in. We also had good contacts and meetings with the domestic policy transition teams, who were also sympathetic. Finally, the two members of our legal team who were also on the immigration transition team provided us with great access. Although our lawyers could not formulate policy on the HIV camp, they could make their views known.

We had indications, however, that our inside approach might not be completely smooth sailing. Our first sign came in a meeting we had with the NAACP after Clinton’s election. In September 1992, when Bush was still President, the NAACP and TransAfrica had led a civil disobedience action in front of the White House protesting the interdiction policy and the Guantanamo camp. Now we asked the NAACP what they thought would happen with this new Democratic administration, and we were shocked by their response. They told us that it was very unlikely that Clinton would, as an early act of his administration, put 300 HIV-positive Haitians on an airplane and bring them into the United States. It was more likely, the NAACP said, that Clinton would first change the summary return policy. When we asked if the NAACP would support us in our struggle, we were told the NAACP would “not be out front on that issue.”67 It sounded to me like typical Washington talk; now that the policy was a Democratic

Nussbaum, White House Counsel, was directly lobbied. Janet Reno, the Attorney General, knew one of our lawyers and actually called our associate at Guantanamo to determine conditions. Bob Hattoy, who was genuinely helpful, worked in the White House as Personnel Director. We had direct access to Peter Edelman, who worked with the Justice Department transition team, and we spoke with Marian Wright Edelman, a close personal friend of the Clinton’s and head of the Children’s Defense Fund.

66. It is hard to imagine a civil rights litigation team with better White House connections; thus, the failure of the inside approach teaches some rather definite lessons on winning political and legal struggles.

one, supposedly progressive Democrats would invariably support their President. Obviously, we were very upset.

Our next blow came on January 14, 1993. A week before his inauguration, Clinton, in a complete reversal of earlier promises, announced that he would continue the Bush policy of summary repatriation.68 Suddenly it became clear that nothing was going to be easy.

Shortly after Clinton’s policy reversal we received news from our clients on Guantanamo informing us that they were on a hunger strike. For them, it was either close the camp or die. The hunger strike started a debate about our inside strategy. While the strike could bring great media and public attention to the camp, some members of our legal team thought it could be counterproductive. We were in the middle of our inside negotiating and lobbying efforts with Clinton’s people, they argued, and by bringing more public attention to the issue we would embarrass Clinton, bring out the right wing, and make it harder to close the camp. Would it not be better to avoid attention and slowly trickle the people out of the camp? Our clients were not popular, publicity could backfire, and some of us still had hopes for the Democrats.

I disagreed. We were already seeing that the kinds of case-by-case negotiations that we had with Paul Capuccio under Bush were not going to happen as smoothly with Clinton’s people. The Democrats were less flexible, they were equivocal on HIV exclusion, they wanted to please everyone, and they wanted to protect their right flank. We had already made extensive efforts with the Clinton people, but we had nothing to show for it except broken promises. Relying on continued case-by-case negotiations alone was a strategy I believed would never work. We had to escalate public pressure.

Two of us went to the camp at the end of January 1993, the height of the hunger strike. The situation was desperate. The Haitians had lost a lot of weight, and many had been hospitalized. Our clients were adamant. They said we could do what we believed was legally necessary, and that they would not oppose us. However, we had not gotten them out, and now they would decide how to act. In many ways, the hunger strike was the strategic turning point. It brought the press, well-known personalities, and politicians to Guantanamo.69 It made the HIV camp a public issue. It also made us, the lawyers, pay a lot

68. On January 14, 1993, Clinton stated, “Those who . . . leave Haiti for the United States by boat will be stopped and directly returned by the United States Coast Guard.” Kamen & Marcus, supra note 57. I still find Clinton’s continuation of the Bush summary return policy shocking. Clinton was literally returning people to jail and death. Did we as a country and Clinton as President learn nothing from the experiences of World War II when we closed our borders and let millions perish in Europe?

