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Spring 5-1-2019

## Not Yet Forgiven for Being Black: Haiti's TPS, LDF, and the Protean Struggle for Racial Justice

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### Recommended Citation

Raymond Audain, Not Yet Forgiven for Being Black: Haiti's TPS, LDF, and the Protean Struggle for Racial Justice, 52 Loy. L.A. L. Rev. 409 (2019).

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# NOT YET FORGIVEN FOR BEING BLACK: HAITI'S TPS, LDF, AND THE PROTEAN STRUGGLE FOR RACIAL JUSTICE

*Raymond Audain\**

*In November 2017, the Trump administration announced its intention to terminate Temporary Protected Status for Haitians in the United States. This Article considers the termination and the lawsuits it prompted, which are helping to define the state of the plenary power doctrine, the breadth of the Fifth Amendment's equal protection guarantee, and the purchase of the communitarian ideal. This Article also focuses on the lawsuit that the NAACP Legal Defense and Educational Fund, Inc. (LDF) filed. Although this may appear to be a new operational context for the organization, the author describes LDF's strong interest in ensuring that the federal government respects fundamental equal protection principles in its policies related to immigrants.*

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\* Senior Counsel, NAACP Legal Defense and Educational Fund, Inc. This Article is based on a panel presentation I gave at *Immigration Politics: Shifting Norms, Policies and Practices*, Loyola Law School, Los Angeles, March 2018. I wish to thank Professor Kathleen C. Kim for inviting me to participate. I also wish to thank Samuel Spital, Ellie Happel, Umami Ansari, Ajmel Quereshi, and the excellent staff of the *Loyola of Los Angeles Law Review* for their insightful comments and editorial suggestions.

## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION .....  | 411 |
| II. THE TRUMP ADMINISTRATION AND HAITI'S TPS.....                    | 415 |
| III. THE UNITED STATES AND HAITI .....                               | 419 |
| IV. HAITIAN IMMIGRATION, EQUAL PROTECTION, AND PLENARY<br>POWER..... | 422 |
| V. TPS COURT CHALLENGES AND THE COMMUNITARIAN IDEAL....              | 426 |

## I. INTRODUCTION

In January 2010, Haiti was struck by one of the deadliest earthquakes in modern history.<sup>1</sup> It killed thousands of Haitians, left more than a million people homeless, and nearly destroyed Port-au-Prince.<sup>2</sup> Haiti's recovery efforts have been hobbled by two additional catastrophes. First, in October 2010, there was a large-scale outbreak of cholera.<sup>3</sup> Then, in October 2016, Hurricane Matthew ravaged parts of the country and killed more than 500 people.<sup>4</sup> These extraordinary circumstances compelled the U.S. Department of Homeland Security (DHS) to designate Haiti for Temporary Protected Status (TPS)<sup>5</sup> in 2010, to re-designate Haiti in 2011,<sup>6</sup> and to repeatedly extend that designation over the next six years.<sup>7</sup> But the Trump administration took a different view of Haiti's TPS designation, one in keeping with its outspoken antagonism towards immigrants of color. Soon after

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1. LAURENT DUBOIS, *HAITI: THE AFTERSHOCKS OF HISTORY* 3 (2012).

2. *Id.*; see Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476, 3,477 (Jan. 21, 2010); Extension and Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000, 29,001 (May 19, 2011) (noting the government of Haiti estimated that 230,000 people died and more than one million Haitians were left homeless); Extension of the Designation of Haiti for Temporary Protected Status, 77 Fed. Reg. 59,943, 59,943 (Oct. 1 2012) (“Haitian government estimates of the death toll caused by the earthquake have ranged from 230,000 to over 300,000 people.”); *Haiti: One Year Later*, OCHA (Jan. 18, 2011), <https://www.unocha.org/story/haiti-one-year-later> (earthquake caused over 222,000 deaths and over 300,000 injuries, left over 1.5 million people homeless, and caused “[w]idespread destruction in Port-au-Prince”).

3. U.S. CITIZENSHIP AND IMMIGRATION SERVS., *TPS CONSIDERATIONS: HAITI (DECEMBER 2016)* 3 (Dec. 2016), [http://www.ijdh.org/wp-content/uploads/2016/10/Haiti\\_TPS\\_StateDept-Dec2016-HaitiMemo.pdf](http://www.ijdh.org/wp-content/uploads/2016/10/Haiti_TPS_StateDept-Dec2016-HaitiMemo.pdf).

4. See *Rapidly Assessing the Impact of Hurricane Matthew in Haiti*, THE WORLD BANK (Oct. 20, 2017), <https://www.worldbank.org/en/results/2017/10/20/rapidly-assessing-the-impact-of-hurricane-matthew-in-haiti>; see also Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,832 (May 24, 2017) (noting that the Haitian government confirmed 546 fatalities from the storm).

5. The Immigration Act of 1990 created the TPS program. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102–232, 105 Stat. 1733 (1991). TPS enables immigrants to live and work in the United States while their country of origin recovers from civil unrest, violence, or natural disasters. 8 U.S.C. § 1254a (2012). Under 8 U.S.C. § 1254a, the Attorney General was authorized to administer the TPS program. The authority to designate countries and administer the TPS program was transferred from the Attorney General to the Secretary of Homeland Security in 2003, with the formation of the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002). The Secretary of Homeland Security has discretion to issue TPS for periods of six to eighteen months. 8 U.S.C. § 1254a(b)(1)–(2). Thereafter, the Secretary must review the conditions in the foreign state and determine whether the reasons for the designation persist. 8 U.S.C. § 1254a(b)(3).

6. Extension and Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000 (May 19, 2011).

7. Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,831 (May 24, 2017).

taking office, the administration warned beneficiaries to prepare for their return to Haiti.<sup>8</sup> Then, in November 2017, DHS announced that it would terminate the program in January 2018, with a delayed effective date of July 2019.<sup>9</sup> As the Haitian government has explained,<sup>10</sup> Haiti cannot safely repatriate the approximately 58,000 Haitians in the United States who have TPS.<sup>11</sup> The U.S. Embassy in Haiti agreed,<sup>12</sup> and no objective review of country conditions could militate otherwise. But the administration's decision to end TPS for Haiti does not reflect an objective review of country conditions. Instead, it reflects racial animus against Haitian TPS recipients.

