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Jean v. Nelson: A Stark Pattern of Discrimination

I. HISTORICAL BACKGROUND

Miami, Florida, 1981. Sun-drenched, sandy beaches became the center of stormy controversy as waves of Haitian immigrants debarked at Florida's shoreline. The Krome Avenue detention facility in Miami became as familiar a landmark to South Floridians as the Fontainebleau Hotel on Miami Beach. The migration of Haitians to South Florida was not a new occurrence. Undocumented Haitians, sailing in "small boats barely suited to ocean travel,"[1] had been arriving since December, 1972.[2]

By the summer of 1981, more than 35,000 undocumented Haitians had reached Florida.[3] Between 1972 and 1981, the Immigration and Naturalization Service (INS) consistently admitted undocumented Haitian aliens.[4] Generally, the INS granted parole;[5]

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1. Jean v. Nelson, No. 82-5772, slip op. at 2780 (11th Cir. Apr. 12, 1983), *petition for reh'g and suggestion for reh'g en banc filed* May 10, 1983.

2. Louis v. Nelson, 544 F. Supp. 973, 978 (S.D. Fla. 1982), *aff'd in part, rev'd in part, and remanded sub nom.* Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

3. Jean v. Nelson, slip op. at 2780. The United States Court of Appeals for the Eleventh Circuit noted the Haitians "came to America seeking relief from economic oppression, as the government would have it, or to escape political oppression, as plaintiffs assert." *Id.*

4. *Louis v. Nelson*, 544 F. Supp. at 978-79.

> It is highly likely that INS' inaction [maintaining a parole and work authorization policy rather than initiating a detention policy] provided the greatest inducement to the ultimate swollen tide of incoming, undocumented Haitians. Record material suggests that a large percentage of the aliens bought passage to the United States from promoters in Haiti whose best sales pitch was the large number of the prospect's countrymen who, without visas or other documents, had reached Florida and were residing there undisturbed. Protestations by INS

detention of aliens awaiting hearings was "rare."[6] The INS had agreed with the National Council of Churches in 1977 that illegal Haitian entrants were to be detained only briefly for medical screenings and then released to available sponsors and given work authorizations pending their exclusion hearings.[7] That general parole agreement terminated in May, 1981.[8]

> The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981 and July 31, 1981; and a policy of detention was initiated.[9]

The INS changed its parole policy because of the influx in 1980 of Cuban and Haitian immigrants.[10] The Mariel boatlift[11] transported more than 125,000 Cubans to the United States during the spring of 1980—while INS officials looked on, unable to control this "Freedom Flotilla."[12] Responding in February, 1981 to this

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> of the illegality of such operations could hardly be expected to prevail against the proprietary reasoning that Haitians who reached southern Florida were living, working and earning in the United States.

Haitian Refugee Center v. Smith, 676 F.2d 1023, 1029 n.11 (5th Cir. 1982).

5. Jean v. Nelson, slip op. at 2786. Detention was "limited to those aliens who were likely to abscond, or who posed a threat to the national security." *Id.*

6. *Id.*

7. Louis v. Nelson, 544 F. Supp. at 978.

> Parole of aliens pending an exclusion hearing is a relatively recent phenomenon. Prior to 1954, it was INS policy to detain almost all aliens at the port of entry pending a determination of their admissibility . . . . Large detention centers existed for this purpose at San Francisco, California and Ellis Island, New York. In 1954, however, the new commissioner of the INS . . . decided that this policy of mass detention was inhumane and unnecessary . . . . At that time the policy changed, and aliens were paroled freely into the United States pending a determination of admissibility.

Slip op. at 2786.

8. Louis v. Nelson, 544 F. Supp. at 978.

9. *Id.* at 981; *see infra* notes 10-17 and accompanying text.

10. "By almost all accounts it was mass immigration of Cubans that prompted tightening the net in which the Haitians were caught." Slip op. at 2780 n.3.

11. In April 1980, more than 10,000 Cubans sought refuge in the Peruvian Embassy in Havana, Cuba. Within a few days, boats from South Florida journeyed to Cuba's Mariel Harbor to bring those Cubans and many others to America. Louis v. Nelson, 544 F. Supp. at 978.

12. *Id.* "Once the 'Freedom Flotilla' started, nothing could be done except to allow the Cubans to arrive and then formulate, on a post hoc basis, a plan to process and resettle them." *Id.* at 978-79.

sudden immigration, the Carter administration "established a 'Cuban/Haitian' entrant status." The government promoted efforts to resettle those Cubans who had arrived in the United States between April 21 and June 20, 1980 and those Haitians who had arrived prior to June 20, 1980.[13]

In March, 1981, two months after he took office, President Reagan created a special task force to consider the continuing illegal immigration problem.[14] The task force, headed by Attorney General William French Smith, recommended detaining aliens without parole pending a determination of their right to enter the country. Significantly, the government "had not resorted to widespread detention of undocumented aliens since 1954."[15]

President Reagan approved the recommendations of the task force[16] and publicly stated on July 30, 1981, that there was a need to control immigration.[17] The President said the Attorney General would take administrative actions and propose legislation to achieve this control.[18] Attorney General Smith immediately appeared before two congressional subcommittees on immigration, but he did not propose legislation at that time.[19] Instead, the Attorney General reiterated the conclusion of the task force: there was a "necessity of detaining illegal aliens pending exclusion."[20] The INS, on an unascertainable date in 1981, implemented a policy of detaining Haitian aliens in prisons or camps such as the Krome Avenue detention facility. For some Haitians detention lasted more than one year.[21]

II. A CHRONICLE OF THE CASE

This is a complicated case. The issues presented are complex. And, it is an involved case. The record on appeal is volumi-

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13. *Id.* at 979. The district court noted that, under the Carter administration's policy, "local communities were left with the task of providing jobs, housing, health care and food for the approximately 150,000 new residents of South Florida. This burden taxed local resources to their limits . . . ." *Id.*

14. *Id.* Members of the task force included the attorney general and the cabinet officers in charge of the Departments of State, Defense, Transportation, Labor, Commerce, Health and Human Services, and the Director of the Office of Management and Budget. *Id.*

15. Slip op. at 2781. *See supra* note 7 and accompanying text.

16. Louis v. Nelson, 544 F. Supp. at 980.

17. *Id.*

18. *Id.*

19. *Id.* The administration's immigration bill was introduced in Congress on October 22, 1981. *See infra* notes 77-81 and accompanying text.

20. 544 F. Supp. at 980.

21. *Id.* at 983-84; Jean v. Nelson, slip op. at 2778-79.

> nous. It is a delicate matter as well: the court below noted the extensive publicity this case has received, and the strong feelings with which it is regarded by either side.[22]

Between June 1 and June 5, 1981, the INS conducted mass exclusion hearings for Haitian immigrants. "Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights."[23] Marie Lucie Jean, Lucien Louis, and Herold Jacques, all Haitian aliens, arrived in South Florida on or after May 20, 1981. The timing of their arrival coincided with the new administration's changing immigration policy. Upon applying for entry into the United States, they were detained and subsequently ordered excluded, pursuant to the INS's new policy of "accelerated exclusion proceedings and detention without parole for all Haitian refugees."[24]

On June 10, 1981 Marie Lucie Jean and Herold Jacques, on behalf of themselves and other Haitian aliens similarly situated, and the Haitian Refugee Center, Inc. (HRC)[25] petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus.[26] The petitioners sought to stay the INS's final orders of exclusion against them and approximately eighty-three other Haitian aliens.[27] Petitioners later filed an amended petition for a writ of habeas corpus and a class action seeking declaratory and injunctive relief. The class included Haitians who had received final orders of exclusion and deportation

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22. Jean v. Nelson, slip op. at 2778.

23. *Id.*

24. Brief for Appellees/Cross-Appellants at 2, Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

25. Plaintiff, Haitian Refugee Center, Inc. (HRC) is a Florida nonprofit corporation. The purpose of HRC is to "promote the well-being of Haitian Refugees through appropriate programs and activities" including but not limited to legal representation. The bylaws of HRC state that the membership consists of "the Haitian Refugee Community in Florida and members of the community at large who have shown support and interest for the defined purposes and activities of the corporation." Louis v. Nelson, 544 F. Supp. at 984 n.28.

26. If an alien loses in an exclusion hearing before an immigration law judge, the alien has the right to seek review of the exclusion decision before the Board of Immigration Appeals. If the appeal is unsuccessful, the alien may seek review of the exclusion order by filing a petition for a writ of habeas corpus in the federal district court. *Id.* at 978.

27. Emergency Habeas Corpus Petition to Stay Final Orders of Deportation Against Certain Haitian Refugees Issued by the Immigration and Naturalization Service at 1, Jean v. Meissner, No. 81-1260-CIV-ALH (S.D. Fla. June 10, 1981).

between June 1 and June 5, 1981, as well as those Haitians who were detained without parole pending exclusion proceedings.

