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Essay: The First Amendment Right of Access to Clients and Counsel: *HRC v. Baker*

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THE FIRST AMENDMENT RIGHT OF ACCESS TO CLIENTS AND COUNSEL: *HRC v. BAKER*

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I. INTRODUCTION

On September 30, 1991, a military coup deposed President Jean Bertrand Aristide, the first democratically elected president of Haiti in two hundred years. In the weeks that followed, political violence swept through the Caribbean island. Aristide's supporters and their families were threatened, tracked down, arrested, and in some instances, tortured and killed by the military. Thousands of Haitians fled the political violence of their country. Small wooden boats and other make-shift vessels carried the refugees toward anticipated respite in the United States. The United States government, however, had already cast its nets upon the waters separating the coasts of Cuba and Haiti, ensnaring thousands of Haitian civilians. The United States Coast Guard, acting pursuant to the interdiction program enacted by the executive order of President Ronald Reagan in 1981, intercepted Haitians at sea and sank their boats. The United States Immigration and Naturalization Service (INS) immediately interviewed the Haitians crowded aboard the

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Coast Guard cutters. Conducting the most perfunctory of asylum interviews, the INS determined that only a handful of the Haitians interdicted met the criteria for political asylum. As the interdiction program progressed, the number of Haitians aboard Coast Guard cutters swelled to the thousands.

On November 18, 1991, President George Bush announced that the Haitians aboard Coast Guard cutters would be repatriated to Haiti. That same day, the United States repatriated over five hundred Haitian refugees. The next morning, Ira Kurzban, a Miami attorney representing the Haitian Refugee Center, Inc. (HRC),[1] filed an action in the United States District Court for the Southern District of Florida. The HRC sought to prevent the return of Haitian refugees until the U.S. government implemented fair screening procedures which would enable the refugees to voice their claims for political asylum. The United States began unloading Haitians from Coast Guard cutters to the United States Naval base in Guantanamo, Cuba, where they were held in make-shift camps behind razor wire.

While the United States government maintained custody of the Haitians, it refused to allow the refugees access to American counsel who sought to vindicate the Haitians' rights under United States and international law. In *HRC v. Baker*, the Haitian Refugee Center challenged the actions of U.S. administrative officials (INS officers) in Washington, D.C.; HRC sought to enforce the Haitians' right not to be returned to a country in which they feared political persecution, torture, and even death, at least, not without fair procedures that would enable the Haitians to properly assert their political asylum claims. Throughout the case, the United States government denied the Haitians access to counsel,[2]

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1. According to the Verified Complaint for Declaratory and Injunctive Relief at para. 8, HRC v. Baker, 953 F.2d 1498 (11th Cir. 1992) (No. 91-2653-Civ.-Atkins), the Haitian Refugee Center is a non-profit membership corporation whose purpose is "to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation, and social and referral services."

2. We note here one exception. At the beginning of the litigation, District Judge Donald Graham, presiding instead of Judge Atkins, granted HRC's discovery request for access to the Haitians on Guantanamo and aboard the Coast Guard cutters. By meeting the limited number of Haitians the government allowed HRC to see, HRC was able to amend its initial complaint to include the named class members. Many of the Haitian detainees also became members of the Haitian Refugee Center during the discovery visits, thus adding to the first amendment interests at stake and the associational interests of HRC and its members in government custody.

but the government did allow a host of media, religious groups, and international spectators to visit the detained Haitians, both aboard the Coast Guard cutters and in Guantanamo.

This paper examines the United States government's actions which denied the Haitians access to counsel, as well as its actions denying the Haitian Refugee Center and its attorneys access to the detained Haitians. More specifically, this paper examines the First Amendment issues raised in *HRC v. Baker* and the federal courts' treatment of those issues in light of existing Supreme Court First Amendment jurisprudence.