As such, in January 2018, the NAACP Legal Defense and Educational Fund, Inc. (LDF) filed a lawsuit that challenged the rescission decision on equal protection grounds.<sup>13</sup> For almost eighty years, LDF has focused on vindicating the rights of Black Americans across the United States.<sup>14</sup> Filing suit on behalf of Haitian immigrants may appear to be a new operational context for LDF. However, the racial justice implications of the rescission are profound. First, many of the racial disparities that bedevil our domestic public institutions also bedevil the immigration system.<sup>15</sup> And, as LDF's Director-Counsel explained, it would be unacceptable for LDF to afford the government any leeway to make a decision based on racial

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8. *Id.* at 23,830.

9. Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018).

10. See Letter from Paul G. Altidor, Ambassador, Republic of Haiti, to Elaine C. Duke, Sec'y, Dep't of Homeland Sec. (Oct. 4, 2017), <https://www.miamiherald.com/latest-news/article178072401.ece/binary/Lettertothe%20HonorableElaineC.Duke.pdf>.

11. Ellie Happel, *Ending TPS for Haitians Was Unlawful—and Racist, Too*, MIAMI HERALD (Aug. 22, 2018, 6:49 PM), <https://www.miamiherald.com/opinion/op-ed/article217167695.html>.

12. See *Saget v. Trump*, 375 F. Supp. 3d 280, 317 (E.D.N.Y. 2019).

13. Complaint, Nat'l Ass'n for the Advancement of Colored People v. U.S. Dep't of Homeland Sec., 364 F. Supp. 3d 568 (D. Md. 2019) (No. 1:18-cv-00239-MJG), 2018 WL 550254.

14. *History*, LDF, <https://www.naacpldf.org/about-us/history/> (last visited Mar. 5, 2019).

15. See, e.g., JULIANA MORGAN-TROSTLE & KEXIN ZHENG, N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, THE STATE OF BLACK IMMIGRANTS, <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf>; see also Teresa Wiltz, *For Some Black Immigrants, Life in Limbo*, PEW: STATELINE (Sept. 27, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/09/27/for-some-black-immigrants-life-in-limbo> ("Immigration experts say that black immigrants face more discrimination and scrutiny than other migrant groups. Many of the challenges they face intersect with the challenges of native-born African-Americans, from housing discrimination to disproportionate representation in the criminal justice system.").

discrimination in *any* context.<sup>16</sup> LDF took the same position in similar circumstances more than thirty years ago when it warned that the federal government cannot be left to discriminate with impunity against thousands of Haitian asylees, in part because that would reinforce racist attitudes and undermine the national goal of eliminating racial and ethnic discrimination.<sup>17</sup>

LDF's commitment to the elimination of racial discrimination found its greatest expression in *Brown v. Board of Education*,<sup>18</sup> the decision that overruled the "separate but equal" doctrine of *Plessy v. Ferguson*.<sup>19</sup> *Brown* has been described as the most important Supreme Court decision of the twentieth century;<sup>20</sup> it is the wellspring of modern equal protection jurisprudence.<sup>21</sup> In the immigration context, however, *Brown's* impact<sup>22</sup> has been blunted by the so-called plenary power doctrine, which, some believe, gives Congress and the President almost total latitude to discriminate against excludable immigrants, even on the basis of race.<sup>23</sup> The doctrine is rooted in the

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16. *Don't Tell Your Story Too Soon*, CROOKED: POD SAVE THE PEOPLE (Feb. 27, 2018), <https://crooked.com/podcast/dont-tell-your-story-too-soon/>.

17. See Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioners, *Jean v. Nelson*, 472 U.S. 846 (1985) (No. 84-5240), 1985 WL 670075, at \*4.

18. 347 U.S. 483 (1954).

19. 163 U.S. 537 (1896). A largely Haitian American organization in New Orleans, the *Comité des Citoyens*, was responsible for bringing *Plessy*, and the litigant, Homer Plessy, was Haitian-American. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 212 (2004).

20. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 344 (2004); Derrick A. Bell, Jr., *Brown v. Board of Education and The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980).

21. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 696 (5th Ed. 2015).

22. Professor Hiroshi Motomura has explained that "[t]he historical path from *Brown* in 1954 to the important amendments to the Immigration and Nationality Act of 1965 is a very direct one." Hiroshi Motomura, *Brown v. Board of Education, Immigrants, and the Meaning of Equality*, 49 N.Y.L. SCH. L. REV. 1145, 1145-46 (2005). The 1965 amendments ended the national origins system that dated back to the 1920s and codified the federal government's preference for northern and western European immigrants. *Id.* "It's no coincidence that in the same year as the 1965 immigration amendments ended that very blatant form of white privilege in the immigration system, the Voting Rights Act of 1965 also became law." *Id.*

23. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984) ("The currents that have transfigured constitutional jurisprudence, administrative law, civil rights, and judicial ideology since the New Deal and especially since the 1960s, have largely passed immigration law by . . ."); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) ("The plenary power doctrine's contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions."); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017) (Pursuant to "plenary power" doctrine, "courts

notorious *Chinese Exclusion Case* of 1889,<sup>24</sup> which reflects the same bigotry as *Plessy*.<sup>25</sup> Louis Henkin famously described the doctrine as a “constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects.”<sup>26</sup> Indeed, although some courts continue to abide by the plenary power doctrine despite its dreadful origins, its sway has been steadily diminishing.<sup>27</sup> The administration’s unapologetically racialized approach to immigration is forcing courts to consider anew the extent to which the federal

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allowed the government to exclude noncitizens on the basis of race” and “categorically denied review over government decisions that would plainly violate constitutional rights outside of the immigration context.”).

24. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed . . . [Such a] determination is conclusive upon the judiciary.”); see also *Ekiu v. United States*, 142 U.S. 651, 660 (1892) (defining the contours of “the province of the judiciary”); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (same); Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants’ Rights*, 26 CORNELL INT’L L.J. 695, 696 (1993) (“[*Chae Chan Ping*] marks the beginning of the plenary power doctrine, which in its purest form severely limits (and often completely forecloses) judicial consideration of constitutional challenges to immigration decisions by the political branches.”).

25. See Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22 (1998) (“The legislative history of the statutes approved by the Court in the plenary power cases indicates that they were not primarily motivated by a desire to influence foreign policy or international affairs, or even to protect American labor, but instead to foster white supremacy by defending white civilization against an undesirable race.”); see also Schuck, *supra* note 23, at 3 (noting that classical immigration law reflects exclusionary impulses, “celebrated norms and countenanced practices that were decidedly, sometimes grotesquely, illiberal”).

26. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 862 (1987).