The complaint challenged INS practices and procedures used in processing the Haitians for exclusion.[28] The plaintiffs alleged, *inter alia*, that (1) the INS had not complied with the Administra-

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28. The complaint included the following grounds for relief:

> (1) that the Defendant officials of INS District VI and their employees conducted preliminary interviews . . . in which the refugees were compelled to appear in person before INS representatives without being permitted to be accompanied, represented, and advised by counsel, and without being advised of their right to do so, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b); (2) that on or about May 20, 1981, Defendants changed their prior policy with respect to the parole and detention of Haitian refugees arriving after that date, the order in which such refugees would be subjected to exclusion proceedings would be conducted, a change in policy which is unlawful since not accomplished in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553; (3) that Defendants failed to provide Petitioners with adequate notice of their right to counsel at exclusion hearings and of their right to a hearing [and] . . . failed to give Petitioners written notice of the purposes for their detention and hearing . . . in violation of INS Operations Instruction . . . § 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, [and] the Due Process Clause of the Fifth Amendment . . . ; (4) that Defendants denied Petitioners . . . access to counsel in connection with their exclusion proceedings, in violation of . . . the Due Process Clause of the Fifth Amendment, the First Amendment . . . and in violation of Plaintiff Haitian Refugee Center, Inc.'s rights under the First Amendment; (5) that Defendants denied petitioners . . . their right to a public exclusion hearing . . . ; (6) that Defendants denied Petitioners . . . their right to apply for political asylum . . . and (7) that Defendants have applied a double standard regarding the exclusion of aliens, subjecting Haitian refugees but not other refugee groups to the above policies and procedures, resulting in discrimination and threatened discrimination based on race and national origin in violation of the equal protection requirements of the Due Process Clause of the Fifth Amendment . . . .

Louis v. Meissner, 532 F. Supp. 881, 883-84 (S.D. Fla. 1982).

Plaintiffs removed two parties named in the first complaint—Marie Lucie Jean and Herold Jacques—and named six Haitian aliens in addition to Lucien Louis because

> On or about August 10, 1981, [the district court] granted defendants' motion to vacate petitioners' final orders of exclusion and to remand [to] the Immigration and Naturalization Service. As a result, the class designated as "petitioners" in the Complaint, and defined as refugees for whom final orders of exclusion and deportation have been issued, is non-existent and has been absorbed into the class designated as "plaintiffs" in the Complaint, and defined as refugees who have not as yet been issued final orders of exclusion and deportation.

Supplemental Pleading and Second Amended Complaint for Declaratory, Injunctive, and Mandatory Relief—Class Action at 1, Louis v. Meissner, No. 81-1260-CIV-ALH (S.D. Fla. Aug. 24, 1981).

The amended complaint stated that Lucien Louis, one of the original petitioners, was released on parole into the community after testifying on June 29, 1981. But Louis was retained as a party to this action because (1) he was subjected to preliminary interviews without counsel; (2) he was subject to having his parole revoked at any time; and therefore, (3) he was subject to being detained again. *Id.* at 2. *See also* 532 F. Supp. at 884.

tive Procedure Act's (APA) rulemaking requirements before implementing the new detention policy; (2) the INS violated the fifth amendment by enforcing its new policy in a discriminatory manner; and (3) the INS denied HRC's first amendment right of access to the Haitians and the Haitians' access rights to friends, family, and counsel.[29] Plaintiffs sought declaratory relief regarding the validity of their claims, an injunction against the enforcement of INS's new detention policy, a stay of deportation for any Haitian excluded under the new policy, and a stay of exclusion hearings for Haitians unrepresented by counsel.[30]

A. *The District Court Decisions*[31]

On September 30, 1981, in a "strongly worded opinion,"[32] the district court granted plaintiffs' motions for class certification and a preliminary injunction against deportation of class members.[33]

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29. Louis v. Nelson, 544 F. Supp. at 983 n.25.

30. Slip op. at 2779.

31. Numerous lawsuits challenged the disparate treatment of Haitian immigrants. The INS had required Haitian aliens to assert their claims for political asylum in exclusion hearings rather than in the customary deportation hearings. Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded without opinion*, 566 F.2d 104 (5th Cir.), *vacated as moot*, 631 F.2d 1247 (5th Cir. 1978). The INS had also delayed the issuance of work authorizations for Haitians. National Council of Churches v. Egan, No. 79-2959-CIV-WMH (S.D. Fla. Aug. 29, 1979). The expedited procedure for processing Haitian claims for political asylum was the subject of another suit. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). In Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981), Haitian immigrants sought access to counsel and fair hearings and protection from erroneous deportation.

32. Slip op. at 2779.

33. In his order granting the temporary restraining order (which subsequently was converted into a preliminary injunction, 530 F. Supp. at 930), Judge Hastings described at length how the INS had been playing a "human shell game" with the Haitians. The INS had transferred members of plaintiffs' class from the Krome Avenue detention facility in Miami to detention facilities located in Puerto Rico, West Virginia, Texas, and New York.

> Having made a long and perilous journey on the seas to Southern Florida, these refugees, seeking the promised land, have instead been subjected to a human shell game in which the arbitrary Immigration and Naturalization Service has sought to scatter them to locations that, with the exception of Brooklyn are all in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters. In this regard, INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores. . . . These refugees were removed from Miami, a city with a substantial immigration bar as well as volunteer lawyers from various organizations expressing an interest in representing these refugees. Miami also has a large Haitian population, and as a result, many Creole speaking individuals able to serve as translators to facilitate the attorney/client relationship, as well as community support groups and family members able to assist these

District Court Judge Alcee Hastings[34] certified the class of Haitian aliens who had "arrived in the Southen District of Florida on or after May 20, 1981, who are applying for entry into the U.S. and who are presently held in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are *unrepresented* by counsel."[35] The court also found fault with the closed-door proceedings in which eleven Haitians were ordered deported. The government later acknowledged that the mass exclusion hearings, at which the Haitians had neither legal representation nor adequate translators, were improper.[36] The government did not appeal the preliminary injunction. Instead, it requested an immediate trial.[37]

On February 24, 1982, District Court Judge Eugene Spellman modified the class to include Haitians represented by attorneys.[38] In a matter of weeks, the Dade County Bar Association recruited

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> refugees in their exclusion proceedings. From this relatively advantageous location from the prospective of the refugees, INS has distributed them to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all willing to represent them.

Louis v. Meissner, 530 F. Supp. 924, 926 (S.D. Fla. 1981).

In July, 1981, the State of Florida brought suit against the federal government because the Krome Avenue detention facility was overcrowded. The government told the court that it would try to keep the population at Krome below 1,000 persons. Therefore, the INS had to transfer Haitians to other detention facilities throughout the country whenever Krome's population exceeded 1,000 detainees. Louis v. Nelson, 544 F. Supp. at 983. The district court determined these transfers were necessary to comply with the government's representations in the suit brought by Florida. *See* Graham v. Smith, No. 81-1497-CIV-JE (S.D. Fla. 1981). The court concluded that these transfers were not intended to deny plaintiffs' access to counsel, nor were they intended to discriminate against them. Louis v. Nelson, 544 F. Supp. at 983 n.27. By June, 1982, approximately 2,100 class members were detained at various detention facilities. *Id.* at 984.

34. This case was heard by Judge Alcee Hastings until December 3, 1981, when it was transferred to Judge Eugene Spellman. Louis v. Meissner, 532 F. Supp. at 883 n.1 (1982).

35. Louis v. Meissner, 530 F. Supp. at 930 (1981) (original emphasis omitted; emphasis supplied).

36. *Id.* at 928.

37. Jean v. Nelson, slip op. at 2779.

38. The Class consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

Louis v. Meissner, 532 F. Supp. at 884. Judge Spellman modified Judge Hastings's orders certifying the class and enjoining the defendants from holding exclusion hearings because of legal and factual developments that occurred subsequent to the entry of Judge Hastings's orders.

more than 300 attorneys to represent the plaintiffs.[39] Thereafter, the government could conduct exclusion hearings for class members represented by counsel but was enjoined from holding any exclusion proceedings for unrepresented class members until their claims were resolved.[40]

On June 18, 1982, following a six-week trial, the district court announced its findings of fact and conclusions of law.[41] Its final judgment followed on June 29th.[42] The court declared the new detention policy "null and void" and restored to "full force and effect" the parole policy that existed prior to May 20, 1981.[43] The district court ordered the government to release the Haitians,[44] including the more than one thousand held at the Krome Avenue detention facility.

The plaintiffs prevailed on their claim that the INS had violated the rulemaking procedures of the APA. "[W]hen the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way."[45] The court entered final judgment in favor of the government on the fifth amendment discrimination claim. The district court stated that the new immigration policy "was not well planned or executed and consequently it sometimes appeared to be arbitrary or inconsistent."[46] Nevertheless, the district court concluded that the plaintiffs had failed to prove by a preponderance of the evidence that they were detained because of their race or

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39. [S]ubsequent to the transfer, the Dade County Bar Association has made a significant and historic effort to obtain attorneys to represent indigent Haitian nationals, many of whom have been incarcerated at the Krome Detention Facility for over six months. In a matter of weeks, the Dade County Bar Association has been successful in obtaining over three hundred lawyers to represent the indigent Haitians so that their hearings may proceed and they may obtain some form of resolution of their asylum claims to remain in the United States.

Id. at 884-85 n.6. Prior to the modification, the class included only unrepresented Haitians. "To leave the class in that status would have placed the Haitians in detention in the situation of choosing between having counsel or having the protection of this Court's injunction, and any relief that may ultimately be obtained from this lawsuit." *Id.* at 885 n.6.

40. *Id.* at 885.

41. Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982), *aff'd in part, rev'd in part, and remanded sub nom.* Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

42. Louis v. Nelson, 544 F. Supp. 1004 (S.D. Fla. 1982), *aff'd in part, rev'd in part, and remanded sub nom.* Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

43. *Id.* at 1006.

