No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

—against—

ALAN C. NELSON, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE*
LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS
IMMIGRATION CLINIC OF COLUMBIA UNIVERSITY SCHOOL OF LAW
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
AMERICAN JEWISH CONGRESS
IN SUPPORT OF PETITIONERS

Counsel:
HARRIET RABB
LUCAS GUTTENTAG
JEFFREY P. SINENSKY
RUTI G. TEITEL
PHIL BAUM
LOIS C. WALDMAN

Of Counsel:
GLENN S. KOLLEENY
SCOTT HORTON
Attorneys for *Amici Curiae*

Counsel of Record:
ARTHUR C. HELTON
36 West 44th Street
New York, New York 10036
(212) 921-2160

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INTEREST OF AMICI

Amici curiae, the Lawyers Committee for International Human Rights, offer this brief in support of petitioners.

The Lawyers Committee for International Human Rights is a national legal resource center in the areas of refugee and asylum law. Since 1978, the Lawyers Committee has monitored proposed legislation and regulations in the refugee and asylum areas, has engaged in litigation in significant cases in these areas, and has assisted in providing legal representation for numerous applicants for political asylum in the United States from countries all over the world.

Along with other legal groups, the Lawyers Committee is assisting in the implementation of the final judgment in Louis v. Nelson, 544 F. Supp. 1004 (S.D.

Fla. 1982), by recruiting and training volunteer lawyers to represent the released Haitians in applying for political asylum in the United States. The Lawyers Committee is dedicated to ensuring that refugees and asylum-seekers receive just and equitable consideration under domestic and international law.

The Immigration Law Clinic of Columbia University School of Law, created in 1980, is an educational and service-providing center concerned with immigration and political asylum/refugee legal matters. The Columbia Law School faculty and students in the Clinic assist and represent persons otherwise financially unable to secure counsel. The Clinic is particularly concerned with the constitutional, civil rights and human rights implications of United States immigration and refugee policy and practice.

The Anti-Defamation League was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origins.

Since its inception in 1913, the ADL has espoused a principle against discrimination: "to secure justice and fair treatment for all." In keeping with this principle, ADL has intervened in numerous landmark cases, urging the unconstitutionality or illegality of racial practices, e.g., Brown v. Board of Education, 374 U.S. 483 (1954) and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); and most recently in the

rehearing of the Japanese-American internment cases, Korematsu v. United States, No. CR-27635 (N.D. Cal. April 18, 1984).

In addition to the ADL's concern with combatting racial discrimination is its traditional interest in immigration policy -- to assure that immigration procedures adhere to basic standards of American justice and fairness, including respect for due process and fundamental human rights, regardless of race, creed, ancestry or national origin. It is these principles which are at issue in the present case.

The American Jewish Congress is an organization founded in 1918 to protect the rights of American Jews. One of its most important goals since then has been the creation of a fair and equitable immigration law which does not mask invidious discrimination in the form of differential treatment of aliens on the basis of race,

religion or national origin. In keeping with this policy the American Jewish Congress recently resolved that the Haitian refugees whose rights are at issue here should be paroled into this country while their applications for political asylum are pending.

SUMMARY OF ARGUMENT

All persons, including so-called "excludable" aliens, have recourse to the Fifth Amendment of the United States Constitution to redress governmental abuse, such as invidious discrimination. The Court has recognized this entitlement in several cases, and the decision in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), is distinguishable and no longer of continuing validity.

This case involves the discriminatory incarceration of Haitians. Such discrimination violates the Fifth Amendment. Incarceration, moreover, is an activity that is wholly unrelated to the immigration inspection and admission process. The discriminatory incarceration of the Haitians is, therefore, unconstitutional.

The discriminatory incarceration of the Haitians is also a violation of the Immigration and Nationality Act, which contemplates the exercise of the parole power in a non-discriminatory and individualized fashion. Such discrimination constitutes an abuse of administrative discretion.