II. The First Amendment Claim

The initial complaint alleged that the named defendants failed to follow INS rules and procedures intended as a safeguard against the forced return of refugees possessing valid political asylum claims. The complaint also alleged that the defendants' actions violated the Refugee Act of 1980, the Immigration and Nationality Act, Executive Order 12324, the INS guidelines promulgated under Executive Order 12324, the Fifth Amendment of the United States Constitution, and international law, including Article 33 of United Nations Protocol Relating to the Status of the Refugees.[3]

The amended complaint specifically asserted that defendants' refusal to allow counsel access to its clients violated HRC's and the Haitians' First Amendment rights. Because the government allowed press, religious groups, political representatives, and even another attorney to visit HRC's clients, HRC argued that the ban on HRC's access to the Haitians was content-based discrimination.[4]

On December 3, 1991, Senior United States District Judge C. Clyde Atkins determined that HRC had a First Amendment right of access to the Haitians detained on Coast Guard cutters and on Guantanamo Naval base. Judge Atkins additionally ruled that the Haitians "[w]ere denied information concerning their rights, the

3. "No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." U.N. Convention Relating to the Status of the Refugees, July 28, 1951, art. 33, 139 U.N.T.S. 150, 176.

4. However, as noted by both District Judge Atkins and the Eleventh Circuit Court of Appeals majority, HRC did not amend its complaint to allege that the government was depriving HRC of its First Amendment rights based on the content of HRC's message.

availability of counsel, and assistance in making their asylum claims" and that HRC had a right of access based on the First Amendment right of counsel to "inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration."[5]

At the hearing, the government urged that *Ukrainian-American Bar Association (UABA) v. Baker*[6] was dispositive on the issue of counsel's First Amendment right to access.[7] In *UABA v. Baker*, the UABA obtained a court order which required the Secretary of State and the INS to give Soviet and East Bloc aliens seeking asylum in the United States a notice advising them of the UABA's offer to provide asylum seekers with free legal advice. The government appealed to the court of appeals, arguing that it was under no obligation to provide would-be asylum seekers with information about the UABA's legal assistance program. *UABA* held that the government had no affirmative obligation to provide governmental assistance to help the UABA achieve its political objectives.

Judge Atkins, however, distinguished *Ukrainian-American Bar Association*, noting that "unlike the UABA, HRC [w]as not asserting that its [F]irst [A]mendment right imposes any affirmative obligation on the defendants. Instead, HRC sought reasonable and meaningful right of access that is consistent with the government's time, place and manner restrictions."[8]

Judge Atkins carefully abstained from any judicial activism, allowing the government to provide a plan for reasonable and meaningful access to HRC's clients. The government, however, declined to permit access and never submitted a plan. Rather, the government asserted in its emergency motion for stay pending appeal that counsel had no right of access whatsoever. Although Judge Atkins certified the Haitian plaintiffs as a class, the government continued to deny class counsel access to their clients, while

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5. District Court Order Granting Preliminary Injunctive Relief and Supporting Memorandum Opinion dated December 3, 1991 [hereinafter District Court Order] at 45 (quoting Jean v. Nelson, 727 F.2d 957, 983 (11th Cir. 1984)).

6. 893 F.2d 1374 (D.C. Cir. 1990).

7. It is essential to note that in *UABA v. Baker* the United States Court of Appeals for the D.C. Circuit rejected, without any substantive analysis, *Jean v. Nelson* which stated that "counsel have a first amendment right to inform [detained aliens] of their rights, at least when they do so as an exercise of political speech without expectation of remuneration." *UABA*, 893 F.2d at 1381 (quoting Jean v. Nelson, 727 F.2d 957, 983 (11th Cir. 1984) (en banc)).

8. District Court Order, *supra* note 5, at 47.

continuing to allow access to non-parties, such as the media, religious groups, and other spectators.[9]

III. The Foundation of the Right to Access

Judge Atkins specifically determined that the basis of HRC's right of access was the First Amendment right of counsel to "inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration." This fundamental right is founded in Supreme Court precedent, such as *NAACP v. Button*[10] and *In re Primus*,[11] as well as in *Jean v. Nelson*,[12] an Eleventh Circuit decision.

In *NAACP v. Button*, a Virginia statute forbade the solicitation of legal business by a "runner" or "capper."[13] The definition of a "runner" or "capper" included an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. The Virginia Supreme Court of Appeals had held that the actions of the NAACP, specifically the manner in which it obtained plaintiffs to challenge racial policies, could be constitutionally proscribed by Chapter 33's expanded definitions.[14] The NAACP petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Virginia Supreme Court of Appeals.

In re Primus involved a First Amendment challenge to a statutory prohibition against solicitation. South Carolina lawyer Edna

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9. The government's denial of access of HRC's attorneys to the Haitian refugees, while permitting other non-party visitors, clearly supported the argument that the government excluded HRC attorneys based on the content of their message.