27. See Kim, *supra* note 23, at 79 (noting that courts have “largely retreated from plenary power principles” and “commentators have been discussing the ‘demise’ of plenary power for decades”); see also Motomura, *supra* note 23, at 547 (By 1954, “the doctrine had long been under heavy fire from many quarters. Critics expressed deep concern over the continuing isolation of an entire body of law from the mainstream of American public law—isolation not only from the process of constitutional judicial review, but also from the constitutional norms and principles developed through that process over the years. Even though the Court had endorsed some version of the plenary power doctrine in cases decided in the 1970’s, a number of observers had predicted the gradual demise of the doctrine and a corresponding reintegration of our usual expectations regarding judicial review into immigration law.”) (footnotes omitted). One school argues that the erosion of plenary power reflects “a larger administrative law project to constrain the” delegation of discretion “to unelected agency officials.” See Kim, *supra* note 23, at 113. The “delegation concerns” argument suggests that courts have not repudiated the plenary power doctrine but have instead reserved it for Congress and the President, who are not at liberty to delegate it to unelected agency officials. *Id.* at 115. Another school argues that courts’ decreased commitment to plenary power reflects the incremental integration of modern equal protection principles into the immigration context, a traditional area of judicial restraint. See Motomura, *supra* note 23, at 566–67.

government is unconstrained to discriminate against immigrants of color.

## II. THE TRUMP ADMINISTRATION AND HAITI'S TPS

President Trump has long made clear his hostility towards immigrants of color and his preference for white immigrants. In June 2017, the President articulated his antipathy towards Black immigrants specifically when he reportedly reacted to a document listing the number of immigrants who had received visas in 2017.<sup>28</sup> Upon learning that 15,000 Haitians were allowed to enter the United States, President Trump is reported to have said, they “all have AIDS.”<sup>29</sup> During that June 2017 meeting, President Trump also learned that 40,000 immigrants from Nigeria had received visas to enter the United States in 2017.<sup>30</sup> According to news reports, he reacted by stating that, once they had seen the United States, these Nigerian immigrants would never go back to their “huts” in Africa.<sup>31</sup> The President upbraided his senior advisers for the perceived influx of immigrants of color.<sup>32</sup>

During a subsequent White House meeting with several U.S. Senators, the President is alleged to have disparaged a draft immigration plan that included people from Haiti, El Salvador, and some African countries, asking, “Why are we having all these people from shithole countries come here?”<sup>33</sup> President Trump is alleged to have further disparaged Haitians in particular, asking, “Why do we need more Haitians?”—and ordered the bill’s drafters to “[t]ake them out.”<sup>34</sup> The President allegedly expressed his preference for more

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28. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

29. *Id.* This article states that other officials insist that President Trump never used the words “AIDS” or “huts.” *Id.* Several participants in the meeting said that they did not recall President Trump using those words. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?utm\\_term=.b56f11cc896f](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f). Other senators have suggested the word used might have been “shithouse.” Julie Hirschfeld Davis, *Trump’s Harsh Words, Not His Plan for Wall, Dominate Hearing*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/politics/trump-shithole-shithouse-immigration.html>.

34. Dawsey, *supra* note 33.

immigrants from places like Norway,<sup>35</sup> where the population is over 90 percent white.<sup>36</sup> Haiti's population, by contrast, is over 95 percent Black.<sup>37</sup> As Senator Richard Durbin pointed out, President Trump's singling out of Haitians for exclusion was "an obvious racial decision."<sup>38</sup>

The administration gamed the TPS review process to paper over this obvious racial decision. First, as the district court decision in *Saget v. Trump*<sup>39</sup> details, White House officials pressured DHS to terminate the program, warning Acting Secretary of Homeland Security Elaine C. Duke that they would be "extremely disappointed" if she delayed the decision.<sup>40</sup> Similarly, Attorney General Jeff Sessions pushed Secretary Duke to "ha[ve] the guts to pull the trigger."<sup>41</sup> And, according to *Saget*, Secretary Duke "was well aware the White House wanted to terminate TPS for Haiti and other predominantly non-white foreign nations."<sup>42</sup> Secretary Duke's own handwritten notes indicate that she understood what was happening.<sup>43</sup> "This conclusion," she wrote, "is the result of an America first view of the TPS decision."<sup>44</sup>

The administration also tried to sabotage Haiti's TPS by attempting to create a public narrative that traded on some of the most insidious anti-Black stereotypes. In early 2017, DHS and U.S. Citizenship and Immigration Services (USCIS) appointees sought crime and public assistance data on Haitians with TPS.<sup>45</sup> In an

35. *Id.*

36. See Jennifer Bendery, *Trump's Homeland Security Chief Not Sure if Norway Is Mostly White*, HUFFINGTON POST (Jan. 16, 2018, 1:38 PM), [https://www.huffingtonpost.com/entry/kirstjen-neilsen-norway-white-trump\\_us\\_5a5e2a44e4b0fcbc3a13dbb4](https://www.huffingtonpost.com/entry/kirstjen-neilsen-norway-white-trump_us_5a5e2a44e4b0fcbc3a13dbb4); *The World Factbook: Norway*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html> (last updated Feb. 18, 2019).

37. *The World Factbook: Haiti*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (last updated Feb. 24, 2019).

38. Carl Hulse, *Inside the Oval Office Immigration Meeting that Left a Senator Stunned*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/politics/trump-durbin-immigration-daca.html>.

39. 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

40. *Id.* at 348.

41. *Id.*

42. *Id.* at 370.

43. *Id.* at 347–48.

44. *Id.* at 348.

45. *Id.* at 307; see also Alicia A. Caldwell, *AP Exclusive: US Digs for Evidence of Haiti Immigrant Crimes*, AP NEWS (May 9, 2017), <https://apnews.com/740ed5b40ce84bb398c82c48884be616> ("Internal emails . . . show a top immigration official wanted not only crime data on Haitians

April 2017 email, USCIS's Office of Policy and Strategy Chief directed her staff to compile "details on how many [Haitian] TPS holders are on public and private relief" and "how many have been convicted of crimes of any kind (any criminal/detainer stats you can find)."<sup>46</sup> She also sought information on how many were "out of work," and the number of current Haitian TPS recipients who were "illegal pre-TPS designation."<sup>47</sup> After staff said they could not gather the information, she pressed them to search further. "I know some of it is not captured," she said, "but we'll have to figure out a way to squeeze more data out of our system."<sup>48</sup> Likewise, in an April 2017 email, Secretary of Homeland Security John F. Kelly directed staff to collect, "[s]pecific to Haiti, details on how many are on public and private relief, how many school aged kids [are] in school, how many [are] convicted of crimes of any kind."<sup>49</sup> "According to internal DHS communications," *Saget* explains, "officials sought this data to bolster the decision to terminate TPS for Haiti."<sup>50</sup>

Of course, these data are irrelevant to any assessment of country conditions,<sup>51</sup> and DHS's relentless efforts to manufacture prejudicial evidence about Haitian TPS recipients drew the attention of lawmakers. Senator Bill Nelson wrote to Secretary Kelly to express his concern about the reports.<sup>52</sup> So did Senators Robert Menendez, Ron Wyden, Edward Markey, Kirsten Gillibrand, and Sherrod Brown, who expressed their alarm about "the troubling news that your department has asked for information on the criminal history and

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who are protected from deportation under the [TPS] program, but also how many were receiving public benefits.").