69. Jesse Jackson and others gained access to Guantanamo through their connections to the
more attention to our clients. From the strike forward, we were a continuous presence in the camp. Whether we liked it or not, our clients had set the course for an outside agitational strategy.

In early February 1993, we were in touch with the Department of Health and Human Services ("HHS"), headed by Donna Shalala. The Surgeon General of the United States worked under HHS and had the power to remove HIV from the list of communicable diseases, which would lift the HIV exclusion for immigrants. HHS was aware of the dire situation in the Guantanamo camp and seemed to find it appalling. The Department, therefore, decided to try to remove HIV from the list, which would effectively free the Haitians. While we had always hated the HIV ban and wanted it removed, we were nervous about what this approach would mean for the Haitians. Removal of the HIV ban for all immigrants was a hot-button issue, a focus for fears about AIDS and immigrants. Once before, on January 23, 1991, HHS had tried to remove the HIV ban by publishing a proposed regulation removing HIV from the list of "communicable diseases of public health significance." However, due to an orchestrated right-wing attack led by Congressman Dannemeyer and intense political pressure, HHS was forced to publish an interim regulation leaving it on the list.

Now, however, with a Democratic President who seemed to support the change, we hoped it would be different. The regulation was drafted and taken to the White House. When Clinton refused to approve it, the staff at HHS was crushed. It was an amazing sell-out. By this time the press had gotten wind of the proposed regulation, and bills were drafted mandating that HIV be declared a communicable disease. Unfortunately, Clinton refused to fight for what had been part of his social platform, and a law was passed declaring HIV to be a communicable disease. Now, even if the Surgeon General determined otherwise, his hands were tied. The Haitians were worse off than before.

It was a bleak moment. In one of our last-gasp attempts at resurrecting our inside strategy, we arranged a meeting with Michael Cardozo, Clinton's transition person at the Department of Justice. Since

Clinton administration. Even Jesse Jackson, however, was not permitted access to the camp itself but visited with the refugees elsewhere on the base.


73. Telephone Interview with an aide to Secretary of HHS (Feb. 11, 1993).

the INS was part of the department, the Attorney General or Acting Attorney General had the authority to parole the Haitians into the United States.\textsuperscript{75} We gave Cardozo a plan for slowly bringing the Haitians to the United States, but we were unnerved by his response. He said that in his view, or at least in the view of those close to the President, Clinton could weather a dead Haitian on Guantanamo better than he could deal with the negative political fallout of having HIV-positive Haitians coming to the United States. This conversation, more than any other, made us realize that our inside strategy had its limits and that we had to go public with an aggressive outside strategy. Our acquaintance with various staff people in the White House was not enough to overcome what Clinton and his advisers feared was an unpopular issue. Nor did the moral consequences of the policy carry any weight: the Clinton administration, like others, was not one that acted because of morality, but for political expediency. As a result, we would be going to trial. A federal judge would have to close the camp, because Clinton was never going to.\textsuperscript{76}

V. OUR OUTSIDE STRATEGY

In this section I describe our outside strategy, which involved applying pressure outside elite circles and outside our networks of acquaintances in Washington. Our strategy included getting media attention, holding demonstrations and hunger strikes, and even engaging in civil disobedience. We were joined in this outside strategy by AIDS activists, the American Haitian community, African American organizations, students, immigration activists, and, most significantly, the Haitians incarcerated on Guantanamo, who refused to be quiet and wait for us to win through inside persuasion or the courts.

The truth was that even if the entire legal team had decided to follow only an inside strategy, we could not have made all of the participants with an interest in the case adhere to that path. HIV activists, especially ACT-UP, and Haitians in the United States were going to insure that the issue was on the public agenda. The Haitians themselves, jailed on Guantanamo, provided perhaps the best example of how we did not have complete control over events. The Haitians on Guantanamo had their own reality and it was extremely different from ours. While we debated about the degree of publicity we wanted, they