10. 371 U.S. 415 (1963).

11. 436 U.S. 412 (1978).

12. 727 F.2d 957 (11th Cir. 1984)(en banc).

13. 1956 Va. Acts ch. 33.

14. The Supreme Court described in detail how the NAACP obtained party plaintiffs. For example, a local NAACP branch would invite a legal staff member to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff members would bring printed forms to the meeting authorizing them and other NAACP or Defense Fund attorneys to represent the signers in legal proceedings to achieve desegregation. On occasion, some of those present would sign the blank forms with the understanding that a member or members of the legal staff, with or without the assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. Sometimes, the Virginia State Conference of NAACP branches distributed petitions to local branches for the purpose of finding petitioners willing to "go all the way" in any possible litigation that might ensue. *Button*, 371 U.S. at 421-422.

Smith Primus advised a gathering of women about their legal rights stemming from their having been sterilized as a pre-condition to receiving public medical assistance. The attorney, affiliated with a branch of the American Civil Liberties Union (ACLU), sent a letter advising that free legal assistance was available from the ACLU. As a result of these actions, the lawyer was publicly reprimanded by the South Carolina Supreme Court.

In both *NAACP v. Button* and *In re Primus*, the petitioners launched constitutional challenges which claimed that the statutory proscriptions against solicitation encroached upon First Amendment rights. In *Button*, the NAACP charged that Chapter 33, as applied to its activities, abridged the freedoms guaranteed by the First Amendment. Specifically, petitioners claimed that the statute infringed upon "the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed and other rights."[15] The United States Supreme Court reversed the decision of the Virginia Supreme Court of Appeals, holding that the activities of the NAACP, its affiliates, and legal staff were political activities — modes of expression and association protected by the First Amendment.

In *Primus* the petitioner charged that the ACLU's letter offering legal services to the prospective litigant involved constitutionally protected expression and association protected under the First Amendment. The Court considered Ms. Primus's motivation for soliciting the litigant and distinguished *Ohralik v. Ohio State Bar Association*,[16] a case which the Court decided the same day. *Ohralik* held that states may proscribe in-person solicitation by lawyers seeking to communicate with potential clients when their motivation is to communicate purely commercial offers. The Court distinguished *Ohralik* by accurately noting that Primus did not engage in an in-person solicitation for pecuniary gain. The Court concluded that Primus had expressed personal political beliefs in the advancement of the associational objectives of the ACLU.

After *Button*, *Primus*, and *Ohralik*, organizational activity designed to inform individuals of their rights, at least when done as an exercise of political speech without expectation of remuneration, cannot be completely proscribed consistent with First

15. *Id.* at 428.
16. 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978).

Amendment protection. Any restriction with respect to time, place, and manner must be reasonable and, under prevailing First Amendment jurisprudence, may not be based on the content of the political speech or its acceptability to the censor.

These principles and legal standards were fully applicable in *Jean v. Nelson*,[17] where the Eleventh Circuit Court of Appeals stated: "The Supreme Court has repeatedly emphasized that counsel have a [F]irst [A]mendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration."[18] The *Jean* court recognized counsel's right of access to detained aliens while considering the government's demonstrated countervailing considerations. The court acknowledged that the regulation of detained aliens may implicate security concerns similar to those applicable in the prison context. The court concluded that it was the district court's responsibility to fashion a remedy that strikes the proper balance between the government's security interest and HRC's exercise of its First Amendment rights.[19]

In light of the foregoing precedent, the district court properly held that the HRC and its attorneys had a First Amendment right of access to counsel its clients. HRC was no less a political advocacy group than the NAACP in *Button* or the ACLU in *Primus*. In fact, the Eleventh Circuit had already recognized HRC as such in prior cases, including *Jean*.[20] Coupled with the fact that the district court had already certified the Haitian detainees as a class and HRC as their attorneys, the government's continued shielding of the refugees seemed incredible.

NAACP v. Button and *In re Primus* firmly established the First Amendment's protection of speech designed to further political goals, particularly through litigation that challenges legislative or executive action. The First Amendment protects petitioning for judicial redress of grievances where access to the legislative process is ineffective. The motivation of the speaker and the organization whose goals were advanced by speech — not the audience receiving

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17. 727 F.2d 957 (11th Cir. 1984)(en banc). In *Jean*, the exercise of First Amendment rights was not conditioned on the recipient of the message having reciprocal rights.