44. *Id.* The court set forth an interim plan for release of the detained Haitians; *see id.* at 1007-09.

45. 544 F. Supp. at 1004.

46. *Id.* at 1002.

origin: "[t]hey were excludable aliens unable to establish a prima facie claim for admission and . . . non-Haitians were detained pursuant to this policy as well."[47] The release order mooted the first amendment right of access claim.[48]

B. *The Eleventh Circuit Decision*

On July 13, 1982, the United States Court of Appeals for the Eleventh Circuit denied the government's motion for a partial stay of the final judgment.[49] The government then appealed the district court's ruling that the new detention policy was null and void. The Haitians cross-appealed on the discrimination and right of access issues, as well as the district court's dismissal of the procedural claims.[50] The Eleventh Circuit heard oral argument on this expedited appeal on September 1, 1982. More than seven months later, on April 12, 1983, the Eleventh Circuit rendered its decision. It affirmed the district court's ruling on the APA claim, holding invalid the INS's new detention policy. The Eleventh Circuit found that the government had discriminated against the Haitians.[51] The appellate court held the district court's factual findings on the discrimination issue were "clearly erroneous."[52] The court concluded that the HRC's right of access under the first amendment was violated. The HRC attorneys were entitled to inform the detained Haitians about their legal rights. The court of appeals remanded the case to the district court with directions to provide specific relief, including: (1) an injunction against the discriminatory enforcement of a valid policy; (2) continued parole of class members; (3) record-keeping that will ensure nondiscriminatory application of immigration policies; (4) relief necessary to resolve the political asylum and access issues; and (5) "whatever further relief is neces-

47. *Id.* at 1004.

48. 544 F. Supp. at 1005 n.2.

49. Jean v. Nelson, 683 F.2d 1311, 1312 (11th Cir. 1982).

50. The district court dismissed the Haitians' claims of a right to (1) counsel during INS interviews; (2) notice of the nature of exclusion hearings; (3) access to counsel, friends, and relatives; (4) notice of the existence of a right to apply for political asylum; and (5) individual rather than mass exclusion hearings.

The court dismissed the first four claims on the ground that the violations alleged in INS practices and procedures were reviewable on appeal to the Board of Immigration Appeals and in a habeas proceeding, *see supra* note 26. The district court determined that it lacked subject matter jurisdiction to hear these procedural claims. The fifth claim was dismissed as moot because the INS agreed to halt the mass exclusion hearings. Louis v. Meissner, 532 F. Supp. at 888-89.

51. Slip op. at 2823-25.

52. *Id.* at 2833.

sary to ensure that all aliens, regardless of their nationality or origin, are accorded equal treatment."[53]

III. THE AUTHORITY OF THE EXECUTIVE BRANCH

The Eleventh Circuit incorrectly stated that "Congress and the Executive branch share the immigration power."[54] The legislative branch of the federal government has plenary power over immigration.[55] Congress delegates to the executive branch limited authority to administer immigration matters.[56] Constitutionally, the executive branch can exercise power over immigration in one of two ways: either through the President's power over foreign affairs[57] or through a statutory delegation from Congress.

When the President acts in the immigration context, a distinction must be drawn between whether he is administering immigration matters or exercising his foreign affairs powers. The United States Supreme Court has long recognized the distinction and has carefully delineated the powers of the President in the immigration context.[58] In *Jean v. Nelson*, however, the Eleventh Circuit failed to distinguish between the two sources of presidential power. The appellate court's commingling of presidential powers may have invited the government's petition for a rehearing en banc. The government contended in its petition for rehearing that the Eleventh Circuit's decision in *Jean v. Nelson* encroaches on presidential authority in immigration matters.[59] The portion of the opinion that deals with delegation doctrine indicates that the three-judge panel concluded that the President's authority over our national borders also gives him authority to act in immigration matters.[60]

The Eleventh Circuit's opinion reveals an improper reading of the Supreme Court's decision in *Ekiu v. United States*,[61] the semi-

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53. *Id.*

54. *Id.* at 2782.

55. U.S. CONST. art. 1, § 8; Lloyed Sabando Societa v. Elting, 287 U.S. 329, 334 (1932); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 336 (1908).

56. "[T]he Executive's authority is limited by the statutory grant of Congress," Slip op. at 2781.

57. U.S. CONST. art. II, § 2.

58. Ekiu v. United States, 142 U.S. 652 (1891); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1949).

59. Appellants'/Cross-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc*, Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

60. Slip op. at 2782.

61. 142 U.S. 652 (1891).

nal case on the issue of the constitutional allocation of immigration power. *Ekiu* states that the power to admit or exclude aliens "may be exercised either through treaties made by the President and the Senate, or through statutes enacted by Congress."[62] The President's authority to affect immigration through treaties is inherent in his power over international relations;[63] the Constitution confers the immigration power on Congress.[64]

The court of appeals similarly misapplied *United States ex rel. Knauff v. Shaughnessy*,[65] an immigration case that arose during World War II, in which the Supreme Court stated:

> Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency.[66]

Both cases on which the Eleventh Circuit relied held that because the President has inherent power over foreign affairs, broad delegations of power over immigration to the executive branch are permissible. "[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."[67]

Because Haitian immigration was a problem of national rather than international concern, the President constitutionally could not have exercised his power over foreign affairs to alter immigration policies.[68] Accordingly, the President could only act pursuant to his delegated powers. The Immigration and Nationality Act (INA) delegates to the President the power to suspend the entry of aliens if he finds that their entry would be detrimental to the interests of the United States.[69] The exercise of executive power under the INA requires a presidential proclamation.[70] President

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62. *Id.* at 659.

63. *Id.*

64. *Id.* The Supreme Court in *Ekiu* upheld the constitutionality of a statute delegating immigration power to the executive branch; the executive's inherent power was not an issue.

65. 338 U.S. 537 (1949).

66. *Id.* at 543.

67. Galvan v. Press, 347 U.S. 522, 531 (1954).

68. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (broad military powers of the Commander in Chief do not permit the President to halt a national strike).

69. 8 U.S.C. § 1182(f) (1976).

70. *Id.*

Reagan never issued a proclamation to suspend the entry of Haitians, although he did issue a proclamation to interdict the sailing vessels of all undocumented aliens on the high seas.[71] A presidential proclamation is the prerequisite to the exercise of the powers delegated to the executive under the INA. Failure to issue such a proclamation negates any claim that the President was exercising the power Congress delegated to him.

The INA confers additional authority over immigration matters to the executive branch. Under the INA, the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe . . . any alien applying for admission to the United States . . . ."[72] Congress's delegation of power to the Attorney General to parole does not encompass an affirmative grant of power to detain, although a decision "not to parole" effectively subjects an alien to detention. The Supreme Court generally construes delegated powers narrowly to prevent the exercise of unbridled discretion[73] and to avoid conflicts between the branches of government.[74]

For example, the Court held in *Kent v. Dulles*[75] that the Secretary of State, who had broad discretion in passport matters, did not have authority, absent a specific Congressional grant, to deny passports to American citizens whom the Secretary believed to be Communists. The case arose prior to the effective date of a law that granted the Secretary power to deny passports to Communists. The Court refused to permit the Secretary to curtail the free movement of citizens absent specific enabling legislation.[76] The Supreme Court reasoned that Congress did not intend by its previous silence to grant such pervasive power to the Secretary of State.

Similarly, in *Jean v. Nelson*, the Attorney General did not have the specific authority to detain Haitians under the INA. Three months after the detention of the Haitians began, the Reagan administration proposed immigration legislation.[77] In his letter

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71. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981).

72. 8 U.S.C. § 1182(d)(5)(A) (Supp. V 1981).

73. Kent v. Dulles, 357 U.S. 116, 128 (1958).

74. National Television Ass'n v. United States, 415 U.S. 336, 340-41 (1974).

75. 357 U.S. 116 (1958).

76. Although the case dealt with the exit rights of citizens rather than the entry rights of aliens, the Court indicated that extreme conditions involving danger to public safety are a prerequisite to permitting the legislative and executive branches to take coordinated actions when the constitutional power belongs to Congress. *Id.* at 127, 130.

77. The Reagan administration's bill, the Omnibus Immigration Control Act, was introduced on October 22, 1981. S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. S11,992 (daily ed. Oct. 22, 1981).

transmitting the Omnibus Immigration Control Act, the Attorney General recognized that existing legislation[78] "probably would not authorize such procedures as . . . the detention of aliens pending deportation proceedings . . . ."[79] Congress still has not passed the Omnibus Immigration Control Act, which would empower the President to declare an immigration emergency.[80] Under the administration's proposed bill the President would be able to expedite exclusion and asylum claims and to detain aliens pending deportation proceedings;[81] he does not have this power now.

Congress's failure to legislate on the controversial subject of immigration[82] does not empower the executive branch to implement its own immigration policies. The President did not use his delegated power, which would have required a proclamation, to exclude the Haitians. The Attorney General did not have the authority to detain Haitians. The executive branch clearly usurped the power of Congress. There was considerable public sentiment in favor of the government's policy of detaining Haitians, but popular appeal does not justify disregard for the law.[83] The Constitution confers on Congress the power to formulate immigration policy.