46. Plaintiffs' Response to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1), Fed. R. Civ. P. 12(B)(6), or, alternatively, for Summary Judgment Pursuant to Fed. R. Civ. P. 56, Exhibit 20 at 1, *Saget v. Trump*, 345 F. Supp. 3d 287 (E.D.N.Y. 2018) (No. 1:18-cv-01599-WFK-ST).

47. *Id.* at 49.

48. Caldwell, *supra* note 45; *see also Saget*, 375 F. Supp. 3d at 309 (quoting April 27, 2017, email to USCIS staffers).

49. *Saget*, 375 F. Supp. 3d at 307–08 (alteration in original).

50. *Id.* at 307. In May 2017 DHS's Office of Public Affairs circulated an email with draft press conference talking points that included denials that DHS or USCIS ever looked into criminal history or welfare data in connection with the TPS decision. *Id.* at 310–11.

51. According to two officials, during their combined nine years as USCIS researchers, no senior USCIS officials had ever asked them to gather criminality or welfare data on a TPS population. *Id.* at 308.

52. Letter from Sen. Bill Nelson to John F. Kelly, Sec'y, Dep't of Homeland Sec. (May 17, 2017), <http://www.ijdh.org/wp-content/uploads/2016/10/2017-05-17-Nelson-to-Kelly-Haiti-TPS-Extension.pdf>.

public benefits use of Haitian nationals protected under [TPS].”<sup>53</sup> They noted that the “timing of this information request suggests that this information is pretext to deny an extension of TPS,” and urged the administration to “keep [its] review within the bounds dictated by Congress.”<sup>54</sup>

But the administration did not hew to the TPS statute. Instead, in addition to pressuring DHS to end the program and trying to publicly impugn Haitian TPS recipients, the administration flouted the conventional TPS review process to contrive a justification for termination.<sup>55</sup> When reviewing a country’s TPS designation, DHS is required to consider whether “the conditions in the foreign state . . . for which a designation is in effect . . . continue to be met.”<sup>56</sup> Consistent with that statutory mandate, DHS traditionally undertook a careful review of post-earthquake conditions in Haiti with respect to housing, food security, infrastructure, and public health.<sup>57</sup> In this instance, however, DHS ignored or discounted these metrics. For instance, DHS departed from the government’s past practice of considering *all* country conditions at the time of the periodic review, not just conditions that were directly attributed to the earthquake.<sup>58</sup> DHS also discounted the impact of Hurricane Matthew and the cholera epidemic.<sup>59</sup> It also failed to account for “unsafe homes, food security concerns, and longstanding public health challenges.”<sup>60</sup> In fact, *Saget* found that DHS and USCIS officials directed staff to research information that would favor termination, and strategically edited a key agency memorandum to support the case for termination and undermine the case for extension.<sup>61</sup> The Department of State also undertook a “highly unusual” process, according to *Saget*.<sup>62</sup> The U.S.

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53. Letter from Sens. Robert Menendez, et al., to John F. Kelly, Sec’y, Dep’t of Homeland Sec. (May 19, 2017), [https://www.menendez.senate.gov/imo/media/doc/HAITI-TPS\\_5\\_19\\_17.pdf](https://www.menendez.senate.gov/imo/media/doc/HAITI-TPS_5_19_17.pdf).

54. *Id.*

55. *Saget*, 375 F. Supp. 3d at 347 (“[T]he evidence shows Acting Secretary Duke, the White House, and other Government agencies and officials undertook the TPS review process with the explicit goal of terminating TPS for Haiti.”).

56. 8 U.S.C. § 1254a(b)(3)(A) (2012).

57. *Saget*, 375 F. Supp. 3d at 301.

58. *Id.* at 350.

59. *Id.*

60. *Id.* at 356.

61. *Id.* at 350–351.

62. *Id.* at 352–53.

Embassy in Haiti recommended extension,<sup>63</sup> and embassy recommendations typically received great deference.<sup>64</sup> But the Embassy's views were cast aside in this case, in contravention of longstanding practice.<sup>65</sup>

### III. THE UNITED STATES AND HAITI

Unfortunately, the administration's disaffection for Haiti is nothing new. The relationship of the United States to Haiti has been, for centuries, punctuated by noxious anti-Black prejudice.<sup>66</sup> By the end of the eighteenth century, French Saint-Domingue—as Haiti was then known—was the world's largest producer of sugar, grew half of the world's coffee, and became the most profitable colony on earth.<sup>67</sup> It was also a brutal slave state where between 5 and 10 percent of the enslaved population died annually from overwork and disease.<sup>68</sup> Many of the enslaved people who arrived in Saint-Domingue in the late eighteenth century were African soldiers captured in battle.<sup>69</sup> As Laurent Dubois writes, Saint-Domingue's slavers were bringing “literally thousands of soldiers to their shores.”<sup>70</sup> In August 1791, enslaved persons on a sugar plantation ignited the largest slave revolt in history,<sup>71</sup> and, within two years, every enslaved person in the colony was free.<sup>72</sup>

Professor Dubois explains that “the Haitian Revolution was an act of profound—and irreversible—transformation,”<sup>73</sup> which deeply unsettled the United States. For W.E.B. Du Bois—a founder of the NAACP—it offered the burgeoning abolition movement “an irresistible argument.”<sup>74</sup> Senator Thomas Benton of Missouri encapsulated the United States' attitude towards Haiti in 1826:

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63. *Id.*

64. *Id.*

65. *Id.*

66. For a brief summary of Haitians' contributions to American history, see DANIELS, *supra* note 19, at 212.

67. DUBOIS, *supra* note 1, at 19.

68. *Id.* at 21.

69. *Id.* at 23.

70. *Id.*

71. *Id.* at 5.