18. *Id.* at 983 (citing In re Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963)).

19. *Jean*, 727 F.2d at 984.

20. *See Jean*, 727 F.2d 957 (11th Cir. 1984); Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1561 n.10 (11th Cir 1990), *aff'd sub nom.* McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888 (1991).

the message — distinguishes *Button* and *Primus* from *Ohralik*. As long as the speaker or organization engaged in political speech "without expectation of remuneration," the exercise of the speech is a fundamental right protected by the First Amendment. Considering both its message and its motivation, HRC and its counsel had a protected First Amendment right to speak with their clients.

The government sought to eviscerate that right by claiming it did not exist. Solicitor General Starr argued that the Haitians had no First Amendment rights since they were aliens outside of United States borders. He argued that HRC had no First Amendment right of access to the Haitians on Guantanamo and aboard Coast Guard cutters unless the recipients of HRC's message had a corresponding First Amendment right to hear HRC's message. Interestingly, Starr based this argument on dicta in *Ukrainian-American Bar Association*, where the court, without specifically addressing the issue, suggested that the UABA's First Amendment right could not be derivative of the rights of those detainees the UABA wished to counsel.[21] As authority, the *UABA* court relied on other courts of appeals which had held that an unadmitted alien has no Sixth Amendment right to counsel even in the civil deportation process.[22] The Eleventh Circuit panel accepted the government's argument which asserted that the detained Haitians had no First Amendment right, remarking, "[I]n the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States. Thus, it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights."[23] The circuit court found that even assuming that HRC had a limited right, *Ukrainian-American Bar Association* prevented the exercise of that right. The panel majority stated that HRC's claim was "nothing more than a claim that it has a right to compel the government to assist it in exercising a right of association."[24] By framing the issue as such and relying on *Ukrainian-American Bar Association v. Baker,* non-binding precedent from another circuit that is factually distinguishable,[25] the court swept

21. UABA v. Baker, 893 F.2d 1374, 1382 (D.C. Cir. 1990).

22. *See* Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988); Baires v. INS, 856 F.2d 89, 90 (9th Cir. 1988). These cases, based on the Sixth Amendment right to counsel in criminal cases, have no relevant application here.

23. HRC v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992).

24. *Id.*

25. HRC was not seeking the government's assistance.

away HRC's First Amendment rights.[26]

HRC's right of access should not have been dependent on the Haitian's right to hear its message — it should only have been limited by content-neutral time, place, and manner restrictions and the government's countervailing interest in maintaining security and order.

IV. Time, Place, and Manner Restrictions in the Quasi-Military Forum

HRC v. Baker is inconsistent with U.S. Supreme Court and Eleventh Circuit jurisprudence which would protect HRC's First Amendment rights within the framework of reasonable time, place, and manner restrictions in the quasi-military forum of Guantanamo Naval base.

Guantanamo is a mixed use Naval base consisting of military and non-military facilities. The Haitian detainees were housed in non-military sections of the base, which according to General Master Don Bierman, represented a "slice of America." The standards for evaluating the right of access vary with the character of the property at issue.

Perry Education Association v. Perry Local Educators' Association,[27] defined three types of public properties. The first are purely public forums, such as streets and parks, where limits on expressive activity are sharply circumscribed; not only must the regulations be content-neutral, they must be narrowly tailored to serve a significant government interest such that ample alternative channels of communication are left open.

The second are public forums opened for the purpose of expressive activity, such as university meeting halls and municipal theaters. Here, the same standards apply as in purely public forums — reasonable time, place, and manner restrictions are permissible.

The third type of public property are non-traditional public forums and are governed by different standards. The First Amendment "does not guarantee access to property simply because it is

26. A natural extension of the circuit court's opinion would bar the transmission of political messages to Cuba via radio or television, as Cubans possess no First Amendment right to hear freedom messages.

27. 460 U.S. 37 (1983).

owned or controlled by the government."[28] Guantanamo best fits into this third category.