IV. VIOLATION OF APA RULEMAKING PROCEDURES

The Eleventh Circuit affirmed the district court's finding that the implementation of the new detention policy without compliance with APA procedures[84] rendered the policy invalid. The gov-

78. The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. V 1981).

79. Letter from Attorney General William French Smith to the Vice President of the United States, *reprinted in* 127 CONG. REC. S12,084-85 (daily ed. Oct. 22, 1981).

80. Omnibus Immigration Control Act, S1765, tit. VII, 97th Cong., 1st Sess., 127 CONG. REC. S11,999-12,001 (daily ed. Oct. 22, 1981).

81. *Id.* at § 240B., 97th Cong., 1st Sess., 127 CONG. REC. S11,999-12,000 (daily ed. Oct. 22, 1981).

82. The House Judiciary Committee noted the President's ongoing review of immigration policy and expected that the administration would submit legislation "in the near future." H.R. Rep. No. 264, 97th Cong., 1st Sess. 10, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 2577, 2579. Because of the overall consideration that the administration was giving to immigration policy, the House Judiciary Committee restricted the scope of the amendments to the Immigration and Nationality Act to reforms that the committee considered urgent and noncontroversial. *Id.*

83. The Eleventh Circuit noted that the district court's opinion stressed one principle: the government must "act within the letter of the law." Slip op. at 2778.

84. The APA's notice and comment provision provides:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

ernment had failed to promulgate the policy in accordance with the APA's "notice and comment" requirements.[85] The government initially argued that it had not engaged in rulemaking because statutes both mandated detention and left parole in the discretion of the Attorney General.[86] Thus, no rule[87] was necessary to imple-

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(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553 (1976).

85. *Id.* § 553(b).

86. Slip op. at 2794 (citing 8 U.S.C. § 1225(b) (detention) & § 1182(d)(5)(A) (parole)).

87. The APA defines the word "rule" as follows:

[T]he whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appli-

ment the policy.[88] The circuit court held that the admnistration's announcement of the detention policy amounted to a new rule of "general applicability."[89] Accordingly, the INS should have followed APA rulemaking procedures. The court stated that a far-reaching general policy that explicitly reverses a longstanding policy is a rule.[90] The government argued alternatively that, even if announcement of the new policy established a rule, surrounding circumstances brought the detention policy within the ambit of three specific exceptions to the notice and comment requirements.[91]

First, the government asserted an exemption because the policy dealt with a "foreign affairs function of the United States."[92] The Eleventh Circuit indicated Congress's intent that the exception be narrowly construed,[93] and added that nothing in the record supported a finding that notice and comment rulemaking would have resulted in "undesirable international consequences."[94] Second, the court found that the government's action could not come within the "interpretative rule" exception.[95] The new policy did not merely clarify or explain existing policy; it was actually "a substantive modification [of existing regulations] or adoption of new regulations."[96] Third, the government claimed that its action was a "general statement of policy."[97] The circuit court affirmed the dis-

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ances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

5 U.S.C. § 551(4) (1976) (emphasis supplied).

88. *See supra* notes 16-21 and accompanying text.

89. *See* the APA's definition of "rule" *supra* note 87.

90. Slip op. at 2794 (quoting American Trucking Ass'n v. United States, 688 F.2d 1337 (11th Cir. 1982)).

91. *See* 5 U.S.C. § 553 (1976), *supra* note 84.

92. 5 U.S.C. § 553(a)(1) (1976).

93. Slip op. at 2795 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 13 (1945)).

94. Slip op. at 2796. The court factually distinguished the government's cases as involving graver international consequences: Nademi v. INS, 679 F.2d 811 (10th Cir. 1982) (visa regulation for Iranian nationals during hostage crisis upheld); Malek-Marzbar v. INS, 653 F.2d 113 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 161 (1982) (departure regulations for Iranian nationals in response to hostage crisis upheld); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (INS directive rescinding deferred departures for Iranian students held to be within foreign affairs exception due to the President's response to the takeover of the United States Embassy in Teheran).

95. *See* 5 U.S.C. § 553(b)(A) *supra* note 84. The exception under this subsection covers both "interpretative rules" and "general statements of policy." The circuit court noted that the government neither distinguished the two nor offered any legal argument for the assertion that the policy change was merely an interpretative rule. Slip op. at 2796-97.

96. Slip op. at 2797 (quoting Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1979)).

97. *See* 5 U.S.C. § 553(b)(A) *supra* note 84.

trict court's conclusion that this exception was inappropriate, but determined that the lower court had applied an incorrect test.[98]

The Eleventh Circuit held that the general statement of policy exception does not apply to a rule that establishes a "binding norm,"[99] a rule whereby those implementing the policy have no discretion in its application. In developing the binding norm test,[100] the court briefly analyzed the function served by notice and comment rulemaking. Citing the District of Columbia Circuit's opinion in *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*,[101] the court emphasized that rulemaking procedures increase "the likelihood of administrative responsiveness to the needs and concerns of those affected."[102] The opportunity for objection to a new policy through notice and comment rulemaking would be paramount where the policy does not allow discretionary application, effectively precluding the public's ability to challenge the policy's application to unique circumstances at some time in the future. The exceptions to notice and comment procedures "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense."[103] The proper balance between the interests of the government and the public depends upon the degree to which the rule establishes a "binding norm."

The peculiar facts of this case prompted the court to conclude that the new policy had the effect of a binding norm.[104] In the ab-

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98. *See* Louis v. Nelson, 544 F. Supp. at 996-97. The district court found the "general statement of policy" exception did not apply for two reasons. First, the policy did not set a goal for the future, but rather reflected a procedure in immediate effect. Second, the lower court found the policy had a "substantial impact" on the incarcerated Haitians. *Id.* at 1000. Neither of these findings, according to the circuit court, were sufficient as a basis for concluding that the new rule could not be deemed a general statement of policy.

99. The term "binding norm," in this context, apparently originated in Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581 (1958). *See also* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (cited in Guardian Fed. Savings and Loan Ass'n v. Federal Savings and Loan Ins. Corp., 589 F.2d 658, 666 (D.C. Cir. 1978).

100. The Eleventh Circuit acknowledged Guardian Fed. Savings and Loan Ass'n v. Federal Savings and Loan Ins. Corp., 589 F.2d 658 (D.C. Cir. 1978), as the source of the test it adopted while attempting to further develop the underlying rationale. Slip op. at 2800 n.21.

101. 589 F.2d 658 (D.C. Cir. 1978).

102. Slip op. at 2800 (citing 589 F.2d at 662).

103. Slip op. at 2800 (quoting *Guardian Federal*, 589 F.2d at 662).

104. Slip op. at 2801-02 n.24. The Eleventh Circuit's application of the binding norm rule is problematical because the court retrospectively viewed the rule's effect to determine

sence of specific guidelines, "the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians."[105] Ranking government officials testified that the rigid, nondiscretionary policy of detention implemented by their subordinates was not the policy they had intended.[106] Nevertheless, the policy as implemented established a binding norm and should have been subjected to notice and comment rulemaking.[107]

One may misapprehend the significance of the APA issue as being merely of a technical nature: the INS failed to follow APA procedures as the courts said they must. The opinion limits federal agencies' future use of delegated authority to implement policy. Congress created the "general statement of policy" exception to established rulemaking procedures: the Eleventh Circuit gave meaning to the phrase.[108] In adopting the "binding norm" test, the Eleventh Circuit joined the growing number of circuits that have recently expressed concern over defining the limits of power delegated to executive agencies.

Because "the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District

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whether the rule created a binding norm. A prospective judicial approach is incompatible with an agency's obligation to make prospective determination of whether to engage in notice and comment rule making.

105. Slip op. at 2801.

106. Discerning precisely the intended effect of the new policy presented a problem to both the district court and the Eleventh Circuit. The testimony of former INS Commissioner Doris Meissner, Associate Attorney General Rudolph Giuliani, and INS Commissioner Nelson actually conflicted as to the meaning and details of the policy. For examples of the conflicts in testimony, see slip op. at 2788-89 n.9. "The officials contradicted one another several times, and did not agree on the substance of the policy. This evidence, and lack thereof, indicates the disarray with which the Administration pursued its new policy." Slip op. at 2788.

107. Pursuant to an order rendered by the district court, Louis v. Nelson, No. 81-1260-CIV-EPS (S.D. Fla. July 2, 1982) (30-day stay of injunction against enforcement of the detention policy with respect to future illegal entrants), the INS published an interim rule in the Federal Register regarding detention and parole of aliens. 47 Fed. Reg. 30,044 (1982) (to be codified at 8 C.F.R. §§ 212, 235). Although the publication solicited comments during a 30-day period commencing July 9, 1982, it involved the APA exception to the usually required 30-day period preceding the effective date. *See supra* note 84, APA § 553(d)(3). The INS cited as the requisite "good cause" for the APA exception that "the delays involved in customary publication would seriously impair the Service's ability to protect the country's borders and would be detrimental to the public interest." 47 Fed. Reg. at 30,044.

