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Detention of HIV-Positive Haitians at Guantanamo

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Rx SALES TO THE NEW MANAGED CARE MARKET

The conference will be held in Philadelphia, Sept. 13 and 14.
Contact IBC USA Conferences, 225 Turnpike Rd., Southborough, MA 01772-1749; or call (508) 481-6400.

AMERICAN COLLEGE OF EPIDEMIOLOGY

The "12th Annual Scientific Meeting" will be held in Bethesda, Md., Sept. 20 and 21.
Contact Carol Ann Kiner, ACE, 6728 Old McLean Village Dr., McLean, VA 22101; or call (703) 556-9222.

INTERASMA 93

The "14th World Congress of Asthmology" will be held in Jerusalem, Israel, Oct. 24-29.
Contact in the U.S.: Gil Kenes, 1617 J.F.K. Blvd., Suite 946, Philadelphia, PA 19103; or call (800) 223-3855. Contact outside the U.S.: Secretariat, P.O. Box 50006, Tel Aviv 61500, Israel; or call (972) 2 517-4571.

CALL FOR ABSTRACTS

Abstracts are being accepted for the "35th National Student Research Forum," to be held in Galveston, Tex., April 28-30. Deadline for submission is Nov. 15.
Contact NSRF, Ashbel Smith Bldg., Rm. G-210, Route M-17, Univ. of Texas Medical Branch, Galveston, TX 77550; or call (409) 772-3762.

PHARMACEUTICALS AND BIOMATERIALS

The following seminars will be held: "Pharmaceutical Tablet Technology: Design Formulation, Unit Operations, Manufacturing, QA and Bioavailability" (San Juan, P.R., Sept. 27-29 and Cherry Hill, N.J., Oct. 18-20); "Medical Product Liability — How to Prevent and Defend against Lawsuits" (Boston, Oct. 6 and 7); "Luminide Drug Delivery" (Princeton, N.J., Oct. 15); "Re-Engineering Environmental Compliance Process" (Cherry Hill, N.J., Oct. 19 and 20); and "Advances in Medical Plastics" (Cambridge, Mass., Oct. 25-27).
Contact Technomic Publishing, Pharmaceutical Div., 851 New Holland Ave., Box 3535, Lancaster, PA 17604; or call (717) 291-5609.

ANTICOAGULANTS AND ANTITHROMBOTICS

The "4th International Symposium," entitled "Advances in Anticoagulant, Antithrombotic, and Thrombolytic Therapies," will be held in Boston, Sept. 27-29.
Contact IBC USA Conferences, 225 Turnpike Rd., Southborough, MA 01772-1749; or call (508) 481-6400.

AMERICAN TYPE CULTURE COLLECTION

The following workshops will be held in Rockville, Md.: "Insect Cell Culture and Protein Expression with Baculovirus Vectors" (Sept. 27-30) and "DNA Fingerprinting" (Oct. 12-15).
Contact ATCC Workshops Manager, 12301 Parklawn Dr., Rockville, MD 20852; or call (301) 231-5566.

M.D. ANDERSON CANCER CENTER

The following will be held in Houston: "Medical Oncology Board Review Course" (Sept. 27-Oct. 1) and "International Symposium on Pediatric Neuro-Oncology" (May 18-21).
Contact MDACC, Univ. of Texas, Conf. Services, Box 131, 1515 Holcombe Blvd., Houston, TX 77030-4095; or call (713) 792-2222.

ACHIEVING A STRATEGIC EDGE IN AMBULATORY CARE

The following will be held in Boston, unless otherwise indicated: "New Ways to Manage Ambulatory Care" (Sept. 28); "Workshop on Financial Analysis" (Newton, Mass., Oct. 29); and "Directions of Change in Ambulatory Care: Cost, Quality and Access" (Dec. 16).
Contact Massachusetts Health Data Consortium, 400-1 Totten Pond Rd., Waltham, MA 02154; or call (617) 890-6040.

MANAGED CARE IN THE 90s

The conference will be held in Newport Beach, Calif., Oct. 20-22.
Contact Laura Anne Russell, Natl. Association of Managed Care Physicians, Innsbrook Corporate Ctr., 5040 Sadler Rd., Suite 103, Glen Allen, VA 23060-6124; or call (800) 722-0376 (natl.) or (804) 527-1905 (Va.).

LEGAL ISSUES IN MEDICINE**DETENTION OF HIV-POSITIVE HAITIANS
AT GUANTÁNAMO****Human Rights and Medical Care**

GEORGE J. ANNAS, J.D., M.P.H.