The government sought to take advantage of the Naval base's location outside of the United States. Appealing Judge Atkins' order, the government argued that "[i]t is settled law that aliens outside of the United States cannot challenge their exclusion on the basis of any [F]irst [A]mendment interest in communications with American citizens."[29] The government also argued that "the judiciary may not second-guess immigration determinations at the behest of American citizens claiming a right to communicate with aliens, so long as the Executive has a 'facially legitimate and bona fide' reason for the exclusion."[30] Thus, by denying HRC any access to its clients, the government was able to argue that the district court's order granting reasonable and meaningful access forced the government to "retain the aliens within U.S. custody, either by bringing them to this country or by keeping them aboard Coast Guard ships or transporting them to a U.S. military installation in foreign territory. Forcing Executive officials to follow one of these courses, rather than repatriate those aliens found not to have a legitimate claim of refugee status, is certainly as intrusive as the grant of the short-term visa sought in *Kleindienst*."[31] In other words, the government argued that the district court's grant of access forced it to refrain from repatriating the Haitians. The government opted to keep them in custody abroad or at sea so that it could regulate with whom the Haitians spoke. In this manner, the government was able to equate HRC's requested access with relief circumscribed by *Kleindienst* — admission based on the alien's non-existent First Amendment rights.

Thus, the government claimed that its chosen forum allowed it to deny access to counsel while selectively allowing access to other persons without judicial interference. The government argued:

> While its asserted rights would be ambitious were the aliens incarcerated within the United States, *see Ukrainian-American Bar Association*, 893 F.2d at 1381, here the activity in which

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28. United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981).

29. Brief for Appellants/Cross-Appellees at 25, HRC v. Baker, 953 F.2d 1498 (11th Cir. 1992) (Nos. 91-6099, 91-6105, 91-6118) [hereinafter Brief for Appellants] (citing Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)).

30. Brief for Appellants, *supra* note 29, at 25-26 (citing *Kleindienst*, 408 U.S. at 769-70).

31. Brief for Appellants, *supra* note 29, at 28.

> [HRC] asserts a right of access involves U.S. vessels on the high seas and a military facility leased from another sovereign nation. Establishment of such a right might compel the government to provide any variety of interested citizens with access to aliens seeking sanctuary in U.S. embassies and facilities abroad. Here, as in *Kleindienst*, approval of [HRC's] [F]irst [A]mendment claim would "prove too much," either making a nullity of the Executive's broad discretion in matters of foreign policy, military operations, and immigration enforcement, or thrusting upon the courts a case by case balancing of political interests for which they are plainly ill-suited. 408 U.S. at 768-69; *see Ukrainian-American Bar Association*, 893 F.2d at 1379-80.[32]

In oral argument (second appeal in the Eleventh Circuit) Judge Cox asked Solicitor General Starr whether the record contained any reason why HRC could not have access to its clients on Guantanamo. Judge Cox specifically wanted to know whether a commanding officer at the naval base had said that it was necessary to limit HRC's access to the Haitians at Guantanamo for military reasons. Judge Cox even went so far as to proclaim at oral argument: "If some commanding officer tells me 'That's my position,' then that's okay. I, as a judge am not going to look at it." Solicitor General Starr could provide no such military rationale. The record contained no military justification for denying HRC access to its clients on Guantanamo, but after oral argument the government did submit to the Eleventh Circuit Court of Appeals affidavits which were untested by any adversarial process. Though the court of appeals accepted this post hoc military justification, it was not part of the factual record nor did it comport with the Supreme Court's analysis in *Greer v. Spock*[33] which provides a test for the application of military rationale to First Amendment restrictions in a military forum.

Greer v. Spock upheld the right of military authorities to limit access to military installations where the access is found to constitute a "clear danger to [military] loyalty, discipline, or morale."[34] However, the United States Supreme Court in *Greer* specifically

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32. Emergency Motion for Stay Pending Appeal dated December 4, 1991 at 23. Compare THE FEDERALIST No. 78 ("[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments [executive and legislative]; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation . . . .").

33. 424 U.S. 828 (1976).

34. *Id.* at 840.

stated that the government could not, consistent with the First Amendment, deny access to a military forum simply because the government does not agree with the content of the First Amendment expression involved. While the Supreme Court upheld the limitations on access to a military installation in *Greer*, the Court noted that the record demonstrated a "policy, objectively and even-handedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind . . . ."[35] Thus, while *Greer* provided no *general* right of access to a military installation, the Supreme Court carefully circumscribed the government's power. The public's First Amendment right of access to military installations can only be limited in situations where the restriction on First Amendment activities are objectively and even-handedly applied and where the government does not discriminate on the basis of content.