Finally, principles of international law can be a source of interpretation for domestic law entitlements. In this case, the international legal prohibitions against discrimination and detention are particularly instructive. They confirm the constitutional and statutory violations in this case.

ARGUMENT

On February 28, 1984, the United States Court of Appeals for the Eleventh Circuit held that "[e]xcludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution." Jean v. Nelson, 727 F.2d 957, 984 (11th Cir. 1984) (en banc). This determination was made in the face of a prior finding by a unanimous panel of the Eleventh Circuit that officials of the Immigration and Naturalization Service ("INS") had purposefully discriminated against thousands of Haitians by incarcerating them for well over a year in various federal prisons and INS detention facilities. Jean v. Nelson, 711

F.2d 1455, 1487-1502 (11th Cir. 1983).[1] The broad and unprecedented rule of immunity announced by the Eleventh Circuit has no place under the Constitution. Governmental abuse of individuals, such as invidious discrimination on account of race and national origin, is not immune from constitutional review.

Although normally the statutory claims in a brief would be presented before the constitutional arguments, both the Eleventh Circuit and the parties themselves have argued the constitutional points first in this case; accordingly, the outline of this brief will follow the same pattern.

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[1] The Eleventh Circuit en banc accepted the "facts" of the case as set forth by the panel. 727 F.2d at 962. This brief also accepts the factual description of the panel regarding discrimination.

I.

Excludable Aliens Have Constitutional Rights.

This Court recently reiterated the long established principle that aliens, including aliens "illegally" present in this country, are protected by the Constitution's due process clause.

> Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.

Plyler v. Doe, 457 U.S. 202, 210 (1982) (emphasis added) (citations omitted). Indeed, Plyler emphasized that "the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." Id. (citations omitted).

Nonetheless, in finding itself unable to review an INS policy of dis-

criminatory detention specifically targeted against Haitian boat people, the Eleventh Circuit relied on an immigration law fiction that "excludable" aliens are not present in the United States[2] for the purpose of invoking constitutional rights. 727 F.2d at 969-71. It is important to recognize, however, that even the Eleventh Circuit does not contend that the fiction is absolute. 727 F.2d at 972-74. Thus, it concedes, as it must, that excludable aliens may not be punished without due process of law. Wong Wing v. United

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[2] When used in this brief the term "excludable" aliens is not meant to signify that plaintiffs' right to stay in this country has been finally determined. Indeed, upon release in 1982, the vast majority of the class members in Jean have applied for political asylum in the United States pursuant to 8 U.S.C. §§ 1101(a)(42)(A) and 1158, and those claims are in the process of being adjudicated administratively. See Helton, The Most Ambitious Pro Bono Ever Attempted, 12 Human Rights 18, 21, 46-48 (1984).

States, 163 U.S. 228, 238 (1896) (aliens, whether excludable or deportable, may not be criminally punished without due process of law); accord, Rodriguez Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981). See also United States v. Henry, 604 F.2d 908 (5th Cir. 1979) (Fifth Amendment entitles excludable alien to Miranda warning). See generally Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (protections of Fourteenth Amendment are not limited to citizens but "are universal in their application, to all persons within the territorial jurisdiction" of the United States).

Accordingly, there is only one possible answer to the question of whether excludable aliens are entitled to constitutional rights, and that answer must be that they are. Whether petitioners in this case are entitled to constitutional protection against discriminatory incar-

ceration depends on how far those rights extend. The Bill of Rights limits the power of government to act. Of relevance to this case, it provides that the federal government cannot deprive individuals of liberty on the basis of race and national origin. U.S. Const. Amend. V; see L. Henkin, Foreign Affairs and the Constitution 251-70 (1972). Petitioners, like all other persons, are entitled to these basic constitutional protections.

II.

The INS's Discriminatory Refusal to Consider Petitioners for Release on Parole Is Subject to Constitutional Scrutiny.