\textsuperscript{76} Nevertheless, until the Haitians gained their freedom in mid-June 1993, we maintained our high-level administration contacts. We continued to lobby our contacts at the Justice Department and HHS. We also had a very close contact who was a major fund-raiser for Clinton and who was close to the head of the Democratic National Committee. He lobbied heavily to close the camp, and he personally handed Clinton a letter asking him to do so.
were confined behind barbed wire under inhuman conditions and were subject to abuses at the hands of the military. For a time we tried to calm our clients and give them hope that they simply must hold on until Clinton took office. This worked for a while, but eventually their hope evaporated, and the Haitians took the situation into their own hands and went on the hunger strike. Although we were attorneys and could not direct a popular mobilization, we had to work in coalition with all of these independent-minded and often conflicting groups, the politics of which were not always predictable.

I recall a heated debate we had at Yale about the hunger strike. Some of us were fearful that the strike would embarrass the Clinton administration and make it harder for our inside lobbying strategy to work. Others felt it would help put pressure on Clinton, and that it was, therefore, a positive development. In reality, it made little difference what any of us thought. The Haitians had been in the camp almost a year, and they were doing what they believed was necessary to gain their freedom. The hunger strike gave them a semblance of control over their situation and made the lawyers work harder. It forced us to send delegations to the camp. It gave us a reason for pushing public figures such as Jesse Jackson to go to the camp. The hunger strike turned out to be very successful, and it is an example of outside organizing around a legal proceeding, beyond the legal team’s grand plan.

We were representing clients with seemingly everything against them: they were immigrants at a time of intense anti-immigration hysteria; they were also Black, Creole-speaking foreigners; they had strong political ideas; and they were HIV-positive. What we did not recognize at the beginning of the litigation was that these weaknesses could be strengths as well. Our clients had a wide array of potential constituencies in the United States: AIDS activists, Haitians, African Americans, refugee and human rights organizations, religious leaders, Hollywood and public figures concerned about AIDS, students, anti-imperialists, and Haitian democracy advocates. Nonetheless, while these groups were potentially sympathetic, they did not activate themselves automatically. Many of them came on board only after much organizing, education, and internal debate.77

77. Initially, the AIDS, Haitian and immigration communities did not mobilize to free the Guantanamo Haitians. For complex reasons, each of these communities was slow to get involved. Early on, some of the Yale law students, particularly Michael Wishnie and Lisa Daugaard, saw this mobilization as important and worked hard to insure agitational activities. Esther Kaplan, a member of ACT-UP (the AIDS Coalition to Unleash Power), worked to involve ACT-UP. Guy Victor of the 10th Department (a Haitian political organization), Ninaj Raoul (who with others would later form Haitian Women for Haitian Refugees), Ronald Auborg of the National Coalition for Haitian Refugees, Adrien Marcel (a Haitian American doctor), and Patricia Benoit of the
Our political efforts began in June 1992 while Bush was still President. We started locally in New York City with small, difficult meetings of Haitian, AIDS, and human rights activists. The meetings of what was called the Emergency Coalition to Shut Down Guantanamo were difficult. Some non-Haitian people were less focused on the historic stigmatization of Haitians as carriers of AIDS, but were simply horrified at the prospect of government-sponsored incarceration of people with AIDS. Some Haitians were infuriated at the racism of the camps, but uncomfortable with discussions of AIDS and the radicalism of veteran AIDS activists. The Haitians had a different view than the AIDS activists. Therefore, many Haitians in the United States and in Haiti wanted to distance themselves from any issue dealing with HIV. Allegations that Haitians were carriers of the virus had been part of the original hysteria around AIDS and had resulted in widespread discrimination. Furthermore, our clients on Guantanamo did not accept that they were, in fact, HIV-positive, and did not refer to themselves as such. Many Haitians saw the Guantanamo detainees as primarily, if not exclusively, political refugees—political prisoners of the United States. To most Haitians, Guantanamo detainees were imprisoned because they were Black and Haitian, not because they were HIV-positive.