108. The court's treatment of the "foreign affairs" and "interpretative rules" exceptions suggests their application to these facts was not difficult to dismiss. *See* slip op. at 2795-97. The court dedicated considerably more attention to the "general statement of policy" exception than to the other two exceptions combined. "[A]nalyzing a rule within the general statement of policy exception is akin to wandering lost in the Serbonian Bog." Slip op. at 2799.

of Columbia Circuit,"[109] that court has played a major role in interpreting the APA. In *Pacific Gas & Electric Co. v. Federal Power Commission*,[110] the District of Columbia Circuit distinguished a bona fide general statement of policy from a substantive rule by noting that the former

> . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's *tentative intentions for the future.*[111]

Four years later in *Guardian Federal*, the District of Columbia Circuit Court devised an additional standard for assessing whether a rule was "finally determinative of the issues or rights to which it is addressed,"[112] and therefore a binding norm rather than a general statement of policy. *Guardian Federal* focused on the rule's effect on discretionary application: "If it appears that a so-called [statement of general policy] is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law."[113]

The District of Columbia Circuit Court in *American Bus Association v. United States*[114] restated the alternative criteria for a binding norm. A purported statement of general policy is subject to rulemaking requirements if that policy (1) has an effect that is not exclusively prospective or (2) prevents or impedes the freedom of the agency and its decisionmakers to exercise discretion.[115] At least five circuits have employed these criteria.[116]

In *Jean v. Nelson*, the district court relied on the first criterion of *American Bus* and concluded that the detention policy's

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109. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 535 n.4 (1978).

110. 506 F.2d 33 (D.C. Cir. 1974).

111. *Id.* at 38 (emphasis supplied).

112. 589 F.2d at 666 (D.C. Cir. 1978) (quoting Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (1974)).

113. *Id.* at 666. The Eleventh Circuit quoted this language in its opinion. Slip op. at 2800-01 n.21.

114. 627 F.2d 525 (D.C. Cir. 1980).

115. *Id.* at 529.

116. *See* American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982); Cleveland Cliffs Iron Co. v. I.C.C., 664 F.2d 568 (6th Cir. 1981); American Trucking Ass'n v. I.C.C., 659 F.2d 452 (5th Cir. 1981); Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796 (8th Cir. 1981); American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir. 1980).

failure to apply only prospectively was indicative of its binding nature.[117] The Eleventh Circuit disagreed with the district court even though other circuits have generally accepted the first criterion.[118] The Eleventh Circuit remarked that "[n]othing in the statutory phrase 'general statement of policy' requires or even suggests that to fall within the exception the policy must take effect in the future."[119]

The court's desire to emphasize the second standard—the policy's effect on the exercise of discretion—caused it to focus its attention on whether "the agency, or its implementing official, [was] free to exercise discretion to follow, or not to follow, the general policy in an individual case."[120] The court did not, however, fully acknowledge the extent to which discretion was abridged in this case. The new policy also eliminated the discretion that INS officials had exercised under the old policy of general parole.[121] Before the announcement of the new policy, INS officials exercised their discretion in paroling aliens.[122] Under the new policy as implemented, mandatory detention superseded the preexisting discretion of parole. Without a written policy to scrutinize, the Eleventh Circuit had to examine the way immigration officials actually implemented the policy. The court found that the policy's vagueness resulted in "[a] broad rule of detention with undefined exceptions—susceptible to rigid enforcement with no opportunity to avoid the rule's harsh results."[123] INS employees at the operational level understood that all Haitians were to be detained on a nondiscretionary basis. While the feared result of an absence of guidelines is the exercise of unbridled discretion, the lack of standards in this case, ironically, caused a totally nondiscretionary policy of detention.

The Eleventh Circuit made clear that parties affected by agency policy changes must have the opportunity to challenge

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117. The district court had stated that

> [t]he new detention policy is not a general statement of policy that INS hopes to implement in the future. It is being implemented right now! Nor does it set a goal that future proceedings may achieve, for the change has been presented as a fait accompli . . . . Thus, the new criteria for release is not exempt from APA requirements as a "general statement of policy."

Louis v. Nelson, 544 F. Supp. at 973, 996-97.

118. *See* cases *supra* note 116.

119. Slip op. at 2798.

120. Slip op. at 2800.

121. *See* slip op. at 2785-86.

122. *See supra* text accompanying notes 5-9.

123. Slip op. at 2802.

those policies, either by notice and comment rulemaking or on a case-by-case basis at the level of implementation. These safeguards ensure clear guidelines. Whether the failure to provide guidelines resulted from administrative oversight or a calculated attempt to avoid public scrutiny of a controversial policy remains a subject for speculation. In either case, the court sent a message to policymakers: the public must be able to challenge new agency policies that affect substantial rights.

V. A STARK PATTERN OF DISCRIMINATION

The Haitians did not challenge the government's sovereign power to detain aliens.[124] Rather, they asserted that the INS discriminated on the basis of race or national origin, in the exercise of its parole power.[125] Accordingly, the Haitians claimed a violation of their fifth amendment right to equal protection of the laws.[126] The district court found that the INS's new policy had a greater impact on the Haitians than on other nationalities, but concluded that the Haitians had not proven that the INS discriminatorily applied its parole policy.[127] The Eleventh Circuit held this conclusion to be

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124. "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land *shall be detained for further inquiry.*" 8 U.S.C. § 1225(b) (1976) (emphasis supplied). The Haitians could not challenge the statute as violative of their constitutional rights because Congress has plenary authority over immigration matters. *See supra* note 55.

125. *See* 8 U.S.C. § 1182(d)(5) (Supp. V 1981), which authorizes the attorney general to parole excludable aliens. The plaintiffs are excludable aliens. 544 F. Supp. at 998.

126. The Eleventh Circuit acknowledged that the Haitians had a fifth amendment right to equal protection of laws. Although the fifth amendment does not contain an equal protection clause, it does protect all "persons" from invidious discrimination by the federal government. Buckley v. Valeo, 424 U.S. 1, 93 (1976). It is the discrimination that violates the due process requirement of the fifth amendment. Weisenberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). Under the fifth amendment, analysis of discrimination is treated the same as equal protection analysis under the fourteenth amendment. *Buckley*, 424 U.S. at 93. Aliens seeking initial admission are "persons" guaranteed due process of law by the fifth and fourteenth amendments. Plyler v. Doe, 102 S. Ct. 2382, 2391 (1982). Accordingly, although Congress has delegated to the executive branch the power to parole aliens, *see* 8 U.S.C. § 1182(d) (Supp. V 1981), the fifth amendment prohibits the executive from exercising power in an invidiously discriminatory manner, such as on the basis of race or national origin.

The government did not appeal the issue of whether the Haitians had a fifth amendment right to equal protection. Nevertheless, the circuit court affirmed the district court's determination that they did. Slip op. at 2803 n.28.

In addition to the fifth amendment violation, the Eleventh Circuit noted that the Haitians had an alternative challenge to the INS's actions. The court determined that Congress intended that the INS apply the parole statutes in a nondiscriminatory fashion. Slip op. at 2804-05. Thus, the Haitians could have challenged the INS on statutory grounds.

127. 544 F. Supp. at 1001.

"clearly erroneous"[128] and declared that the evidence disclosed "a stark pattern of discrimination."[129]

The court of appeals carefully examined whether the Haitians had shown by a preponderance of the evidence that the government's actions reflected, in part, discriminatory intent.[130] The court concluded that the Haitians had produced sufficient evidence to support a prima facie[131] claim and that the government had not rebutted successfully the Haitians' showing.[132]

The Haitians presented statistical evidence to establish discriminatory intent.[133] An expert, after analyzing data supplied by the INS,[134] testified that the difference between the number of Haitians who should have been released according to the statistics and the actual number released was a " 'statistical joke.' "[135] If Haitians and non-Haitians were detained or paroled for the same reasons, there should have been no significant statistical difference

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128. Slip op. at 2815.

129. *Id.* at 2807.

130. Under the rule enunciated in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), a party challenging an action as discriminatory must establish that the challenged action was motivated at least in part by a discriminatory purpose. The impact of a practice may provide circumstantial evidence of discriminatory intent. *Id.* at 265-66.

131. A prima facie case would be established solely on the basis of the evidence presented by the plaintiff if the plaintiff could survive a motion to dismiss at the close of its case. Slip op. at 2807.

132. The Eleventh Circuit noted that the district court blended its analysis of the preliminary and ultimate factual issues. *Id.* The court postulated that had the district court analyzed the sub-issues separately, it too would have concluded that the Haitians' statistical evidence established a stark pattern of discrimination. *Id.*

133. The court stated that the statistical evidence alone estabished "a prima facie showing of discriminatory intent" under the standard of *Arlington Heights*, 429 U.S. 252 (1977). Slip op. at 2810.

134. The data were "uniquely in the government's possession" and made available to the Haitians only after numerous discovery requests and motions. Slip op. at 2820 n.46. This data came from three separate sources: (1) secondary inspection logs prepared at Miami International Airport between August 1981 and April 1982, (2) INS District VI (the South Florida region) records for August 1 through November 1, 1982, and (3) Krome Avenue detention facility computer records for January through April, 1982.

The first set of data reflected the results of secondary inspection of immigrants, which occurred when the initial immigration officer doubted an individual's right to enter. Individuals who underwent secondary inspections were either paroled, paroled for exclusionary hearing, detained, or inspection was deferred. *Id.* at 2808-09. The second set of data covered persons placed in exclusion proceedings or in an exclusion category, and included, *inter alia*, nationality, length of detention, and date of parole. *Id.* at 2809. The final set of data contained detention and parole information from the Krome Avenue detention facility. *Id.* at 2810.