SPEAKING for the United States, Secretary of State Warren Christopher told the June 1993 World Conference on Human Rights in Vienna that human rights are universal and that "we cannot let cultural relativism become the last refuge of repression."¹ The universality of human rights was first recognized internationally in the 1948 United Nations Declaration of Human Rights.² But the fact that these rights are recognized and even seen as universal does not ensure that they will be respected, even by their strongest supporters.³ The lack of an international tribunal with jurisdiction to hear complaints about human-rights violations and provide remedies for them means that

international codes of human rights continue to be ethical statements more than legal ones.⁴

Many nations, including the United States, have constitutions that protect human rights and effective court systems that can act to correct human-rights abuses by their own governments. One striking example in which the courts ordered the executive branch of government to stop such violations involved the medical care of Haitians in U.S. custody who were positive for the human immunodeficiency virus (HIV). Just one week before the start of the World Conference on Human Rights, Judge Sterling Johnson, Jr., of the U.S. District Court issued an opinion that effectively ordered the United States to shut down its HIV detention center at Guantánamo Bay, Cuba, because of ongoing constitutional, statutory, and regulatory violations of the detainees' rights.⁵ The decision embarrassed President Bill Clinton, who had previously promised to shut down the camp himself.

THE HAITIAN REFUGEES

In 1981 the United States and Haiti agreed to establish a cooperative interdiction program by which U.S. authorities were permitted to board vessels flying the

Haitian flag and determine the status of those on board. If the United States determined that the passengers had violated the laws of Haiti, it could return them and the detained vessel to a Haitian port or turn over the vessel to a Haitian official on the high seas. The United States retained the right not to return refugees who had a "credible fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" in the event they were returned to Haiti. Such refugees were considered "screened in" and were therefore eligible for transfer to the United States to pursue their claim to asylum.

After the military overthrow of President Jean-Bertrand Aristide on September 30, 1991, human-rights violations by the Haitian military, including murder, torture, and arbitrary arrest, prompted approximately 40,000 Haitians to flee their country. Since October 1991, approximately 10,500 such refugees have been found to have a "credible fear" of return and have been granted admission into the United States; about 25,000 others have been returned to Haiti.

In the fall of 1991 the Immigration and Naturalization Service began testing "screened in" refugees for HIV, and in February 1992 those testing positive were interviewed and required to meet a higher standard to establish that they had a "well-founded fear" of persecution. The Immigration and Naturalization Service denied requests by the refugees' attorneys to be present at these interviews.

Haitians interdicted on the high seas were taken to the U.S. naval base at Guantánamo Bay for processing. "Screened out" refugees are not entitled to appeal or to legal representation under the Constitution.^{6,7} "But upon being 'screened in' the Haitian aliens' fundamental legal and human rights status is changed vis-à-vis the United States government."⁶ Those HIV-positive refugees who successfully completed the interview were housed at a separate facility at Guantánamo Bay, Camp Bulkeley. Judge Johnson described this camp as follows when it housed approximately 200 HIV-positive Haitian refugees:

They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to pre-dawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without hearing for camp rule infractions.⁵

MEDICAL CARE AT GUANTÁNAMO

Guantánamo, including Camp Bulkeley, is served by a Battalion Aid Station clinic and a naval hospital. The clinic has two military physicians, a family-practice specialist, and an infectious-disease specialist. Patients can also be transferred from the clinic to the hospital.

Although the military physicians are capable of providing general medical care to the Haitian detain-

ees at Guantánamo, the facilities are inadequate to provide medical care to detainees with AIDS. The physicians themselves first raised this issue in May 1992, requesting that specific HIV-positive patients be evacuated to the United States because adequate medical care could not be provided for them at Guantánamo. Some of these requests were denied by the Immigration and Naturalization Service. At the trial, the United States conceded that the medical facilities at Guantánamo were insufficient to treat patients with AIDS "under the medical care standard applicable within the United States itself." One explanation for the refusal to accept the recommendations for transfer was provided by the special assistant to the director of congressional and public affairs at the Immigration and Naturalization Service; the special assistant reportedly remarked to the press, "They're going to die anyway, aren't they?" Judge Johnson characterized the attitude held by the Immigration and Naturalization Service — that there is "no value in providing adequate medical care when a patient's illness is fatal" — as "outrageous, callous and reprehensible."⁵

Johnson further described what the Immigration and Naturalization Service euphemistically called a "humanitarian camp" as "nothing more than an HIV prison camp."⁵ The judge was concerned not just with the risk of infectious diseases, including tuberculosis, but also with the difficulty of developing an effective doctor-patient relationship in this environment. That the military physicians worked hard to treat the Haitians at the camp was not in dispute. Nonetheless, Judge Johnson concluded that "the doctor-patient relationship has been frustrated."⁵ The Haitians believed that the military physicians were involved in their continued detention, and there were also great cultural differences between the physicians and the Haitian patients. As a result, the patients did not trust either their diagnosis or the medications prescribed for them. As one detainee put it after his release, "They tell me I have the virus, but they offer no proof. The first thing I am going to do [in Miami] is to see a doctor and find out the truth."⁸