The Emergency Coalition's early meetings to discuss language for literature and leaflets highlight the difficulties we had in achieving common ground in our outside political work. Some in the Haitian community wanted to refer to those in the camp as "allegedly" having HIV or AIDS. AIDS activists disagreed. They did not view HIV-positive status or AIDS as something to be ashamed of, and they did not want to equivocate about their status. Finally, a compromise on the phrasing was reached: "Hundreds of Haitians were detained, many of whom have HIV or AIDS."80

Haitian Women's Program did likewise with the Haitian community. William Broberg and Mary Brosnahan from the Coalition for the Homeless, as well as Anna Dumois and Freddie Milano from Community Action Planning Council and Housing Works in New York City, insured that the needs of individual freed Haitians were served. These service groups and others became staunch advocates for closing the camp. Once these groups were involved, there was no stopping them.

78. This dichotomy is a bit simplified. Early on, Patricia Benoit of the Haitian Women's Program, which did HIV education within the Haitian community, held a community forum in which she discussed the problems of being stereotyped as an HIV-carrying population and called on the Haitian community to confront AIDS phobia and get involved with Guantanamo.

79. See generally PAUL FARMER, AIDS AND ACCUSATION (1992). The questionable claim that AIDS was spread from Haiti to the United States was even publicized by critics of U.S. AIDS policy, such as Randy Shilts in his book And the Band Played On. RANDY SHILTS, AND THE BAND PLAYED ON (1987).

80. According to Michael Wishnie, this phrasing was acceptable because it was forthright about the HIV status of the refugees, but given that some false positives had already been
The organizations worked together despite the differing ways that groups perceived the refugee issue, and despite how the refugees saw themselves. As time went on, the groups learned from each other and their political thinking evolved. At one large demonstration, for instance, Guy Victor of the 10th Department—an organization of Haitians living outside of Haiti—led the chant, “HIV is not a crime!” while ACT-UP members led a chant of “No Aristide, No Peace!” We learned an important political lesson: we could form a coalition without mandating that all of its groups have precisely the same political line or tactics. It was critical, though, to have some broad common agreement and a tolerance for each other’s viewpoints in order to effectively achieve our common and ultimate goal—we all wanted to shut down the Guantanamo camp.

Local outside organizing efforts became especially important during the late summer and fall of 1992. The government was bringing some of the Haitians into the United States (those described earlier as pregnant or ill) and, in some cases, keeping them in custody, sometimes in jail. In New York, members of the coalition held regular demonstrations in front of the jail where a refugee was imprisoned. Accordingly, reporters and politicians grew interested in the story.

Some members of the coalition began to work with the Coalition for the Homeless, Housing Works, Community Family Planning Council, Haitian Women’s Program, and Haitian Women for Haitian Refugees to provide housing and social services for released refugees. The discovered, it left open the possibility that not all of the refugees had HIV. Still, the deletion of “alleged” may have led some Haitian groups to cease participation. Telephone Interview with Michael Wishnie, Staff Attorney, Immigration’s Rights Project, American Civil Liberties Union (Mar. 5, 1998).

Lisa Daugaard believes that the groups largely reconciled their differences. In fact, she pointed out to me that, at a demonstration protesting the summary return of Haitians held after the Guantanamo camp was closed, many ACT-UP members attended although no HIV issue was involved.

The diversity of the groups involved in the struggle is shown by the list of endorsers of a typical “community forum” held in Brooklyn. The forum was sponsored by the Emergency Coalition to Shut Down Guantanamo, which included ACT-UP, Haitian Resistance Movement, 10th Department, Black AIDS Mobilization (BAM!), Committee in Solidarity with the People of Haiti, Komite Chalo Jalden, National Coalition of Haitian Refugees, Ti Legliz, Haitian Teachers Association, Haitian Affairs Committee, Haiti Solidarity Network, African-American Women in Defense of Ourselves, Queers United in Support of Political Prisoners, Red Balloon Collective, and Women’s Health Action Mobilization (WHAM!).