The Eleventh Circuit's holding is based on a primarily historical argument. The sovereign power to deny admission on the basis of national origin was upheld in The Chinese Exclusion Case, 130 U.S. 581 (1889). Somewhat more recently, this Court held in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544

(1950) (4-3 decision) that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

The principle established in The Chinese Exclusion Case and Knauff is not unlimited. Both cases involved efforts to compel the government to admit someone from abroad. Neither case is incompatible with the holding of Wong Wing, supra, that while the government's power to admit may be plenary, its treatment of aliens within American territorial limits is subject to constitutional constraints.

The Eleventh Circuit apparently does not dispute even this proposition. Rather, it cites Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), to support its claim that the power to engage in discriminatory and arbitrary detention is inherent in the power to regulate admission. 727 F.2d at 972.

There are, however, several significant differences between Mezei and this case. First, unlike this case, Mezei did not involve racial or national origin discrimination or the failure to accord individual release considerations on such grounds. Second, Mezei involved the denial of admission on national security grounds, which are not present here. Third, the Executive's action in Mezei was deemed consistent with a Congressional policy authorizing detention of security risks. By contrast, the Executive decision to incarcerate Haitian boat people violated the Congressional policy that the parole power be exercised in an individualized and non-discriminatory fashion.[3]

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[3] See Vigile v. Sava, 535 F. Supp. 1002, 1008 (S.D.N.Y. 1982), rev'd on other grounds sub nom. Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982) (INS district director testified that under statutory scheme "parole applications are given individual attention and are resolved on a case-by-case basis.").

Equally significant, Mezei was decided at a very different moment in our constitutional history. At the time of Mezei, the Supreme Court had not yet extended the protection of the Constitution to the mentally incompetent,[4] prisoners,[5]

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[4] Massey v. Moore, 348 U.S. 105, 108 (1954) (Under the Fourteenth Amendment, "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.").

[5] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (Although a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. . . . They retain right of access to the courts. . . . Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. . . . Prisoners may also claim the protections of the

(Footnote continued)

pretrial detainees,[6] children,[7] or residents of U.S. territories and possessions,[8] nor had the Constitution

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Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. (citations omitted)".)

[6] Bell v. Wolfish, 441 U.S. 520, 545 (1979) (Although their rights may be subject to necessary restrictions and limitations, "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that . . . are enjoyed by convicted prisoners.").

[7] In re Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the constitution and possess Constitutional rights," although the "State has somewhat broader authority to regulate the activities of children than of adults.").

[8] Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976) ("It is clear now . . . that the protections accorded by either the Due

(Footnote continued)

been held to guarantee blacks the right to an integrated education.[9]

In addition, Mezei has been widely criticized as a historical anomaly ever since it was decided. A few months after Mezei was decided, Professor Henry M. Hart of Harvard Law School published a dialogue, now recognized as a classic in modern legal training, in which he labels the opinion an "aberration," not "intellectually respectable," and talks of its "brutal conclusions."

> [W]hen justices of the Supreme Court sit down and write opinions in behalf of the Court which ignore the painful forward steps of a whole half century of

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Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").

[9] Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Due to segregated educational facilities, black children were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

> adjudication, making no effo: to relate what then is being done to what the Court has done before, they write without authority for the future. The appeal to principle is still open. . . .

Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts, 66 Harv. L. Rev. 1362, 1390-95, 1396 (1953). See also Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 20 (1984) (Mezei is cited as an example of "some of the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court."); 2 K.C. Davis, Administrative Law § 11:5 at 358 (2d ed. 1979) ("widely considered to be one of the most shocking decisions the Court has ever rendered."); Note, 96 Harv. L. Rev. 1286, 1322 (1983) ("In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development."); and Martin, Due

Process and Membership in the National Community, 44 U. Pitt. L. Rev. 165, 173-80 (1983) (Along with Knauff, Mezei stands for a "rather scandalous doctrine.").