72. *Id.*

73. *Id.* at 16.

74. W. E. BURGHARDT DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638–1870* 70–71 (1904).

Our policy towards Hayti . . . has been fixed . . . for three and thirty years.[ ]We trade with her, but no diplomatic relations have been established between us. We purchase coffee from her and pay her for it; but we interchange no Consuls or Ministers. We receive no mulatto Consuls or black Ambassadors from her. And why? Because the peace of eleven states in this Union will not permit the fruits of a successful negro insurrection to be exhibited among them. It will not permit black Consuls and Ambassadors to establish themselves in our cities, and to parade through our country, and give their fellow blacks in the United States, proof in hand of the honors which await them, for a like successful effort on their part.<sup>75</sup>

The United States refused to recognize Haiti's independence until 1862,<sup>76</sup> and America's hostility persisted for a long time after that. In 1893, two years after he resigned from his post<sup>77</sup> as U.S. minister and consul general to Haiti,<sup>78</sup> Frederick Douglass remarked, "Haiti is black, and we have not yet forgiven Haiti for being black or forgiven the Almighty for making her black."<sup>79</sup> The United States operationalized these prejudices in 1915 when American Marines landed in Haiti to begin an occupation that would last until 1934 and would kill fifteen thousand Haitians.<sup>80</sup> The Marines brought with them to Haiti "a pure racism not felt in the country" since the nineteenth century.<sup>81</sup> Colonel Littleton W.T. Waller, one of the highest-ranking commanders in the early part of the occupation, famously boasted, "I know the nigger and how to handle him."<sup>82</sup> Within a year of their arrival, the Marines saw to it that a significant number of Haitian men

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75. Senator Thomas Hart Benton, Speech Delivered in the Senate of the United States in a Secret Session on the Mission to Panama 34–35 (March 13, 1826).

76. DUBOIS, *supra* note 1, at 153.

77. DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 709 (2018).

78. *Id.* at 692.

79. Frederick Douglass, Lecture on Haiti (1893), in GREAT SPEECHES BY FREDERICK DOUGLASS 105, 106 (James Daley ed., 2013).

80. Edwidge Danticat, *The Long Legacy of Occupation in Haiti*, NEW YORKER (July 28, 2015), <https://www.newyorker.com/news/news-desk/haiti-us-occupation-hundred-year-anniversary>.

81. AMY WILENTZ, THE RAINY SEASON: HAITI SINCE DUVALIER 41 (1989); *see also* DUBOIS, *supra* note 1, at 225–26 ("All of the marines were white, and they brought to the 'land of black people' their own experiences and expectations from the racially segregated United States.").

82. DUBOIS, *supra* note 1, at 226.

were put to forced labor.<sup>83</sup> Haitians, led by army officer Charlemagne Péralte,<sup>84</sup> organized by the thousands to resist the occupation.<sup>85</sup> The U.S. military eventually took to bombarding the insurgents,<sup>86</sup> and Péralte was assassinated by two Marines.<sup>87</sup>

The federal government would repeatedly discriminate against Haitians for the rest of the twentieth century. In one episode that is redolent of President Trump’s association of Haitians with AIDS, in 1982 the U.S. Centers for Disease Control and Prevention (CDC) singled out Haitians as being at a high risk for contracting HIV/AIDS by virtue of their national identity.<sup>88</sup> In 1990, the Food and Drug Administration issued a nationwide ban on Haitian blood donations.<sup>89</sup> By the time the CDC stopped singling out Haitians, they were already widely associated with the disease.<sup>90</sup>

The federal government also has a well-documented history of discrimination against Haitians with respect to federal immigration policy. Not a single Haitian refugee or asylee was accepted by the United States for permanent refugee status between 1981–1990.<sup>91</sup> In 1989, Bruce Morrison, then chair of the House Subcommittee on Immigration, pointed out how the Immigration and Naturalization Service (INS) was treating Haitians unfairly.<sup>92</sup> “There’s been a lot of discrimination [against them],” he said, “They’re black, they are from a nation close to ours, and their country isn’t communist.”<sup>93</sup> As scholar Roger Daniels explains,

It is instructive to note that, despite the ideological differences between the Carter, Reagan, Bush I, Clinton, and Bush II administrations, each has persistently discriminated

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83. *Id.* at 238–43.

84. *Id.* at 223.

85. *Id.* at 257–58.

86. *Id.* at 258.

87. *Id.* at 260.

88. *See Opportunistic Infections and Kaposi’s Sarcoma among Haitians in the United States*, CTR. FOR DISEASE CONTROL & PREVENTION (July 9, 1982), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00001123.htm>.

89. Bruce Lambert, *Now, No Haitians Can Donate Blood*, N.Y. TIMES (Mar. 14, 1990), <https://www.nytimes.com/1990/03/14/us/now-no-haitians-can-donate-blood.html>.

90. *See* Edwidge Danticat, *Trump Reopens an Old Wound for Haitians*, THE NEW YORKER (Dec. 29, 2017), <https://www.newyorker.com/news/news-desk/trump-reopens-an-old-wound-for-haitians>.

91. DANIELS, *supra* note 19, at 213.

92. *Id.*

93. *Id.*; *see also* *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980) (describing disparate treatment between Haitian and Cuban refugees).

against Haitian entrants as opposed to Cubans. The Reagan administration began the practice of towing Haitian, but not Cuban, vessels back to where they came from, the first Bush administration initiated the use of the naval base at Guantanamo for detained Haitians, and the Clinton administration expanded the use of the Cuban base, out of the federal judiciary's reach, as a warehouse for Haitians.<sup>94</sup>

#### IV. HAITIAN IMMIGRATION, EQUAL PROTECTION, AND PLENARY POWER

The federal government's discrimination against Haitian immigrants has repeatedly compelled courts to wrestle with fundamental questions about the limits of the plenary power doctrine.<sup>95</sup> *Jean v. Nelson*<sup>96</sup> is exemplary.<sup>97</sup> During the late 1970s and early 1980s, thousands of Haitians sought political asylum in the United States to escape the maniacal Duvalier regime.<sup>98</sup> It had been the U.S. government's practice since 1954 to parole immigrants freely into the United States while the government reviewed their asylum claims.<sup>99</sup> But in 1981, in response to the influx of undocumented immigrants from Haiti and Cuba, the Attorney General ordered INS to detain without parole any immigrant who could not present a prima facie case for admission.<sup>100</sup> When it came to individual detention decisions, immigration inspectors could exercise unguided discretion,

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94. DANIELS, *supra* note 19, at 214.