FIRST AMENDMENT RIGHTS

A number of groups representing the detained HIV-positive Haitians sued the U.S. government for their release on the grounds that their human and constitutional rights were being violated.⁵ The Haitian Service Organization, for example, asserted that the United States had violated the organization's right under the First Amendment to associate with the detained Haitians and advise them of their legal rights. The court agreed, noting that Guantánamo is a military base entirely under the jurisdiction of the U.S. government; that others, including members of the press, clergy, and politicians, have been permitted to meet with the Haitians; and finally, that the Haitians have often been given erroneous legal advice from "the military, the INS [Immigration and Naturalization Service], the Community Relations Service and even

military doctors.”⁵ The court expansively concluded that the Haitian Service Organization had been barred from meeting with the detainees “because of the viewpoint of the message they seek to convey” and that this violated the organization’s First Amendment rights.⁵ The court did not address the question of whether the Haitians themselves had an independent right to counsel.

DUE-PROCESS RIGHTS

The plaintiffs next asserted that although the detained Haitians were aliens, they had rights to due process because they were prisoners in a U.S.-controlled, prison-like camp where they had been confined for almost two years. The court found that the detainees did have a protected liberty interest in avoiding being returned erroneously to Haiti and that this interest, coupled with the fact that the United States could not justify the denial of counsel, gave rise to a right to the assistance of counsel during the interview in which detainees were required to demonstrate a “well-founded fear” of persecution in Haiti.⁵

The court was also asked to find that the medical conditions in the camp violated the constitutional due-process requirement that the government provide its prisoners with adequate medical care and safe conditions — an issue that had not been raised in previous cases involving the Haitian refugees.⁶ Although Americans have no explicit right to health care, since 1976 American prisoners have been entitled to protection under the Eighth Amendment (which forbids cruel and unusual punishment) from “deliberate indifference to serious medical needs.”⁹ Judge Johnson found that “deliberate indifference” included “denial or delay of detainees’ access to medical care, interfering with treatment once prescribed, [and] lack of response to detainees’ medical needs.”⁵ He also found that it constituted “deliberate indifference” for government officials to reject recommendations and requests “for medical treatment by their own medical doctors [in a way] that exposes the person detained to undue suffering or serious medical risk.”⁵ Specifically, the court found that military physicians had told the Immigration and Naturalization Service that detainees with CD4 cell counts of 200 per cubic millimeter or below “should be medically evacuated to the United States because of a lack of facilities and specialists at Guantanamo” and that the government had “repeatedly failed” to act on this recommendation.⁵

Closely related to the issue of adequate medical care is the prospect of detaining the HIV-positive Haitians indefinitely at Guantánamo. The court found that the detention was not due to any act committed by the Haitians, but to government actions, and that 115 Haitians who had met the “well-founded fear” standard had been detained for almost 2 years, with no indication of when, if ever, they would be released (although they had been told that they could be there for 10 to 20 years or until a cure for AIDS was found).⁵ At the time of the final decision, there were 158 refu-

gees in the camp: 143 HIV-positive adults, 2 HIV-negative adults, and 13 children who had not been tested.¹⁰ The court concluded, in terms that invoke universal human rights:

[T]he detained Haitians are neither criminals nor national security risks. Some are pregnant women and others are children. Simply put, they are merely the unfortunate victims of a fatal disease. . . . Where detention no longer serves a legitimate purpose, the detainees must be released. The Haitian camp at Guantanamo is the only known refugee camp in the world composed entirely of HIV+ refugees. The Haitians’ plight is a tragedy of immense proportion and their continued detention is totally unacceptable to this Court.⁵

STATUTORY AND REGULATORY REMEDIES

The U.S. immigration statute permits the attorney general to “parole” aliens from detention temporarily “for emergent reasons or for reasons deemed strictly in the public interest.”¹¹ This permits the temporary release of aliens with serious medical conditions. The court concluded that the “government’s obstinate refusal to parole Haitians with HIV out of detention constitutes an abuse of the Attorney General’s discretion.”⁵ It ruled that the attorney general, Janet Reno, had abused her discretion by discriminating invidiously, deviating from internal regulations, and doing something Congress could not have intended.