Nation Magazine v. U.S. Dept. of Defense[36] is a case with issues similar to those in *HRC v. Baker*. In *Nation*, members of the press asserted First and Fifth Amendment challenges to regulations promulgated by the United States Department of Defense denying them access to the American military operations of Desert Shield and Desert Storm. The plaintiffs claimed "that the press has a [F]irst [A]mendment right of unlimited access to a foreign arena in which American military forces are engaged."[37] Similarly in *Baker*, HRC sought access to its clients who, though on a military base, were actually located in areas of the base not used for military operations. Even more importantly, HRC sought access to members of a class of plaintiffs who already were represented by HRC in pending litigation.

The district court in *Nation* noted:

> [T]he government chose to grant some access to the press for purposes of covering military activities in the Persian Gulf. By opening the door, albeit in a limited manner, the government created a place for expressive activity. Establishing pools for coverage of the "initial stages" of the Persian Gulf conflict, the government, in essence, determined that the war theater was a limited public forum. . . . Regardless of whether the government is constitutionally required to open the battlefield to the press as representatives of the public, a question that [the dis-

35. *Id.* at 839.
36. 762 F. Supp. 1558 (S.D.N.Y. 1991).
37. *Id.* at 1566.

> trict court] declined to decide, once the government does so it is bound to do so in a non-discriminatory manner.[38]

Thus, *Greer* and *Nation Magazine* offer important First Amendment analyses which were never thoroughly explored in *HRC v. Baker* either by the Eleventh Circuit or by the United States Supreme Court which denied certiorari. In *HRC v. Baker* the government extended its civilian administrative activities, reaching out into international waters, and interjecting American administrative processes into the lives of Haitians at sea, who, once their boats were destroyed and they were forcibly detained by the United States, were completely at the mercy of the United States government. By keeping the Haitians on navy ships and on the military base in Guantanamo, the United States government was able to prevent the plaintiffs' attorneys from counseling the Haitians. As previously noted, this denial of access was not content-neutral.[39] *Nation Magazine* and *Greer* suggest that even if there had been a military reason for denying access, remand would still be necessary to determine whether the denial of access was applied in a content-neutral manner. Here the error was compounded by the problem that the government had failed to establish in the record any military reason for denying access.

Once the government opened Guantanamo to members of the press, the clergy, the U.N High Commission, and other attorneys, the government could not close Guantanamo to HRC's attorneys — such selective denial constitutes discrimination against viewpoints that the government finds offensive or disagreeable. The rigid proscription of *Greer v. Spock*[40] was not applicable. The government abandoned its right to deny access upon opening the gates of Guantanamo and granting access to the Haitian detainees, for

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38. 762 F. Supp. at 1573 (citing Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978); American Broadcasting Co., Inc. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977)).

39. The Eleventh Circuit panel majority emphasized that the district court found "that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." 953 F.2d at 1512 n.7. Counsel for HRC continually argued viewpoint discrimination in its briefs, and the reliance on the absence of a third amended complaint, enabled the Court to ignore the reality of counsel's argument — that the government's exercise of discretion, and accompanying censorship of HRC's views, was based on the content of HRC's message.

40. 424 U.S. 828 (1976). In *Greer*, Fort Dix Military Base was devoted to military training, and regulations limiting political speech were strictly and consistently enforced. *Greer* recognized that the government could proscribe First Amendment rights in this type of military forum as long as the denial was not arbitrary.

other press, religious, and political purposes.[41]

V. The First Amendment Right and Affirmative Government Assistance

In *Nation Magazine* the plaintiffs claimed that "no affirmative assistance from the Government is being requested, only the freedom from interference . . . ."[42] Chief Judge Tjoflat and Judge Cox agreed that HRC did not have a First Amendment right of access to interdicted Haitians on Guantanamo, and that even if HRC did have a right to associate with the Haitians, "this right of association would not give rise to the right of access which HRC claims."[43] Judges Tjoflat and Cox went on to say that "[i]n reality, HRC's claim is that it has a right to associate with the interdicted Haitians and it has a right to compel the government to assist it in asserting that right. The Constitution, however, does not require the government to assist the holder of a constitutional right in the exercise of that right."[44] The Eleventh Circuit majority opinion thus flies in the face of Judge Atkins' factual findings in the district court and the narrowly drawn relief which Judge Atkins left to the government to fashion. Judge Atkins had not ordered the government to provide any particular assistance to HRC, but did require the government to devise a plan to allow HRC meaningful access to the Haitians. In this aspect *HRC v. Baker* was factually distinguishable from *Ukrainian-American Bar Association.* Judge Atkins noted that in *Ukrainian-American Bar Association*, the attorneys were seeking affirmative assistance from the government: notifying a private political group and distributing literature about a private political organization to persons who might in the future flee the Soviet Union. HRC did not seek any affirmative assistance; HRC simply sought the same treatment as the non-parties who