One woman, Ciliese Success, whose baby died a few days after she was brought to the United States, was jailed for a number of months at an immigration detention facility in Manhattan; another man, Rigaud Milinette was brought in for treatment of an eye infection and was also jailed for a period of time. The jailings were not because of any criminal conduct, but rather because the government did not want HIV-positive Haitians on the streets. In other cases, the government wanted our help in finding services, including housing, for the Haitians.

Esther Kaplan of ACT-UP had important contacts in the service community. Key people and organizations in this community were William “Bro” Broberg and Mary Brosnahan of the
service provider groups also worked inside to gain local political support. Through them we received help from Mayor David Dinkins and the New York City Commissioner of Human Resources. We also won the support of three other leading officials, all HIV-positive themselves. These three—Dennis Deleon, a Latino and head of the New York Human Rights Commission; Ron Johnson, an African American and the New York City AIDS czar; and a white City Council member, Tom Duane—worked tirelessly for the cause. They gave speeches, engaged in civil disobedience, and, most of all, insured that New York was willing to take all the Haitians. New York’s willingness to resettle all the Haitians gave us great strength with the United States government. When the Clinton people claimed that the Haitians were unwanted or would burden housing and healthcare, we could reply that New York and other cities had agreed to take them all. Although we did not realize its importance when we began, local organizing played a critical role in our eventual victory.

Perhaps the most important constituency in our coalition was the community of AIDS activists that had been ravaged by AIDS for nearly a decade. This community had a militant interest in ending discrimination against HIV-positive people, and the existence of a detention camp solely for people with the virus resonated with them. Of the AIDS activist organizations in our coalition, ACT-UP took the most radical approach. Its members dogged Clinton everywhere he went. They made the issue hot for him. Members stood in long lines at receptions to shake his hand. Upon meeting him, they would tell him to free the Haitians. At his speeches they would demonstrate with loud chanting and highly visible banners. On one occasion, ACT-UP was outside protesting and getting arrested while one of our lawyers had a 15-minute meeting with Clinton at a fund-raising event.

Coalition for the Homeless, Eviline Longchamps and Sabine Albert of the Haitian Women's Program, Anna Dumois, Freddie Milano and Vicki Alexander of Community Family Planning Council, Ninaj Raoul, Nicole Payan, Jocelyn Mayas and Cassagnol Lafontant of Haitian Women for Haitian Refugees and Keith Kylcer, Eric Sawyer, and Btery Williams of Housing Works. These people and organizations worked incredibly hard both to free the Haitians and to resettle them.

85. New York was not the only city that agreed to house the Haitians. Although South Florida politicians were telling Clinton they would not accept a single HIV-positive Haitian refugee, Boston, Seattle, and others each were willing to settle discreet numbers. Again, this was the result of strong local organizing efforts.

86. Michael Wishnie also believes that, because we had to help service actual clients, the work of the coalition and the lawyers stayed grounded in human reality. Telephone Interview with Michael Wishnie, Staff Attorney, Immigrant's Rights Project, American Civil Liberties Union (Mar. 5, 1998).

87. Again, this demonstrates the importance of local organizing. The New York ACT-UP chapter was part of the local coalition, and after the local coalition distributed a national mailing of press clippings and policy statements, other chapters became involved.
African American organizations were another important part of the coalition. Grassroots groups and leaders alike often saw the issue as racism. Jesse Jackson and the National Rainbow Coalition played a crucial role in organizing black groups and garnering national publicity. On his first trip to Guantanamo, Jackson brought with him Dr. William Gibson of the NAACP and Congresswoman Corrine Brown. Jackson followed with asking the Roman Catholic Church, to which most Haitians belong, as well as other denominations to declare February 21, 1993, a day of fasting for the people of Haiti and those detained at Guantanamo. Jackson himself went on a fast for ten days. Many others fasted as well, including the conservative Cardinal O'Connor from New York. Cardinal O'Connor even agreed to resettle and medically treat all of the Haitians at Catholic hospitals.