135. Id. at 2809. The government challenged the expert's statistical methodology. *See infra* notes 144-50 and accompanying text.

between the two populations. In the expert's opinion, the probability that the statistical differences resulted from chance was " 'on the order of less than two in ten billion' "[136] and in some cases " 'far less than one in ten billion.' "[137] From this severely disproportionate impact on Haitians, the appellate court inferred a discriminatory governmental intent.

The Haitians introduced nonstatistical evidence also.[138] Both government and nongovernment witnesses testified that Haitians as a group were consistently singled out for mistreatment; this established a history of discrimination.[139] Certain departures from normal exclusion adjudication procedures, such as mass hearings behind closed doors with inadequate translators, further indicated discriminatory intent.[140] Finally, an examination of INS papers revealed a special "Haitian Program."[141] Unlike documents pertaining to other aliens, the INS coded by name or by number documents referring to Haitian immigrants.[142] This nonstatistical evidence,[143] together with the Haitians' statistical evidence, convinced the Eleventh Circuit that the Haitians had established a prima facie case of intentional governmental discrimination.

Next, the court examined the government's rebuttal.[144] The government challenged the Haitians' statistical evidence, claiming that the statistical method used by their expert witness was not

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136. Slip op. at 2809.

137. *Id.*

138. When impact alone is insufficient to prove discriminatory intent because the impact does not establish a stark pattern of discrimination, courts should consider the following circumstancial evidence: (1) historical background, (2) the sequence of events leading up to the challenged action, (3) departures from normal procedures as well as substantive departures, and (4) legislative or administrative history. *Arlington Heights*, 429 U.S. at 265-68.

139. Slip op. at 2811. Additionally, the court accepted evidence of "numerous lawsuits initiated in the past to challenge disparate treatment of Haitian immigrants" as proof that satisfied the historical background requirement of *Arlington Heights*. *Id.*

140. *Id.* at 2813.

141. *Id.* at 2814.

142. *Id.* One telex communication from an INS Regional Commissioner to subordinates indicated that some administration officials understood that the new policy was not to be applied universally. The telex, dated September 2, 1981, provided in full:

> PRIORITY
> BE ADVISED CURRENT SERVICE POLICY AND SOUTHERN REGION POLICY RE (HAITIANS) APPLICANTS FOR ADMISSION/ASYLUM REQUIRE THEY BE DETAINED PER I&NA 235(B) AND 8 CFR 235.3(B).

Id. at 2815 (parenthetical in original).

143. The court held that the district court erroneously disregarded evidence of the *Arlington Heights* factors, which showed an "ongoing pattern of discrimination." *Id.* at 2811 (emphasis in original); *see also supra* note 138.

144. Slip op. at 2815-23.

valid to prove discriminatory impact. The expert had performed a binomial analysis on the data.[145] This statistical method predicts the existence of a non-random factor as the explanation for variations between populations. The plaintiffs contended that discrimination was the non-random factor that produced a lower parole rate for Haitians than for non-Haitians. The government argued that binomial analysis was not valid to prove impact because parole is not a random process. The government asserted also that a number of nondiscriminatory factors used by INS officers in their parole decisions accounted for the treatment of Haitians.

The Eleventh Circuit discounted the government's argument for several reasons. The United States Supreme Court has allowed binomial analysis in discrimination cases even though more than one non-random factor might account for the statistical disparities.[146] The Court has stated also that "fine tuning" of statistics is not necessary when there is a glaring discrepancy.[147] The Eleventh Circuit, unlike the district court, was not troubled by the expert's failure to account for potentially significant nondiscriminatory factors that might enter into parole decisions.[148] Because the INS had no published parole policy, the Eleventh Circuit viewed as nonsensical any requirement that the plaintiffs' statistics account for vague, uncertain, or unknown factors.[149] The court was particularly disturbed that the government failed to offer its own statistical evidence in rebuttal.[150]

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145. Binomial analysis compares the incidence of an event in a specific population (e.g., the parole rate for Haitians) with the incidence of an event in a base population (e.g., the parole rate of non-Haitians). The extent to which the specific population's rate varies from the base population's rate is ultimately expressed in terms of standard deviations. The United States Supreme Court has stated that "[a]s a general rule . . . if the difference between the [two rates] is greater than two or three standard deviations," then a non-random factor, such as discrimination, is responsible for the difference. Castanada v. Partida, 430 U.S. 482, 497 n.17 (1977).

146. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (employment discrimination); Castanada v. Partida, 430 U.S. 482 (1977) (jury selection).

147. International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977). The Supreme Court has warned also that "[w]hen special qualifications are required . . ., comparisons to the general population . . . may have little probative value." Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (employment discrimination).

148. The expert did attempt to account for one potential nondiscriminatory factor—documentation status. Adjusting the District VI data, *see supra* note 134, to reflect documentation status, the expert found that only one out of more than 20 tests yielded results showing a nondiscriminatory impact. Slip op. at 2809. The expert did not analyze other potentially significant factors, such as age, reason for entry, or health status. Louis v. Nelson, 544 F. Supp. at 982.

149. Slip op. at 2817.

150. In all, the court gave seven reasons why the government's rebuttal of the plaintiffs'

As the second prong of its rebuttal, the government offered three explanations for the disparate treatment of the Haitians.[151] First, the government argued that the district court's injunction prohibiting exclusion hearings for unrepresented class members was responsible for the prolonged detention of the Haitians. Disagreeing, the Eleventh Circuit concluded that the government's new immigration policy, and not the injunction, precluded parole. Additionally, the court hesitated to allow the government to profit from its own wrongdoing.

Second, the government argued that the INS, which had adopted special procedures to ensure that Haitians were not coerced into voluntarily withdrawing from our borders, prolonged the detention. In response to HRC challenges of coercion and misrepresentation by INS officials, the INS changed procedures and required an immigration judge to preside at voluntary withdrawal proceedings. This slowed the processing of Haitians. The court did not, however, agree that this special INS procedure prevented the paroling of Haitians.

In addition to blaming the district court and the INS, the government accused the State Department of requiring Haitians to present more evidence than non-Haitians were required to present to establish a claim for asylum. This greater burden of proof for political asylum further delayed parole, according to the government. The court concluded that the INS, regardless of State Department policy, had an obligation to expedite asylum procedures.

Overall, the Eleventh Circuit found "a strong case of discrimination,"[152] rebutted only by "self-serving" testimony, "mere protestations," and "arguments of counsel."[153] The court found that the INS had indeed violated the Haitians' fifth amendment equal protection rights.

VI. Constitutional Rights of Excludable Aliens

The Eleventh Circuit's decision in *Jean v. Nelson* is signifi-

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statistical evidence failed. *See* slip op. at 2816-21.

151. The district court found merit in these contentions, stating that the disparate impact could be explained "on grounds other than race and/or national origin." 544 F. Supp. at 1000. The Eleventh Circuit, on the other hand, characterized the explanations as "culprits" that the government used to exonerate itself from responsibility for the disparate impact of its new immigration policy upon the Haitians. Slip op. at 2821-23. The circuit court rejected the explanations as "largely irrelevant." *Id.* at 2821.

152. *Id.* at 2823.

153. *Id.* at 2824.

cant in its finding of large-scale discrimination by the federal government on the basis of race or national origin. While cases involving discrimination by state governments are legion,[154] the federal government has rarely been found liable for similar constitutional violations.[155] The opinion is most noteworthy, however, because it concluded that excludable aliens[156] have fifth amendment rights.[157] There is a paucity of precedent for this conclusion.

The Supreme Court of the United States has said repeatedly that the Constitution gives Congress plenary authority over immigration matters.[158] Accordingly, the Court has held that Congress may exclude aliens for any reason, including race or national origin.[159] Not all aliens have the same constitutional rights. An alien who has entered the country, even illegally, has constitutional rights that substantially limit the powers of both state and national governments.[160] Conversely, an alien who is stopped at the border prior to entry is excludable and has few constitutional rights.[161] His status as an excludable alien does not change when he is taken to a detention facility physically within the country or when he is paroled into the country pending an exclusion hearing.[162] The Supreme Court has created a legal fiction that the alien is standing at the border and has never "entered" the country.[163]

The Court has not accorded excludable aliens the fifth amendment right to due process in immigration matters, as *Shaughnessy*

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154. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (denial of zoning request violated equal protection clause); Graham v. Richardson, 403 U.S. 365 (1971) (discrimination against aliens in awarding state welfare benefits violated equal protection clause); Loving v. Virginia, 388 U.S. 1 (1967) (state antimiscegenation statute violated equal protection clause); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax violated equal protection clause).

155. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hibayashi v. United States, 320 U.S. 81 (1942). *But see* Hill v. Gautreaux, 425 U.S. 284 (1976) (Department of Housing and Urban Development violated fifth amendment and Civil Rights Act of 1964).

156. The Haitians were considered excludable aliens as defined in 8 U.S.C. § 1182(a) (West 1970 & Supp. 1983).

157. Slip op. at 2803.

158. *See supra* note 55.

159. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889).

160. *See* Plyler v. Doe, 102 S. Ct. 2382, 2391 (1982).

161. *See* Landon v. Plasencia, 103 S. Ct. 321, 329 (1982) ("alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"). *See generally* Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 GEO. L.J. 1303, 1306-09 (1982).

162. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); *see also* 8 U.S.C. § 1182(d)(5)(A) (West Supp. 1983) (parole of excludable aliens is not regarded as admission).

163. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958).

v. United States ex rel. Mezei[164] acutely illustrates. For national security reasons, the Attorney General excluded Mezei, an alien, from the country. To avoid publicly disclosing the confidential information on which the exclusion decision was made, the Attorney General denied Mezei a hearing. No other country would accept him, and Mezei was detained at Ellis Island for twenty-one months. The Supreme Court framed the issue as whether the Attorney General's continued exclusion of Mezei without a hearing was "an unlawful detention."[165] The Court held that the denial of a hearing did not violate due process. Rather, the Court said, "Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned."[166]

The Eleventh Circuit confronts this doctrine in *Jean v. Nelson*. The Haitians are excludable aliens. The Krome Avenue detention facility is an Ellis Island. The legal problem parallels that of *Mezei*—that is, whether the executive branch's prolonged detention of the Haitians was unlawful.

To circumvent *Mezei*, the Haitians argued, and the Eleventh Circuit affirmed, that excludable aliens have a fifth amendment right, narrowly confined, that protects them against invidious discrimination in the enforcement of certain procedures attendant to the alien-admissions process. The Haitians do not have a due process right to the availability of parole, but they do have an equal protection right to be treated in a nondiscriminatory manner in whatever parole process has been provided.

Does this mean that Congress could have prohibited parole solely for Haitians? Language in the opinion implies an affirmative answer. In acknowledging that excludable aliens may not have full equal protection rights, the court argued that because Congress enacted a neutral parole statute, the executive was obliged to enforce it in a nondiscriminatory fashion.[167] "This distinction, between legislation and enforcement, is critical. *Congress* can legitimately make distinctions among . . . aliens that would be unacceptable if applied to citizens, . . . but '[i]n the *enforcement of these policies*, the Executive Branch of the government must respect the procedural safeguards of due process.' "[168]

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164. 345 U.S. 206 (1953).

165. *Id.* at 207.

166. *Id.* at 212 (quoting United States ex rel. Knauff v. Shaugnessy, 338 U.S. 537, 544 (1950)).

167. Slip op. at 2804-05.

168. *Id.* at 2805 (quoting the district court's opinion, 544 F. Supp. at 998 (quoting Gal-

To overcome the excludable alien fiction, the court boldly set up its own paradigm. Excludable aliens have no fifth amendment right of due process or equal protection in regard to immigration legislation, but the fifth amendment protects Haitians from invidiously discriminatory enforcement of the legislation. The opinion, however, illustrates the problem of outdated case law. The court apparently considered itself bound by the "entry fiction," which poses a doctrinal barrier to constitutional rights of aliens. Unfortunately, the court was forced to construct a contorted paradigm to achieve a just result.

A better doctrinal approach would extend full constitutional rights to all persons within the territorial jurisdiction of the United States. For almost one hundred years the United States Supreme Court has recognized that any person within a state's jurisdiction, including an illegal alien, enjoys at least some constitutional rights.[169] Today, the Court is moving towards an extension of equal protection guarantees to all persons within the territory of the United States.[170] This approach reflects the understanding that the Constitution governs all activity within the United States.

By clothing all persons with full constitutional rights at the moment they become subject to this country's laws, we avoid the inequities inherent in the current doctrinal formulation. Under *Knauff* a person's constitutional rights are defined by reference to the power granted to Congress. Under the profferred approach, courts no longer would need to make difficult factual decisions as to when constitutional rights attach.[171] Instead, courts would decide constitutional claims raised by illegal aliens—excludable or deportable—no differently than similar claims raised by citizens.[172] Thus, an equal protection claim raised by any alien would be analyzed in three steps:

(1) Does the government activity discriminate in its treatment of the alien?

(2) What level of scrutiny is appropriate in examining the va-

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vin v. Press, 347 U.S. 522, 531 (1954)) (emphasis in district court opinion).

169. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (deportable alien entitled to fourteenth amendment equal protection guarantees).

170. "Our cases applying the Equal Protection Clause reflect the same territorial theme . . . ." Plyler v. Doe, 102 S. Ct. at 2392 (footnote omitted) (deportable illegal aliens). The fifth and sixth amendments have long protected all persons within United States territorial jurisdiction. Wong Wing v. United States, 163 U.S. 228 (1896).

171. *See supra* notes 169-70 and accompanying text.

172. For a similar approach to the issue of aliens' constitutional rights, see Note, *supra* note 161.

lidity of the governmental activity given the nature of the classification or the right involved?

(3) Under that level of scrutiny, is the challenged governmental activity constitutional?

In *Jean v. Nelson* the above issues would have been resolved as follows: First, the Haitians proved that the government discriminated against them.[173] Second, the government's activity distinguished between persons on the basis of national origin, a suspect classification,[174] which demands strict scrutiny. Third, the government did not meet its burden of proving both that detention served a compelling interest and that it was the least restrictive means to that end.[175]

This analysis is not limited to the enforcement of immigration laws by the executive branch; it also applies to Congress's exercise of its power in formulating immigration laws. The Constitution grants Congress plenary power to make these laws,[176] but when Congress enacts a law repugnant to the Constitution, the courts have a duty to declare that law void.[177]

Granting constitutional rights to all persons within the territorial jurisdiction of the United States would allow the courts to test the constitutionality of immigration laws. In the equal protection context, any challenge requiring greater judicial scrutiny than "mere rationality" will force the government, at a minimum, to articulate the interest being served by its course of action. Only when competing interests are identified can courts fairly decide cases according to constitutional mandates.

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173. *See supra* notes 125-33 and accompanying text.

174. Oyama v. California, 322 U.S. 633, 646 (1948); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

175. The Eleventh Circuit's equal protection analysis was incomplete. By only performing the first step of the analysis, one could infer that the court considered discriminatory classification to be unconstitutional per se. Perhaps the court implicitly applied strict scrutiny and held that the government failed to prove a compelling interest, given the court's finding that the government's case consisted of "nothing but the 'mere protestations' and 'arguments of counsel." Slip op. at 2824.

176. U.S. CONST. art. I, § 8, cl. 4.

177. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). Congress's immigration power is analagous to its commerce power under the Constitution, U.S. CONST. art. I, § 8, cl. 3. If one adopts the position that Congress has plenary power over the content of immigration laws, then courts must defer to Congress under the political question doctrine on issues concerning who may be admitted, or the criteria to be used for admissions decisions. Any controversies beyond this limited scope would be justiciable. Thus all laws detailing admissions *procedures* would be subject to judicial review.

VII. First Amendment Rights of Access

> On August 10, 1981, Defendants conducted proceedings for four or five Haitian aliens who had requested counsel without advising counsel for HRC, Inc., of these hearings. As a result, without representation, these aliens were issued final orders of exclusion and deportation. Moreover, as without counsel, they failed to understand their right to appeal, they failed to file the requisite notice of appeal to the Board of Immigration Appeals. . . . Their only possible recourse is the filing of a habeas corpus petition to review the fairness of the procedures they were subjected to. This conceivable remedy is available, of course, only if these aliens may have access to counsel and counsel may have access to aliens to explain the nature of this remedy. Yet, when an HRC, Inc. attorney requested to meet with these refugees to inform them of their right to file a habeas corpus petition to challenge the legality of the exclusion procedures to which they were subjected, and to offer to provide representation . . . defendants denied counsel for HRC, Inc. access to these aliens. . . . The habeas remedy for these aliens is, of course, totally meaningless.[178]

The HRC assserted that the INS had violated its political and associational rights to gather and disperse information under the first amendment by severely restricting its access to the detained Haitians. The Haitians alleged that the INS had also violated their first amendment right to communicate with HRC attorneys and employees, and with friends and relatives.[179] Concluding that the detention was unlawful under the APA, the district court held these access claims were moot.[180] The Eleventh Circuit disagreed. Because the INS could revoke the parole of class members under

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178. Plaintiffs' Supplemental Memorandum of Law in Support of Motion for Preliminary Injunction and in Response to Defendants' First Amendment Argument at 10-11, Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

179. The Haitians argued that they had been denied systematically "access to attorneys, particularly those of HRC, both before and after the filing of G-28 forms, which serve as a Notice of Appearance in immigration proceedings." Brief for Appellees/Cross-Appellants at 64, Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

> Access is denied during weekends, evening hours, meal hours, visiting hours, whenever aliens are moved, and after sundown . . . . Appellants transferred Haitians to remote areas which lacked interpreters and attorneys, making no effort to determine whether they had counsel or relatives in Miami. Appellants consistently denied telephone access to and by refugees of many of the detention facilities so that refugees could not contact attorneys, relatives and other individuals, and HRC and other civil liberties organizations could not solicit clients.

Id. at 66-67.

180. 544 F. Supp. at 1005 n.2.

certain circumstances and because the INS had not abandoned its detention policy, the claims were not moot.[181] The court, therefore proceeded to the merits.

A. *Access to the Haitians*

The appellate court sustained the HRC's "purely legal claim of a right to solicit clients in detention."[182] Relying on two Supreme Court cases, *In re Primus*[183] and *NAACP v. Button*,[184] the Eleventh Circuit stressed that the HRC—the "politically active representative of the Haitian community"[185]—may inform clients and prospective clients of their legal rights when it does so as "an exercise of political speech unaccompanied by expectation of remuneration."[186]

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181. Slip op. at 2831. *See supra* note 107.

182. Slip op. at 2832.

183. 436 U.S. 412 (1978).

184. 371 U.S. 415 (1963).