It should further be noted that both houses of Congress subsequently introduced bills to permit Mezei to enter the United States and that the Department of Justice eventually allowed Mezei to return to his home in Buffalo, New York. In the first edition of his treatise, Davis also reports that after the Department won the case, an "ad hoc committee was appointed, which took evidence and allowed Mezei a chance to know and to meet the evidence against him. The committee found that he was a member of the Communist Party, and as such legally excludable. But the committee nevertheless recommended that he be allowed to return to his home in Buffalo, and the Department followed the recommendation." Davis con-

cludes that the "Supreme Court may well be ashamed of the fact that the unnecessary injustice which it approved turned out to be too much even for the prosecutors to stomach." 1 K.C. Davis, Administrative Law § 7:15 at 482 and 511 (1958).

Mezei's precedential value must be judged from this historical perspective. To the extent Mezei is deemed to immunize from review the discriminatory behavior in this case, it should now be overruled. To do otherwise would be to hold that excludable aliens, including those who are seeking asylum from persecution, are not persons in contemplation of law, and may be incarcerated without recourse to basic due process of law.

It is important to recognize that this is not a case that concerns admissibility. The Eleventh Circuit's characterization of this case as an effort to litigate the constitutionality of peti-

tioners' admission fundamentally miscasts the issue before this Court. 727 F.2d at 971 and 972. Amici do not dispute that when Congress or the Executive establish standards regulating the eligibility for admission of aliens into this country, their power is plenary.

Petitioners have not made claims in this case about their admission, and they do not now seek a judicial determination of their eligibility for admission. Admissibility turns on the success of petitioners' individual claims for political asylum.[18] What is at issue before this

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[18] In order to be eligible for asylum, an alien must have been persecuted or have a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a). The question of whether the statutes and regulations which establish the substantive and procedural entitlement to asylum creates a constitutionally cognizable due process interest in the asylum adjudications
(Footnote continued)

Court is whether the government's blanket refusal to consider petitioners for parole constitutes a denial of equal protection as incorporated in the due process clause of the Fifth Amendment.

The Eleventh Circuit insists that the challenged detention policy is so entwined with an alien's application for admission that it is beyond constitutional scrutiny. 727 F.2d at 971 and 972. This position confuses the nature of parole and the fact that it bears no relation to admission. It also misapprehends the consequences that would result if constitutional standards were applied to the government's parole policy and practice.

In Leng May Ma v. Barber, 357 U.S. 185 (1958), this Court made clear that parole does not affect admissibility.

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is not involved in this case. Cf. Augustin v. Sava, 735 F.2d 32, 36-37 (2d Cir. 1984).

See also Landon v. Plasencia, 459 U.S. 21 (1982). The Court in Leng May Ma rejected an alien's claim that she was entitled to additional admission rights as a result of having been released on parole. The Court explained that "parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It [parole] was never intended to affect an alien's status . . . ." Id. at 190. Parole is a humanitarian act that has no effect on an alien's ultimate immigration status. A paroled alien is no less subject to exclusion, once the underlying admissibility question is decided, than is an alien who has remained in custody throughout the admissions decision process. An alien who has been detained and then paroled "'shall continue to be dealt with in the same manner as any other applicant for admission to the United

States.'" Id. at 188 (citation omitted)(emphasis in original). See also 8 U.S.C. § 1182(d)(5)(A) (parole "shall not be regarded as an admission of the alien and when the purposes of such parole shall have been served the alien shall forthwith return or be returned to the custody from which he was paroled. . .").

In addition, a paroled alien achieves no new immigration status by reason of his release. Parole does not lead to legal permanent residence or eligibility for citizenship. See 8 U.S.C. §§ 1101(a)(15), 1101(a)(16), 1151-1156, 1421-1427. Therefore, such an alien cannot confer any immigration benefits on others and cannot bring family members into the United States. See 8 U.S.C. § 1153. Furthermore, a paroled alien may not travel abroad without forfeiting his parole, and his status as a parolee does not confer upon him authorization to work

while he is in the United States. See 8 C.F.R. § 109 (1984).