The fast and hunger strike took off, galvanizing another key constituency of our political work—students at universities throughout the country. On March 2, 1993, Yale Law School, Clinton's alma mater, spearheaded a national student hunger strike named Operation Harriet Tubman. At least thirty students at Yale participated in the week-long strike, remaining behind a barbed wire enclosure they built to represent the Guantanamo camp. Black ministers from around the country joined in the hunger strike.

Operation Harriet Tubman spread in a “rolling strike” to universities all over the country. Each school would strike for a week or ten days and then pass on the strike. Harvard was next, then Brown, University of Michigan, Columbia, Howard, Georgetown, Penn State, George Washington, Catholic University, New York University, University of Maine, American University, University of California at Berkeley, San Francisco State, City University of New York Law School—where the Dean, Haywood Burns, participated—as well as a number of other schools. The hunger strikes, both at universities and churches, continued almost until the day of freedom for the Haitians.

By March 1993, we had a substantial campaign operating in the United States. Jesse Jackson, the students, gay and AIDS activists, and the hunger strikers themselves on Guantanamo constituted a solid core of organizers. The groups who had organized the Emergency Coalition to Shut Down Guantanamo and the Haitian community in New York were holding regular demonstrations and vigils. People from the Emer-

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88. Cardinal O'Connor's offer was received with suspicion in both the Haitian and AIDS activist community. The Church was hostile to President Aristide, and the Vatican was the only nation to recognize the Cedras military government and exchange ambassadors. The Church's recent foray into providing services for people with AIDS—without safe sex counseling and other practices antithetical to the Church—prompted much opposition in New York. In fact, Cardinal O'Connor's offer may have provoked some service organizations to increase their efforts on behalf of the Haitians, for fear the refugees would end up with the Church.
gency Coalition and progressive doctors who worked with us traveled to Germany and made the existence of the camp an issue at the International AIDS Conference in Berlin. Medical and health organizations—particularly Doctors of the World (who had spent time in the camp), the influential American Public Health Association, and even the Centers for Disease Control—had condemned or criticized the camp. In addition, refugee and human rights groups, including Amnesty International, the National Coalition for Haitian Refugees, and the International Human Rights Law Group (the “Law Group”), campaigned to close the camp. The Law Group filed a major brief with the United Nations’ Working Group on Arbitrary Detention, claiming that the camp violated international law and urging the Working Group to make a site visit.\textsuperscript{89}

Our outside political strategy was also yielding good press coverage. During the early part of the case, we had worried about a negative reaction to stories about our clients. However, when the government refused to allow press visits to the camp on Guantanamo, some reporters filed a lawsuit to gain access.\textsuperscript{90} Once access was achieved, minimal as it was (reporters only were permitted to spend four hours with the refugees), very moving reports began to come out in the major papers.\textsuperscript{91} One influential New York Times story demonstrated the callousness of the United States government, quoting INS official Duke Austin as saying nothing was wrong with the camp because the Haitians were “going to die anyway.”\textsuperscript{92}

At the beginning of our trial in March 1993, seventy-five people joined a spirited picket in front of the Brooklyn courthouse. When the government lawyers arrived from the United States Attorney’s office across the street, protesters confronted them with shouts and chants. The protesters, Jesse Jackson among them, then filled the courtroom. Quiet murmurs of “that’s right” accompanied our opening argument, while muted anger greeted the government’s. Later that day there was a demonstration and civil disobedience, organized by Broadway Cares/Equity Fights AIDS, on Fifth Avenue in front of Rockefeller Center. At the demonstration many prominent people spoke, including Man-

\textsuperscript{89} On file with the Harvard Human Rights Journal.
\textsuperscript{90} The major media were unwilling to join the suit. The suit was initiated by a freelance reporter, Dan Coughlin, who had written some of the best articles on the camp. We, the lawyers for the refugees, did not handle the case, but helped find another law firm to do so.
\textsuperscript{92} Hilts, supra note 62, at 9; see also Haitian Centers Council, Inc. v. Sale, 823 F. Supp. 1028, 1038 (E.D.N.Y. 1993).
hattan Borough President Ruth Messinger, Rabbi Balfour Brickner, Councilwoman Una Clarke, Reverend Jesse Jackson, actress Susan Sarandon, Reverend Herb Daughtry of the Black United Front, and movie director Jonathan Demme. Almost all of the speakers were subsequently arrested when they blocked Fifth Avenue to protest any continued detention of the Haitians.