185. Slip op. at 2832.

> Ample evidence supports HRC's role as a politically active representative of the Haitian community (citations omitted). Evidence also shows that absent HRC's assistance many of the refugee class members would never have been informed of important statutory rights accorded them by Congress. Consequently, we uphold the efforts of HRC in this regard.

Id.

186. *Id.* In NAACP v. Button, the Supreme Court held that the activities of the NAACP, its affiliates, and its legal staff were "modes of expression and association protected by the First and Fourteenth Amendments." 371 U.S. at 428-29. These activities included the solicitation of prospective litigants for the purpose of furthering their civil rights objectives. The NAACP had argued that Virginia statutes prohibiting solicitation of legal business infringed their right to associate with and advise persons who seek legal redress for infringements of their rights. The Court affirmed the NAACP's right to "engage in association for the advancement of beliefs and ideas." *Id.* at 430.

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local . . . . It is thus a form of political expression.

Id. at 429.

In *In re Primus*, a part-time American Civil Liberties Union (ACLU) attorney sought to "further political and ideological goals through associational activity, including litigation." 436 U.S. at 414. The attorney had written a letter asking a woman who had been sterilized whether she wanted to sue the doctor who had participated in a program that sterilized or threatened to sterilize women as a condition of their continued receipt of medical assistance under the Medicaid program. The attorney's actions were "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain." *Id.* at 422.

The Supreme Court of South Carolina found the ACLU attorney engaged in unethical conduct because she had solicited a client for a non-profit organization, "which, as its primary purpose, renders legal services." *Id.* at 427. It rejected the attorney's first amendment argument by attempting to distinguish her case from the NAACP's case in *Button*:

Unfortunately, the Eleventh Circuit's analysis of the detainees' right of access claim is confusing and its findings are ambiguous. Confusion crept into the opinion because the court attempted to distinguish and analyze separately the claims of the HRC and the detained Haitians. Yet throughout its analysis, the court inadvertently referred to "plaintiff's" rights and "plaintiffs' " rights interchangeably,[187] thereby obfuscating many definitive statements regarding the detainees' first amendment rights.

B. *The Haitians' Rights of Access*

Although the court found "merit" in the detained Haitians' first amendment claims, intimating that the Haitians have first amendment rights,[188] it failed to conclude expressly whether these rights are rights independent of the HRC or whether they are reciprocal rights derived from the HRC's right to gather and disperse information. The appellate court, citing *Cruz v. Beto*,[189] a Fifth Circuit decision, strongly suggested the Haitians have reciprocal rights of access. The court had established in *Cruz* that "certain rights of mutual access exist between prisoners and counsel."[190]

"Whereas the NAACP in that case was primarily a political organization that used litigation as an adjunct to the overriding political aims of the organization, the ACLU has as one of its primary purposes the rendition of legal services." *Id.* (original quotation marks omitted). The United States Supreme Court reversed: "For the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.' " *Id.* at 428. "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' (citation omitted) including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance.' " *Id.* at 432.

In Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 531 (S.D. Fla. 1980), *aff'd as modified*, 676 F.2d 1023 (5th Cir. 1982), HRC representatives were excluded from the room where Haitians awaited their asylum interviews. The HRC alleged this violated its first amendment rights and the rights of its members. The court concluded: "There is simply no justification for the continuing abuse of the Haitian Refugee Center's first amendment rights." *Id.* at 532.

187. Slip op. at 2831-32.

188. *Id.* at 2832.

189. 603 F.2d 1178 (5th Cir. 1979).

190. Slip op. at 2832. In *Cruz*, the Fifth Circuit upheld the district court's order enjoining a prison official from banning an attorney's communications with clients and potential clients who were imprisoned.

> The district court concluded that the prisoners' first and fourteenth amendment rights had been violated by the unreasonable limitations on their right to access to the courts, [and] their right to receive effective legal assistance from the attorney of their choice . . . . Furthermore, it found that the arbitrary barring of attorney Cruz from communicating with her clients contravened her first and fourteenth amendment rights to practice her profession.

603 F.2d at 1181.

The court should have expressed more clearly whether Haitians have first amendment rights independent of the HRC. Because the Eleventh Circuit found that the detained Haitians have fifth amendment rights, it follows that they also should possess first amendment rights. Without the right of access to attorneys, the detained Haitains' fifth amendment rights would be meaningless.[191]

Once it determined that the HRC and the detained Haitians' first amendment claims were not moot, the Eleventh Circuit, "[i]n the interest of judicial economy,"[192] directed the district court on remand to review the INS's access guidelines.[193] The court agreed with the INS that "regulation of aliens in detention is analogous to regulation in the prison context."[194] The Eleventh Circuit noted the guidelines "appear overly restrictive,"[195] and instructed the district court on remand to balance the INS's "interest in detention and security against the plaintiffs' first amendment rights."[196] Security concerns at prisons merit restrictive guidelines for visitors. The Haitians argued that their first amendment rights are

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191. *See supra* text accompanying note 1. The Haitians' argument on this issue is correct:

> Aliens are protected by the Bill of Rights provisions of the Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Thus, they receive the protection of the First Amendment, the Fifth Amendment due process clause, and the Fourteenth Amendment due process and equal protection clauses. Wong Wing v. United States, 163 U.S. 228, 238 (1896) . . . . J. NOWACK, [sic] R. ROTUNDA & J. YOUNG, Constitutional Law, 589 (1978).

Plaintiffs' Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law, Jean v. Nelson, No. 82-5772, slip op. at 2770 (11th Cir. Apr. 12, 1983).

192. Slip op. at 2832.

193. The Eleventh Circuit agreed with the INS that immediate injunctive relief was inappropriate because it believed it lacked a sufficient factual record describing when and how the INS denied access between the HRC and the detainees. *Id.* at 2831. "[T]his case does not involve an absolute denial of access, nor does it involve rules we can hold facially impermissible without knowledge of countervailing circumstances." *Id.* The HRC denied that the record was insufficient and argued that regardless of the record, the INS guidelines were facially invalid under the strict requirements of the first amendment because "they grant INS officials unreviewable and unbridled discretion to deny access on mere whim or caprice, personal dislike or prejudice." Brief for Appellees/Cross-Appellants at 65, Jean v. Nelson, No. 82-5772 (11th Cir. Apr. 12, 1983).

194. Slip op. at 2831-32. But the court also recognized the differences between the detained Haitians and prisoners: "The analogy serves its purpose insofar as concerns for security weigh in the balancing process. We limit our holding on this narrow point; there are obvious differences between temporary detention of innocent aliens and the incarceration of convicted felons." *Id.* at 2832.

195. *Id.* at 2832 n.61.

196. *Id.* at 2832.

subject only to reasonable time, manner, and place restrictions.[197] Political expressions and associations may be regulated only when there is a compelling interest to do so and there are no less restrictive alternatives.[198]

The Eleventh Circuit has recognized that first amendment rights run between the HRC and the detained Haitians. The court did not expressly conclude that the detainees have their own first amendment rights of access; implicitly, the court reached that conclusion. Nevertheless, the district court, on remand, cannot uphold guidelines that unduly restrict the detainees' access rights. To do so would infringe on the HRC's right of political expression. The Eleventh Circuit has acknowledged the rights; the district court must provide the requisite protection.

VIII. CONCLUSION

Miami, Florida, 1983. Two years have passed since the INS first began incarcerating Haitians who arrived in Florida. INS's mass detentions represented a return to a policy that was abolished twenty-nine years ago as "inhumane and unnecessary."[199] Although District Court Judge Spellman ordered their release on June 29, 1982, it was only a technical victory for the Haitians. The district court did not find any substantive illegality in the INS's new detention policy; it held the policy was invalid because it was improperly promulgated. By July 1982, INS had remedied the technical flaws in its detention policy.[200]

Consequently, the Haitians did not achieve vindication of their constitutional rights until the second anniversary of their arrival in the United States. The Eleventh Circuit Court of Appeals held what the district court chose not to hold: the United States government intentionally discriminated against the Haitian aliens on the bases of race and national origin. If the Eleventh Circuit had not ruled that the government engaged in "a stark pattern of discrimination,"[201] then the Haitians would have been returned

197. *See generally* In re Primus, 436 U.S. at 438.

198. *Id.* at 424.

199. Slip op. at 2786.

200. To ensure that the technically sound detention policy would not translate into the immediate re-incarceration of the Haitians, the Eleventh Circuit expressly directed Judge Spellman to issue "an injunction against discriminatory enforcement of the new policy." *Id.* at 2833; *see supra* note 107.

201. Slip op. at 2807.

once again to the Krome Avenue detention facility.[202]

This case cannot be viewed dispassionately. Most Americans are descendants of immigrants who fortuitously arrived prior to 1981. Those immigrants believed, and they found, that the United States government would respect their individual rights. The Haitian immigrants suffered oppression and discrimination that was mandated by the United States government. The Krome Avenue detention facility did "create an appearance of 'concentration camps' filled largely by blacks."[203]

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202. The Krome Avenue detention facility remains open, its barbed-wire fences still erect. In April 1983, approximately 400 aliens—including 130 Haitians—were detained there. Rieder, *Haitians and the Court*, The Miami Herald, Apr. 17, 1983, at 1E, col. 5.

203. Louis v. Nelson, 544 F. Supp. at 980 n.19 (quoting Plaintiff's Exhibit 4 at 8, Memorandum of the Attorney General to the President, analyzing the proposed detention policy).

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