The INS's parole decision is no more closely related to the admissions process than are other governmental actions applicable to excludable aliens, actions that must meet constitutional standards. For example, in United States v. Henry, 604 F.2d 908 (5th Cir. 1979), an alien was arrested at the Miami airport before he had been admitted into the country and was subsequently prosecuted for falsely representing himself to be a citizen (18 U.S.C. § 911) in order to gain entry to the United States. When the defendant claimed that he had not been given proper Miranda warnings, the government argued that an "excludable" alien did not have the same rights as other aliens due to "the Federal Government's right to exclude aliens and otherwise control and regulate their entrance into the country."

604 F.2d at 912 (footnote omitted). Although the very facts on which Mr. Henry was being prosecuted were also elements of his attempted illegal entry, the court rejected the government's argument that the Constitution should not apply simply because the defendant was an excludable alien.

Certainly, if the Constitution applies in the Henry context, where the facts at issue were directly related to Mr. Henry's admission, it also must apply to the parole process. The foundation for the Henry prosecution was directly related to admission, whereas an alien's entitlement to be considered for release on parole is not.

Indeed, if the parole process is held to be immune from constitutional attack, then virtually any aspect of government action applicable to excludable aliens would be likewise immune. For

example, the Eleventh Circuit's theory offers no principled basis for distinguishing between the discriminatory practice of not considering certain aliens for parole based on their race or national origin and a policy ordering that all such excludable aliens apprehended at the border be summarily executed, detained in inhumane conditions, or forced into involuntary servitude.

This view would insulate from scrutiny any conditions under which excludable aliens are detained. Excludable aliens in detention would not, under the Eleventh Circuit's rationale, have any constitutional right to be protected from governmental action denying them food, water, medical care or shelter fit for human habitation. Such a theory would permit the government to assert that conditions of confinement are "related" to the admission of the detainees and hence

unreviewable. A rationale that leads to such results must be rejected, and courts have consistently done so. United States v. Henry, supra; Rodriguez Fernandez v. Wilkinson, supra. See also Wong Wing v. United States, supra.

The government may not expand its plenary authority over those immigration issues related to admission to insulate from constitutional review any governmental action affecting excludable aliens merely because the government unilaterally characterizes it as "regarding admission." Parole is not so closely related to admission so as to cloak the former with the immunity afforded the latter.

Furthermore, the principle that an alien is entitled to be considered for parole on a non-discriminatory, individualized basis will not diminish the government's authority to detain those indi-

viduals who are likely to abscond. See Leng May Ma v. Barber, supra. Blanket parole is no more required than blanket detention is permissible. Parole is an act of discretion that is to be exercised on a case-by-case basis pursuant to statutory standards, yet the petitioners in this case were treated as part of an undifferentiated mass and imprisoned accordingly.

Congress, in addition, has made clear its intention that parole decisions for excludable aliens be based on neutral and non-discriminatory criteria bearing on each alien's application. The parole statute itself is written in universal terms, referring to "any alien". 8 U.S.C. § 1182(d)(5)(A). Any ambiguity in the statutory language regarding parole, moreover, must be interpreted in light of the unambiguous history of Congressional efforts to remove the lingering vestiges of

discrimination in the immigration law. Specifically, in 1965 Congress eliminated the last remaining admission quotas based on national origin. See Pub. L. No. 89-236, 79 Stat. 911 (1965), codified in 8 U.S.C. § 1101 et seq. Thus, the implementation of a Congressionally mandated, non-discriminatory parole policy cannot undermine this country's immigration authority.

III.

The Violation of Petitioners' Statutory Entitlement to Individualized and Non-Discriminatory Consideration for Parole Is an Abuse of Discretion

Apart from the constitutional issue, the en banc court erred in its discussion of abuse of discretion. As demonstrated previously, the parole provisions under which petitioners were entitled to consideration are facially neutral. Neither nationality nor race is featured as a criterion in the provision.