95. See Schuck, *supra* note 23, at 68 ("No single development has animated and shaped the current transformation of immigration law more powerfully than the massive influx and subsequent detention of aliens from Cuba, Haiti, El Salvador and other Caribbean Basin countries since 1980. The prolonged incarceration of thousands of aliens, most of them innocent victims of severe economic deprivation, indiscriminate armed conflict, or intense political persecution, has seared the judicial conscience as few events since the civil rights struggles of the 1950s and 1960s have done.").

96. (*Jean IV*), 472 U.S. 846 (1985).

97. See Motomura, *supra* note 23, at 546 (*Jean IV* "captures much of what is significant about the immigration law cases of the past decade.").

98. See *Civiletti*, 503 F. Supp. at 450 (describing plight of "[p]erhaps thirty thousand Haitians [who] have flocked to the shores of South Florida over the past thirty years, fleeing the most repressive government in the Americas"). François Duvalier ruled Haiti from 1957 until his death in 1971; his son, Jean-Claude Duvalier, ruled from 1971 until he fled the country aboard a U.S. Air Force jet in 1986. Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT'L L. REV. 389, 457 (1995).

99. *Jean v. Nelson (Jean I)*, 711 F.2d 1455, 1469 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc), *rev'd*, *aff'd as modified*, 472 U.S. 846 (1985); see Schuck, *supra* note 23, at 29.

100. *Jean IV*, 472 U.S. at 849; see Schuck, *supra* note 23, at 29.

and they did so to discriminate against Haitian asylum seekers.<sup>101</sup> Detentions frequently lasted months, and in some cases over a year.<sup>102</sup> For instance, in 1982 *The New York Times* reported on sixty-eight Haitian men and women who were detained for seven months in a former Navy brig.<sup>103</sup> They had not been outdoors, except for a rare trip in manacles to a doctor or to disciplinary quarters.<sup>104</sup> A district court found that the government was playing “a human shell game” with these asylum seekers by moving them around the country to “desolate, remote” areas.<sup>105</sup> The detention policy was widely described as a moral disgrace<sup>106</sup> and challenged in a series of cases that culminated in *Jean*.

*Jean* involved a class of Haitian asylees who alleged that the parole policy violated the equal protection guarantee of the Fifth Amendment.<sup>107</sup> The government argued that the asylees’ immigration status rendered them powerless to assert equal protection rights.<sup>108</sup> An Eleventh Circuit panel held that excludable immigrants have a right to be considered for parole in a non-discriminatory fashion, and therefore could raise an equal protection claim, notwithstanding Congress’s prerogative “over the who and how of immigration.”<sup>109</sup> The panel applied *Village of Arlington Heights v. Metropolitan Housing Development Corporation*<sup>110</sup> to assess the allegations of discrimination.<sup>111</sup> *Arlington Heights*, which establishes the framework for demonstrating that a governmental decision was motivated at least in part by a discriminatory purpose,<sup>112</sup> is a pillar of modern equal protection jurisprudence. It is telling that courts adjudicating equal

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101. *Jean I*, 711 F.2d at 1470, 1473–74.

102. *Id.* at 1463.

103. Laurie Johnston, *83 Haitians in Brooklyn Still Fight for Asylum*, N.Y. TIMES (Feb. 28, 1982), <https://www.nytimes.com/1982/02/28/nyregion/83-haitians-in-brooklyn-still-fight-for-asylum.html>.

104. *Id.*

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

106. *Louis v. Nelson*, 544 F. Supp. 973, 976 (S.D. Fla. 1982).

107. *Jean IV*, 472 U.S. 846, 849 (1985). The petitioners also alleged that the government’s change in policy violated the Administrative Procedures Act, 5 U.S.C. § 553 (APA). *Id.*

108. *Id.* at 868, 872–73.

109. *Jean I*, 711 F.2d 1455, 1483–84 (11th Cir. 1983), *rev’d*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff’d as modified*, 472 U.S. 846 (1985).

110. 429 U.S. 252 (1977).

111. *Jean I*, 711 F.2d at 1485.

112. *Vill. of Arlington Heights*, 429 U.S. at 266.

protection claims involving immigrants have long applied the *Arlington Heights* framework without reservation.<sup>113</sup>

The Eleventh Circuit panel found that the statistical evidence showed a “severely disproportionate impact” that revealed a pattern of discrimination “as stark as that in *Gomillion* [*v. Lightfoot*] or *Yick Wo* [*v. Hopkins*].”<sup>114</sup> The panel also considered the numerous prior lawsuits that challenged the disparate treatment of Haitian immigrants,<sup>115</sup> extensive testimonial evidence that Haitians were targeted and mistreated,<sup>116</sup> and evidence of the government’s departures from the normal exclusion procedure.<sup>117</sup> “All told,” the panel explained, “plaintiffs mustered an impressive array of witnesses and equally impressive number of documents to demonstrate circumstantially, and to an extent, directly, intentional government discrimination against Haitians.”<sup>118</sup> The panel concluded that the “plaintiffs were denied equal protection of the laws, as mandated both by the Constitution and our interpretation of Congress’ enabling immigration legislation.”<sup>119</sup>

The en banc Eleventh Circuit reversed and remanded the case to the district court.<sup>120</sup> Although it did not dispute the factual findings of invidious discrimination, it deemed the plaintiffs excludable immigrants who had not been formally admitted into the United States.<sup>121</sup> In its view, the decision to parole or detain an excludable immigrant was a part of the admissions process, and the Executive branch was free to discriminate on the basis of national origin in making parole decisions.<sup>122</sup> The Supreme Court took the case in December 1984.<sup>123</sup>

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113. *See* *Louis v. Nelson*, 544 F. Supp. 973, 999 (S.D. Fla. 1982).

114. *Jean I*, 711 F.2d at 1489.

115. *Id.* at 1490–91.

116. *Id.*

117. *Id.*

118. *Id.* at 1494.

119. *Id.* at 1509.

120. *Jean IV*, 727 F.2d 957, 962 (11th Cir. 1984) (en banc), *aff’d as modified*, 472 U.S. 846 (1985).

121. *Id.* at 969 (“Since an alien’s legal status is not altered by detention or parole under the entry doctrine fiction, it seems clear that plaintiffs here can claim no greater rights or privileges under our laws than any other group of aliens who have been stopped at the border.”).

122. *Id.* at 963 (remanding to the district court to determine whether lower-level officials abused their discretion by discriminating on the basis of national origin, since the government contended that the parole regulations utilized facially neutral criteria).