41. Thus, under *Perry's* analysis of even a non-traditional public forum, the government's limitation on access violated HRC's First Amendment rights. Additionally, findings of fact were made in the district court regarding Guantanamo's use and character. It was improper for the court of appeals to ignore those findings and others regarding the extent that the base had been opened to the press and non-parties. It was improper for the court of appeals to ignore those findings regarding the character of the base as found by the general master. It was also improper to permit the introduction of new findings, based on unchallenged affidavits at the appellate level, contrary to the carefully detailed findings in the trial court.

42. 762 F.2d at 1571.

43. 953 F.2d at 1513.

44. *Id.* (citations omitted).

were allowed into Guantanamo.

HRC's First Amendment right to counsel the detained Haitians should not have been dependent on the Haitians' right to hear HRC's message. Because the district court did not find that HRC was seeking the government's affirmative assistance in counseling the Haitian detainees, the Eleventh Circuit's opinion in *HRC v. Baker* is unsettling.

VI. The Checking Value of the First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[45]

The Constitution provides for freedom of expression and freedom of association "without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."[46] As Justice Brennan so eloquently stated in *Perry Education Association,* "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech'."[47]

As noted by Professor Winick in his essay dedicated to Ira Kurzban, the First Amendment has played an invaluable role in complementing this checking value of the independent bar in asserting human rights in the face of government abuses. The First Amendment should serve to expose shameful government action and bring public pressure to right and cleanse government practices. As Justice Brandeis once aptly noted, "Sunlight is said to be the best of disinfectants."[48] And, as Justice Harlan stated in *N.A.A.C.P. v. Alabama,* "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."[49] *HRC v. Baker* exposed

45. U.S. Const. amend. I.

46. NAACP v. Button, 371 U.S. 415, 444-45 (1963).

47. 460 U.S. 37, 61 (1983) (J. Brennan dissenting).

48. Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914).

49. 357 U.S. 449, 460 (1958).

the United States government's questionable motive in arbitrarily excluding from asylum groups of black Haitians who demonstrate credible fears of political persecution under Article 33 of the U.N. Protocol Relating to the Status of Refugees. By placing content-based restrictions on access to forums in which the United States government has interjected its activity, the executive sought to censure and control political controversy over its policies. It took a handful of determined lawyers and the independence of one careful and experienced federal district judge to shed light on the Haitian plight at the hands of the United States government.

But as much as *HRC v. Baker* champions the American ideals that protect First Amendment freedoms, the checking value of private attorneys, and the vital role of an independent judiciary, it also raises grave concerns about the future of First Amendment right of access in government controlled forums, particularly military forums.

"The people have certain natural rights which are retained by them when they enter into Society. Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the United States."[50] The rights of expression embodied in the text of the First Amendment are not a grant of rights which persons receive from the government by virtue of a contractual relationship inherent in the citizen-state relationship. They are, rather, the liberty rights of all persons regardless of their citizenship, and these rights remain inviolate from government intrusion. Thomas Jefferson said that "[a] bill of rights is what the people are entitled to against every government on earth." The idea that the government can suppress the right of organizations to counsel persons detained by the United States; that Haitians have no right of access to counsel, indeed no rights of free association, due process, liberty, property, or freedom from political persecution because the U.S. has pirated them off to a military installation, is inhumane and a flagrant perversion of our Founders' vision of the Bill of Rights.

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50. Roger Sherman's Draft of the Bill of Rights, *reprinted in* Randy Barnett, Foreword: Unenumerated Constitutional Rights and the Rule of Law, 14 HARV. J.L. & PUB. POL'Y, 615, 629-30 (1991).

Even more dangerous is the idea that in the context of an international human rights crisis, the United States may work unilaterally in foreign territories as "rescuer" and "captor" without providing any avenues of redress in its legal system for persons whose lives are ensnared and imperiled by its programs.