Specifically, the court ruled that the attorney general had kept the Haitians in detention “solely because they are Haitian and have tested HIV-positive.” Federal regulations do not permit medical status and HIV infection to be used as criteria for continued detention, and Congress has not provided for mandatory exclusion of persons with HIV infection from either “parole (the means by which interdicted aliens who are screened in are brought to the United States in order to pursue their asylum claims) or the grant of asylum in the United States.”⁵ The court noted further that congressional action makes aliens with HIV infection excludable from the United States but “*does not* mandate such exclusion,” because of the attorney general’s “power to temporarily parole out of detention aliens otherwise excludable from admission” to the United States⁵ (emphasis in original). Under these circumstances, the court concluded that further imprisonment of the HIV-positive Haitians “serves no purpose other than to punish them for being sick.”⁵

On the basis of these findings and rulings, the court, among other things, permanently enjoined the processing of Haitians with “well-founded fear”; held unlawful the attorney general’s denial of parole to the “screened in” Haitians; and ordered that the screened-in HIV-positive Haitians “be immediately released (to anywhere but Haiti) from . . . detention.”⁵

The Clinton administration announced almost immediately that it would comply with the court’s order and release the 158 Haitians held at Camp Bulkeley to enter the United States. The Justice Department, however, quite reasonably indicated that it may ap-

peal certain portions of the opinion, including the judge's "expansive view of the rights of aliens" and his view of the court's authority "to limit the Attorney General's exercise of her discretionary authority."¹¹

AIDS AND HUMAN RIGHTS

The reactions of both individuals and governments to people with AIDS have not always been benign, and challenging discriminatory actions in court has become almost commonplace in the United States. Such challenges have been largely successful and helped prod Congress to pass the Americans with Disabilities Act, which applies to virtually all diseases and handicaps. The AIDS epidemic has also prompted renewed interest in human rights with regard to health, especially in the international arena. There has, for example, been wide support in the public health community for unrestricted international travel by people with AIDS (or HIV infection), and discrimination on the basis of disease has been denounced.¹² This was symbolized by the decision to move the 1992 World AIDS Conference out of the United States to protest U.S. immigration policy toward people with HIV infection.

The Haitian case also illustrates the difficulties physicians and their patients face when the physician's primary loyalty is not to the patient but to the physician's employer. This problem of dual loyalty is especially difficult in the military and in prisons. About prisons in particular, it has been correctly observed that "correctional health services must diagnose, comfort, and treat in a setting designed to confine and punish . . . creating a tension between the deprivation of liberty and the provision of care."¹³ Although punishment was not the purpose of the confinement at Camp Bulkeley, the deprivation of liberty combined with the use of physicians under military authority made a trusting doctor-patient relationship virtually impossible.

Judge Johnson was correct in saying that Guantánamo had the only refugee prison camp exclusively for HIV-positive persons, but he had only to look more closely at Cuba itself to find the world's only facility where HIV-positive citizens are placed in mandatory quarantine. Located in a suburb of Havana, Cuba's main quarantine facility is largely fenced in and is composed of barracks housing hundreds of people.¹⁴ Since inspectors from other nations have not been permitted to report on conditions in the quarantine facility, it is impossible to know how much better or worse they are than those at Guantánamo. We do know, however, that the liberty of those living there is extremely restricted and that they are separated from their families.¹⁵ Unlike the United States, however, Cuba has no constitution guaranteeing individual rights and no independent court system to which the inmates in the Cuban facility can appeal for release.

As the United States becomes more and more concerned with immigration problems, it is likely that

more draconian steps will be taken by Congress and officials of the Immigration and Naturalization Service to restrict entry into the country. Recent congressional action to ban immigration by those infected with HIV, signed into law by President Clinton on June 10, 1993, is only the most visible such reaction.¹⁶ The justification is twofold: there is the cost of caring for those with HIV infection and AIDS, and there is the risk of spreading HIV to others. Both are legitimate areas of concern. Nonetheless, the cost of caring for immigrants with HIV infection should be viewed in the same manner as the cost of caring for patients with any other expensive illness (including, in appropriate circumstances, requiring people to demonstrate sufficient ability to pay for their care). Likewise, the risk of spreading infection is a legitimate public health concern — one that justifies, for example, confining patients with active tuberculosis who refuse to cooperate with treatment and voluntary measures of infection control.¹⁷ But to avoid violations of both human rights and the Constitution, the risk of a person's spreading the disease in question must be real, and its assessment must not be based primarily on irrational fear or prejudice.

Discrimination based solely on disease status has not yet received sufficient attention as a form of human-rights violation. When governments sponsor such discrimination, the courts can help by speaking clearly and strongly in support of fundamental human rights. When discrimination also adversely affects medical care, physicians and lawyers should work together to defend and promote the interests of the sick, both in their own countries and internationally.

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