The discretion of the INS in the parole area is limited by the basic prin-

ciple that its actions may not be "arbitrary, capricious and an abuse of discretion . . . ." 5 U.S.C. § 706(2)(A). In a highly regarded opinion,[11] "Judge Friendly, writing for the Second Circuit Court of Appeals, held that a refusal by INS to suspend the deportation of an alien was reviewable for abuse of discretion and set forth an explanation of the abuse of discretion standard:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant."

Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (emphasis added). See also

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[11] See e.g. 5 K.C. Davis, Administrative Law 28:7 at 288(2d ed. 1984).

Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982).

Invidious dicrimination constitutes an abuse of discretion; so does an inexplicable departure from a statutorily imposed, facially neutral standard. In this case, the record of discrimination and departure from the standard is ample, and a remand would serve no useful purpose.

In adopting a "facially legitimate and bona fide reason" test for denying parole, the Eleventh Circuit, 727 F.2d at 977, ignored the well developed approach to abuse of discretion under the Administrative Procedures Act. Moreover, the test is borrowed inappropriately from an admissions case: Kleindienst v. Mandel, 408 U.S. 753, 770 (1972), which involved the propriety of a denial of a waiver by the Attorney General under the congressionally imposed ideological exclu-

sions provision of the immigration law. In this case, unlike in Kleindienst, the actions of subordinate agency officials are involved, rather than those of the Attorney General and Congress. Moreover, as shown before, release on parole is unrelated to admission into the United States. In addition, the "facially legitimate and bona fide reason" test cannot be utilized to provide a pretext for discimination.

Rather than reaching the constitutional issue, this case could be resolved on the ground that respondents abused their discretion by discriminatorily refusing to consider petitioners for release on parole. In the event that this court finds it necessary to address the en banc court's analysis of abuse of discretion, it should accordingly reject the facially legitimate and bona fide reason standard in favor of the more

traditional approach in administrative law to measure abuse of discretion. See Wong Wing Hang, supra.

IV.

Respondents' Discriminatory Parole Practice Violated Standards of International Law Which Inform the Interpretation of Domestic Law.

A. Customary International Law

The government's discriminatory refusal to consider parole, resulting in over a year of incarceration for the petitioners, also violates established principles of international law. In Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981), the District Court held that the extended, indefinite confinement in federal prison of an excludable Cuban national, who had arrived in the United States in June 1980 and who could not be deported in the foreseeable future, violated customary international law. In finding the pertinent rule of customary

international law, the court referred to several international instruments, including the Universal Declaration of Human Rights, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights. The District Court determined that indefinite, arbitrary detention violated customary international law and issued a writ of habeas corpus to remedy the continued unlawful detention. Rodriguez Fernandez v. Wilkinson, supra, 505 F. Supp. at 798-800.

On appeal, the Tenth Circuit affirmed, viewing principles of international law as an appropriate reference for construing American law.

> It seems proper then to consider international law principles for notions of fairness as to [the] propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment. See Universal Declaration of Human Rights, Arts. 3 and 9, U.N. Doc. A/801 (1948); The American Con-

> vention on Human Rights, Part I, ch. II., Art. 7, 77 Dept. of State Bull. 28 (July 4, 1977).

Rodriguez Fernandez v. Wilkinson, supra, 654 F.2d at 1388. See also Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n.19 (N.D. Ga. 1981).

These court decisions have been confirmed in a recent codification of the pertinent international law rules. See Restatement of Foreign Relations (Revised) § 702 (Tent. Draft No. 3, 1982) (hereinafter "Restatement"). It is now beyond peradventure that customary international law prohibits prolonged arbitrary detention. The Restatement specifically provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention . . . .

Restatement § 702(e).[12] As to prolonged arbitrary detention, the comment to Section 702 provides:

> Detention is arbitrary if it is not pursuant to law, but may also be arbitrary if "it is incompatible with the principles of justice or with the dignity of the human person" . . . . Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by a notice of charges . . . . A single, brief, arbitrary detention would violate provisions of the principal international agreements; arbitrary detention violates customary law if it is prolonged and practiced as state policy.

Id., comment g (citation omitted).

In this case, the detention of the Haitians was clearly prolonged, for many well over one year. It was, more importantly, arbitrary. It was not possi-

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[12] The Reporter's Notes to Section 702 emphasize that "[a]rbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments . . . ." Note 6.

ble for the Haitians to be considered for release irrespective of the individual circumstances of their cases. The INS simply asserted the power to imprison indefinitely, and the only apparent justification was one of administrative convenience. Detention under such circumstances, however, violates customary international law. It is appropriate in this case "to consider international law principles for notions of fairness". See Restatement § 134.

B. The Protocol Relating to the Status of Refugees

The fact that many of the detained Haitians applied for political asylum in the United States provides an additional international law referent. In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223; T.I.A.S. No. 6577; 606 U.N.T.S. 267. The Protocol prohibits discrimination (Article

3) and the imposition of penalties (Article 31(1)) against refugees, as well as unnecessary restrictions upon their movements (Article 31(2)).[13]

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[13] Subdivision 2 of Article 31 of the Protocol clearly applies to a person who is in the process of having his or her status as a "refugee" adjudicated. The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Geneva 1979) (the "Handbook") of the United Nations High Commissioner for Refugees is the principal international referent for the interpretation of the Protocol. Indeed, the Board of Immigration Appeals itself has cited the provisions of the Handbook as persuasive authority in the analysis of asylum claims. In re Frentescu, 18 I&N Dec. 244, 246 (B.I.A. 1982); In re Rodriguez-Palma, 17 I&N Dec. 465, 468 (B.I.A. 1980). The Handbook makes it clear at paragraph 28 that "a person is a refugee within the meaning of the 1951 Convention [and the Protocol] as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

In this case, the detention of the Haitians whose asylum applications were pending constitute "discrimination" as well as a "penalty" and unnecessary "restriction" on their movement. There had been no particularized showing of a threat to national security or that, if released, the aliens would abscond. See Leng May Ma v. Barber, supra, 357 U.S. at 190. The constitutional claims in this matter should therefore be resolved in a fashion consistent with this country's obligations under the Protocol.[14]

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[14] The question of whether the Protocol is a self-executing treaty need not be reached in this case since the Protocol (as well as customary international law) should be looked to as a source to interpret domestic law and confirm the constitutional claims. See Rodriguez Fernandez v. Wilkinson, supra.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
January 17, 1985

Respectfully submitted,[15]

Counsel:
Harriet Rabb
Lucas Guttentag
Jeffrey P. Sinensky
Ruti G. Teitel
Phil Baum
Lois C. Waldman

Of Counsel:
Glenn S. Kolleeny
Scott Horton

Counsel of Record:
Arthur C. Helton
36 West 44th Street
New York, N.Y. 10036
(212) 921-2160

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[15] Counsel wish to acknowledge the assistance of Rhonda L. Brauer, law clerk, in the preparation of this brief.

ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH

823 United Nations Plaza
New York, N.Y. 10017

MEMORANDUM

To: National Law Committee

From: Jeffrey P. Sinensky and Steven M. Freeman

Date: February 4, 1985

Subject: Jean v. Nelson, No. 84-5340 (U.S. filed January 17, 1985)

We are pleased to share with you ADL's amicus brief submitted to the U.S. Supreme Court in Jean v. Nelson. The case has reached the Supreme Court on a writ of certiorari from the U.S. Court of Appeals for the Eleventh Circuit. The brief, prepared by the Lawyers Committee for International Human Rights, was joined by ADL, the Immigration Clinic of the Columbia University School of Law, and the American Jewish Congress.