123. *Jean v. Nelson*, 469 U.S. 1071 (1984).

The following year, in an opinion sanitized of any description of the discrimination that Haitian refugees suffered or the deadly consequences many would face if forced to return to Haiti,<sup>124</sup> a six-justice majority applied the doctrine of constitutional avoidance to sidestep the equal protection issue.<sup>125</sup> The Court held that the operative statutes and regulations did not permit officials to discriminate on the basis of race or national origin,<sup>126</sup> and affirmed the en banc Eleventh Circuit's judgment insofar as it remanded to the district court to determine whether the officials were acting within their authority.<sup>127</sup> It faulted the Eleventh Circuit for reaching the parole question on constitutional grounds.<sup>128</sup>

In dissent, Justice Thurgood Marshall—LDF's first Director-Counsel, who litigated *Brown*<sup>129</sup>—took the *Jean* majority to task for failing to take up the constitutional issue.<sup>130</sup> He would have held unequivocally that the petitioners had a Fifth Amendment right to parole decisions that are free from invidious race discrimination.<sup>131</sup> In Justice Marshall's estimation, “[o]ur case law makes clear that the excludable aliens do, in fact, enjoy Fifth Amendment protections.”<sup>132</sup> He referred to cases that established the constitutional rights of criminally accused immigrants, and asserted that “[t]here is no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms.”<sup>133</sup> Finally and most forcefully, Justice Marshall reproached the Court for betraying its “long-held and recently affirmed commitment to apply the Constitution's due process and equal protection guarantees to all individuals within the reach of our sovereignty.”<sup>134</sup>

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124. See *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980).

125. *Jean IV*, 472 U.S. 846, 855–57 (1985).

126. *Id.* at 855.

127. *Id.* at 857.

128. *Id.* at 848.

129. GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 4, 336–40 (2012); Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 535–36 (1994).

130. *Jean IV*, 472 U.S. at 858 (Marshall, J., dissenting) (“In my mind, there is no principled way to avoid reaching the constitutional question presented in this case.”).

131. *Id.*

132. *Id.* at 873.

133. *Id.*

134. *Id.* at 874–75.

LDF endorsed Justice Marshall's position as *amicus curiae* in *Jean*.<sup>135</sup> Describing the elimination of race discrimination as "a national goal of the highest order,"<sup>136</sup> LDF argued that the Constitution must be read to prohibit intentional race discrimination against Haitian immigrants.<sup>137</sup> LDF felt strongly that the case implicated the interests of all American citizens, who are collectively and individually harmed by an atmosphere of racial prejudice promoted by an official policy of discrimination.<sup>138</sup> The stakes were clear to LDF in 1985:

The actions of [the government] in this case set an example of racial prejudice and hatred. This example can be expected to permeate throughout society, reinforcing racist attitudes and undermining the national goal of eliminating racial and ethnic discrimination. Any official policy and program incorporating invidious racial lines, regardless of the identity of the immediate victims, represents an affront to the constitutional guarantee of equal protection.<sup>139</sup>

The stakes are equally clear today, and TPS recipients may offer the Supreme Court another opportunity to describe the reach of the equal protection mandate in the immigration context.

## V. TPS COURT CHALLENGES AND THE COMMUNITARIAN IDEAL

Since LDF filed its lawsuit in January 2018, three other lawsuits have challenged the rescission decision on equal protection grounds. *Ramos v. Nielsen*<sup>140</sup> was filed in San Francisco by nine TPS beneficiaries<sup>141</sup> from Sudan,<sup>142</sup> Nicaragua,<sup>143</sup> El Salvador,<sup>144</sup> and

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135. Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioners, *Jean v. Nelson*, 472 U.S. 846 (1985) (No. 84-5240), 1985 WL 670075, at \*10.

136. *Id.* at \*6.

137. *Id.*

138. *Id.* at \*3.

139. *Id.* at \*4.

140. 321 F. Supp. 3d 1083 (N.D. Cal. 2018).

141. Class Action Complaint, *Ramos*, 321 F. Supp. 3d 1083 (No. 3:18-cv-01554-EMC), 2018 WL 4823816.

142. Sudan was designated for TPS in 1997. *Ramos*, 321 F. Supp. 3d at 1098. In October 2017, DHS announced the termination of TPS effective November 2018. *Id.*

143. Nicaragua was designated for TPS in 1999. *Id.* at 1096-97. In December 2017, DHS announced the termination of TPS effective January 2019. *Id.* at 1097.

144. El Salvador was designated for TPS in 2001. *Id.* at 1095. In January 2018, DHS announced the termination of TPS effective September 2019. *Id.*

Haiti.<sup>145</sup> *Centro Presente v. United States Department of Homeland Security*<sup>146</sup> was filed in Boston by fourteen TPS recipients from Haiti, El Salvador, and Honduras.<sup>147</sup> And *Saget* was filed in Brooklyn by ten TPS recipients from Haiti.<sup>148</sup> Each involved a claim that the administration's decisions to terminate the various TPS programs violated the equal protection component of the Fifth Amendment because the decisions reflected racial animus.<sup>149</sup>

The government's efforts to dismiss the race discrimination claims in each case have failed.<sup>150</sup> *Centro Presente* and *Saget* applied the *Arlington Heights* framework.<sup>151</sup> So did *Ramos*,<sup>152</sup> which, in October 2018, preliminarily enjoined the federal government from enforcing the decisions to terminate TPS for, *inter alia*, Haiti.<sup>153</sup> With respect to the equal protection claim, the court found that there were, "at the very least, serious questions going to the merits."<sup>154</sup> These serious questions were aroused by evidence suggesting that the White House pressured DHS to end TPS.<sup>155</sup> They were also aroused by "evidence that President Trump harbors animus against non-white, non-European aliens which influenced his . . . decision to end the TPS designation."<sup>156</sup> *Ramos* also noted that the sequence of events leading up to the rescission was "irregular and suggestive of a predetermined outcome not based on an objective assessment."<sup>157</sup>

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145. Class Action Complaint, *supra* note 141.

146. 332 F. Supp. 3d 393 (D. Mass. 2018).

147. *See id.* at 397. Honduras was designated for TPS in 1999. *Id.* at 399. In May 2018, DHS announced the termination of TPS effective January 2020. *Id.* at 403.

148. *Saget v. Trump*, 345 F. Supp. 3d 287 (E.D.N.Y. 2018).