The Emergency Coalition's organizing resulted in a dramatic protest beamed by television to a billion and a half people. In addition, during the Academy Awards, Susan Sarandon and Tim Robbins walked onto the stage wearing red ribbons as a reminder of AIDS and denounced the HIV prison camp at Guantanamo. The existence of the camp had become a major national and international issue that could not be ignored.

VI. CONCLUSIONS

Once we won the trial in the District Court it was more or less a forgone conclusion that the government would not ask for a stay of the order or appeal. We had defeated them in the public arena, and we had never stopped agitating inside the Washington Beltway. We also demolished them in court. As a result of our combined efforts, there was little political sense in keeping the camp open, and now the government had a pretext for closing it. Senator Graham, a Democrat from Florida, however, made one last-ditch effort to urge the Clinton administration to request an immediate stay. He had the support of forty-two members of Congress. We gathered our forces once more to engage in a massive telephone and letter campaign urging the Clinton administration to comply with the court order and not seek a stay. Ultimately, the government obeyed the order. By the time of our court victory there were fewer than 150 Haitians left at Guantanamo; we had trickled the others one by one into the United States. On June 14, 1993, the last of the Haitians arrived in New York.

In tears, we greeted each Haitian individually at the airport. These were people we had known under the most adverse conditions. Now they were arriving to a welcome of flowers and friends. I cried and cried. These people had been so strong, had endured so much, and yet nearly two years of their already foreshortened lives had been stolen from them. We had won a difficult victory, but it was bittersweet. Nothing could bring back those lost years.

Looking back, I believe that the political climate created by our organizing work around Guantanamo is the only thing that protected the court victory. The executive branch could easily have appealed. Had it done so, it is likely Judge Johnson's opinion would have been reversed, if not by the appeals court, then by the Supreme Court, which
was extremely hostile to the rights of aliens in general and Haitians in particular. Given the government's motivations and interests, only our unremitting political pressure forced the Clinton administration to let Judge Johnson's decision stand.

Throughout this litigation two administrations were driven not by what was right, but what they believed was politically popular—and Black HIV-positive Haitian refugees were certainly not thought to be popular. The government impressed its attitude upon us at every step of the struggle. For example, when we first filed the case, the Bush administration requested sanctions against us for litigating what it claimed was a frivolous case and sought an unprecedented $10 million bond in an attempt, I believe, to intimidate both us and the court. A high-level attorney in the Bush administration told us that Attorney General Barr believed that everyone who was HIV-positive should be returned to Haiti. Despite their hostility to our clients, the government used the decision of the federal district court as an excuse to free the Haitians. The court decision forced the government, feeling increased pressure, to commit to action that it was not bold enough to take on its own. Public image, not law or morality, consistently ruled the government's calculations.

It would be comforting to think that the lessons of Guantanamo are clear and agreed upon. I suspect, though, that our ongoing differences of opinion and approach remain. In my own conclusions about the case, I draw the following lessons.

The first, and perhaps the most important point, is that victory is possible. I do not mean to be falsely optimistic, or to say that the struggle will be easy. Nonetheless, under almost impossible conditions, with a flexible strategy, a creative combination of tactics, and the unending determination of our clients, we won.