The case is a class action suit arising out of a government practice of discriminatory detention resulting in the incarceration of thousands of Haitians arriving in this country after May 20, 1981. The Haitians in question, many of whom were detained for over a year, were considered "excludable aliens" who had not been formally admitted into the United States.

The detention of the Haitians was upheld by the 11th Circuit, which relied on the legal fiction that excludable aliens are not "present" in this country and then went on to hold that "excludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum or parole on the basis of rights guaranteed by the United States Constitution." Jean v. Nelson, 727 F.2d 957, 984 (11th Cir. 1984) (en banc). As our brief points out, "this determination was made in the face of a prior finding by a unanimous panel of the Eleventh Circuit that officials of the Immigration and Naturalization Service (INS) had purposefully discriminated against thousands of Haitians by incarcerating them for well over a year in various federal prisons and INS detention facilities." See Jean v. Nelson, 711 F.2d 1455, 1487-1502 (11th Cir. 1983).

At the outset, the brief emphasizes that the government's power to set standards regarding the Haitians' admissibility is not at issue. Rather the policy under attack is the government's blanket refusal to consider the Haitians for parole pending determination of their admissibility. The plaintiff petitioners contend that the 11th Circuit erred in linking the challenged detention policy with the issue of admissibility. As our brief notes, the 11th Circuit position "confuses the nature of parole and the fact that it bears no relation to admission." The brief stresses that "a paroled alien achieves no new immigration status by reason of his release, [and is] no less subject to exclusion, once the underlying admissibility question is decided, than is an alien who has remained in custody throughout the admissions decision process."

The primary challenge to the government detention policy, set out in our brief, is that aliens, including aliens "illegally" present in this country, are protected by the Constitution's due process clause. In Plyler v. Doe, 457 U.S.

202 (1982), the Supreme Court specifically declared that "the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." In this case, the incarceration of the Haitians was a clear example of invidious and unconstitutional discrimination.

The brief's second argument is that the INS' discriminatory refusal to consider the Haitians for release on parole is subject to constitutional scrutiny. It distinguishes in three important ways a case relied upon by the Eleventh Circuit, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), which held that the power to engage in discriminatory and arbitrary detention is inherent in the power to regulate admission. First, the brief notes, "Mezei did not involve racial or national origin discrimination or the failure to accord individual release considerations on such grounds." Second, "Mezei involved the denial of admission on national security grounds, which are not present here," and third, contrary to the situation in Mezei, the Executive decision in this case "violated the Congressional policy that the parole power be exercised in an individualized and nondiscriminatory fashion." The brief adds that "Mezei was decided at a very different moment in our constitutional history," and that it "has been widely criticized as a historical anomaly." The brief concludes this portion of the discussion by asserting that

> to the extent Mezei is deemed to immunize from review the discriminatory behavior in this case, it should now be overruled. To do otherwise would be to hold that excludable aliens, including those who are seeking asylum from persecution, are not persons in contemplation of law, and may be incarcerated without recourse to basic due process of law.

Amicus brief at page 21.

Third, the brief argues that "the violation of petitioners' statutory entitlement to individualized and nondiscriminatory consideration for parole is an abuse of discretion" on the part of the INS. The INS is governed in this area by a statutorily imposed, facially neutral standard, and "in this case, the record of discrimination and departure from the standard is ample." According to the brief, "rather than reaching the constitutional issue, this case could be resolved on the ground that respondents abused their discretion by discriminatorily refusing to consider petitioners for release on parole."

Finally, the brief notes that the INS' discriminatory parole practice violated standards of customary international law and the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, which prohibit prolonged arbitrary detention. The United States is a party to the Protocol and has accepted other international legal obligations proscribing discriminatory treatment such as that accorded to the Haitians in this case.

JPS/SMF:lfg

cc: ADL Regional Directors