149. *See id.* at 291–92, 296; *Ramos*, 321 F. Supp. 3d at 1092; *Centro Presente*, 332 F. Supp. 3d at 404. Plaintiffs in *Saget* also alleged that the government violated their due process rights, the APA, and the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, and that its actions were *ultra vires* of the provisions of the Immigration and Nationality Act, 8 U.S.C. § 1254a(b)(1)(A)–(C). 345 F. Supp. 3d at 292. Plaintiffs in *Ramos* also alleged that the government violated their substantive due process rights and the APA. 321 F. Supp. 3d at 1092. Plaintiffs in *Centro Presente* also alleged that the government violated the due process clause of the Fifth Amendment and the APA. 332 F. Supp. 3d at 404.

150. *See Saget*, 345 F. Supp. 3d at 292; *Ramos*, 321 F. Supp. 3d at 1123; *Centro Presente*, 332 F. Supp. 3d at 396.

151. *Saget*, 345 F. Supp. 3d at 304–04; *Centro Presente*, 332 F. Supp. 3d at 412.

152. *Ramos*, 321 F. Supp. 3d at 1131.

153. *Id.* at 1108.

154. *Id.* at 1098.

155. *Id.*

156. *Id.* at 1100.

157. *Id.* at 1101.

Like *Ramos*, in April 2019, *Saget* preliminarily enjoined the rescission.<sup>158</sup> Proceeding from the principle that “[t]he equal protection component of the Fifth Amendment’s Due Process Clause generally prohibits discrimination by official conduct on the basis of race,”<sup>159</sup> *Saget* concluded that *Arlington Heights* provided “the governing legal standard.”<sup>160</sup> In addition to President Trump’s comments,<sup>161</sup> the court considered the disparaging comments of other administration officials.<sup>162</sup> For instance, Secretary Kelly allegedly said, “Haitians are ‘[n]ot a bad people, but they are welfare recipients.’”<sup>163</sup> *Saget* also considered the aberrant sequence of events that preceded the termination decision. *Saget* described “a stark departure from ordinary procedure, suggestive of a pre-determined outcome not anchored in an objective assessment, but instead a politically motivated agenda.”<sup>164</sup> “[T]he evidence suggests,” the court explained, that the White House induced DHS “to ignore statutory guidelines, contort data, and disregard objective reason to reach a predetermined decision to terminate TPS and abate the presence of non-white immigrants in the country.”<sup>165</sup>

It is telling that, in these TPS cases, the government has unsuccessfully urged the courts to apply the deferential standard set forth by the Supreme Court in *Trump v. Hawaii*,<sup>166</sup> which adjudicated an Establishment Clause challenge to entry restrictions for certain foreign nationals.<sup>167</sup> The government argued unsuccessfully that *Hawaii* requires courts to apply rational basis review to these race discrimination claims.<sup>168</sup> *Ramos* and *Centro Presente* distinguished *Hawaii* because the government did not cite national security or foreign policy reasons for terminating TPS.<sup>169</sup> They also distinguished *Hawaii* because TPS beneficiaries are already in the United States and,

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158. *Saget*, 375 F. Supp. 3d at 295.

159. *Id.* at 365 (citing *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954)).

160. *Id.* at 366.

161. *Id.* at 371.

162. *Id.* at 371–72.

163. *Id.* at 312 (alteration in original).

164. *Id.* at 372.

165. *Id.* at 368–69.

166. 138 S. Ct. 2392 (2018).

167. *Id.* at 2403.

168. See *Centro Presente v. United States Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 410 (D. Mass. 2018); Defendants’ Supplemental Brief Regarding Equal Protection Claim at 1, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018) (No. 18-cv-01554-EMC).

169. *Ramos*, 321 F. Supp. 3d at 1129; *Centro Presente*, 332 F. Supp. 3d at 411.

therefore, enjoy greater constitutional protections than persons who are seeking admission for the first time.<sup>170</sup> *Ramos* and *Centro Presente* took care to emphasize the substantial connections that TPS beneficiaries have developed during their time in the United States.<sup>171</sup> *Centro Presente* noted that several of the plaintiffs had United States citizen children, worked in a variety of fields, obtained educational degrees in the United States, and were active in their communities, such that they had developed or begun to develop the ties of permanent residence.<sup>172</sup> *Ramos* also noted that many TPS beneficiaries in the United States have “deep, long-term ties.”<sup>173</sup>

By minding these ties, the courts are acknowledging that these individuals are part of the fabric of their communities and deserve to fall within the Constitution’s ambit. They are also embracing an expansive, communitarian view of membership in American society. Around the time of *Jean*, Peter Schuck described the emergence of this communitarian ideal rooted in notions of universal rights and essential and equal humanity, which, he predicted, would profoundly alter immigration jurisprudence as classical immigration law’s moral and legal foundations were increasingly discredited.<sup>174</sup> “The forces of change,” he wrote in 1984, “are insistently hammering at the gate, threatening the autonomy and insularity that have long sheltered classical immigration law from developments elsewhere in the legal culture.”<sup>175</sup>

More than three decades later, more than six decades after *Brown*, and almost eight decades after its inception, LDF continues to help animate the forces of change, this time in an effort to engender what Hiroshi Motomura has described as “a radically broader view of the constitutionally protected community than that implicit in the plenary power doctrine.”<sup>176</sup> LDF’s dedication to that inclusive view of American law has led the organization to shape jurisprudence in areas

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170. *Ramos*, 321 F. Supp. 3d at 1129; *Centro Presente*, 332 F. Supp. 3d at 411. *Ramos* also distinguished *Hawaii* because the executive order at issue was “issued pursuant to a very broad grant of statutory discretion,” whereas “Congress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever.” *Ramos*, 321 F. Supp. 3d at 1130.

171. *Ramos*, 321 F. Supp. 3d at 1129–30.

172. *Centro Presente*, 332 F. Supp. 3d at 411.

173. *Ramos*, 321 F. Supp. 3d at 1129–30.

174. Schuck, *supra* note 23, at 4–8.

175. *Id.* at 35.

176. Motomura, *supra* note 23, at 584.

as seemingly disparate as education,<sup>177</sup> capital punishment,<sup>178</sup> voting rights,<sup>179</sup> and employment.<sup>180</sup> That dedication now compels the organization to vindicate the principle that the federal government is not at liberty to discriminate against tens of thousands of Black men, women, and children in the United States just because they happen to be immigrants. As such, with the TPS case, LDF reaffirms its fundamental commitment to the struggle for racial justice in all aspects of American life.

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177. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968).

178. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759 (2018); *Furman v. Georgia*, 408 U.S. 238 (1972).

179. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

180. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).