The next lesson is one I have always believed, and it was reinforced for me in this case. Little, if anything, is won inside the Washington Beltway. In fact, we had to create significant public pressure to force politicians to deal with the issue. If we just met quietly with them, they could be polite and send us home without agreeing to anything. Our dealings with the Clinton administration, where all of our good connections and ability to work inside were fruitless, underscored this conclusion. Politicians do not do the right thing because of morality,


94. The government requested Rule 11 sanctions against the attorneys litigating the case. If such sanctions had been imposed by the court, the plaintiffs' attorneys and plaintiffs ultimately could have been required to pay thousands of dollars.
but because they are pushed. As Frederick Douglass said, "power concedes nothing without a demand."\textsuperscript{95} Our initial faith in the words of candidate Clinton resulted in our clients trusting us less, and may have cost our clients four or five months in the camp.\textsuperscript{96} The lesson is simple: never trust politicians to do the right thing, and never hinge a legal strategy on their words. It is action that counts. Clinton, like many other politicians, did not act until forced to do so.

The lesson about the Democrats, also, I hope will be clear. Even if the Democrats agreed with us in their hearts, they were often too weak-kneed to act. Our ability to convince them through humanitarian appeals was limited; we needed to apply political pressure as well. I will never agree with those who saw their loyalty to the Democrats as greater than their loyalty to principle or to human rights. An outrage perpetuated by a "friend" must be challenged as surely as the wrongs committed by our enemies.

We also learned not to hold back an activist strategy for fear it would backfire and cause the politicians to get upset. The politicians had already factored in the negative; we did not have to do it for them. Taking aggressive political action also yielded unanticipated, positive results. For example, while we approached ACT-UP solely to enlist their political support and their militant public presence, its members subsequently were key in locating service providers for the Haitians, a critical requirement for their release. These unexpected benefits cannot be overemphasized. Thoughtful activism is necessary to win legal battles and can achieve multiple and unforeseen objectives in struggles that are in essence political. Silence, on the other hand, achieves nothing.

Finally, I hope that one lesson from Guantanamo will be taken to heart by lawyers and activists who work with political cases. Our clients are the actors who drive the strategy. They have their own reality, their own demands, and their own vision. We know more about the law, and we may have a particular range of skills and abilities. However, our knowledge of the difficulties in winning hard cases can make us overly cautious in our approach to litigation. Our clients know more about their own lives and bring their own power to the case. They are not instruments of our political purposes, and while we need

\textsuperscript{95} Frederick Douglass, West Indian Emancipation, Speech Delivered at Canandaigua, New York (Aug. 4, 1857), in 2 Philip S. Foner, The Life and Writings of Frederick Douglass 437 (1950).

\textsuperscript{96} It should be understood that we not only trusted Clinton, but that most of us believed our legal case was too weak to result in the closing of the camp. While we probably underestimated the strength of our case, I am not sure we would have pushed for trial before the elections even if we had confidence in our claims. The majority of us still would have waited for Clinton.
to discuss and argue and exchange to develop an effective approach, ultimately they will and should decide.

EPILOGUE

The last few years have not been good for immigrants seeking refuge in the United States. During the Guantanamo litigation our team fought and lost what I consider the most important refugee case of the later half of the twentieth century, Sale v. Haitian Centers Council. Sale grants the President authority to interdict refugees on the high seas and summarily return them to their oppressors. I believe this power is clearly contrary to the United Nations Protocol, which was implemented to end the barbaric practices of countries during World War II. Although we won certain constitutional rights for our clients at Guantanamo, later cases challenging the treatment of refugees in the camp lost. In the future, if courts follow the Eleventh Circuit’s rulings, the United States will have carte blanche to treat or mistreat refugees at Guantanamo however it chooses. In addition, HIV-positive immigrants seeking entry to the United States are worse off than when we began the litigation in 1991. While they can still obtain waivers for entry, the exclusion has now been legislated by Congress, and only Congress can lift the ban. Finally, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 treats immigrants harshly and has the potential to force hundreds of thousands of refugees out of the country. Recently, Congress has attempted to remedy this provision of the law, but has done so in a fashion that only protects Central Americans, primarily Nicaraguans, and persons from former East-bloc communist countries. Conspicuously not included in this legislation are Haitian refugees.

99. See supra note 5.
101. See Frank Trejo, Measure May Offer Hope to Central Americans Living in U.S., DALLAS MORNING NEWS, Nov. 15, 1997, at 34A.