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## *HCC's* Lasting Impact; Remarks from Senator Chris Coons

61 N.Y.L. SCH. L. REV. 81 (2016–2017)

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## HCC'S LASTING IMPACT; REMARKS FROM SENATOR CHRIS COONS

I am grateful for the opportunity to reflect on what the *HCC* case<sup>1</sup> means twenty-five years later. Now, I may be wrong, I may be misremembering this, but here is how I think I got involved in the case. As a student in the last semester of a four-year joint degree program, I had taken advantage of a somewhat loose deadline for major papers at Yale Law School and Yale Divinity School. And there was this thing called a SAW.<sup>2</sup> I was beginning my last semester with three thirty-page papers not yet started and due in May as a condition of graduation, so that I could take the bar exam and start my job as a federal clerk. I had gone to Long Island to stay at my then-girlfriend's house with a huge box of books and note papers, and locked myself in a room. I was for sure, honestly, finally, going to get these three papers done.

I got a call from a friend named Ray Brescia, who said, "Hey Chris." And I said, "Hey what?" And he said, "Now you know, there's just this really neat idea we have in the Human Rights Clinic."<sup>3</sup> And I asked, "Who's we?" He mentioned that Lisa Daugaard and Graham Boyd had this wonderful idea for how to get around a res judicata barrier to relitigating a case that had already been brought in Florida on behalf of Haitian refugees.<sup>4</sup> And the punchline to the whole thing was: "Since you're the only guy in the clinic who is a *Bluebook*<sup>5</sup> maniac, and loves source citing,<sup>6</sup> would you mind just kind of going in and helping them out for an hour in New York? They have this little draft done and they just would like you to come proof it for them." Now that call may not have been from Ray, it may have been from—I do not remember exactly. But I do remember saying, "Look, here's the deal, I will come into Simpson Thacher for one hour, that's it, because I have to get back to these papers."

When I got there, I discovered a room that smelled funny, with several people with whom I had been involved in previous cases that were spectacular, and fun, and life-changing, in my first year of law school. I had this funny feeling I was wandering

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1. My involvement in the litigation began with work on *Haitian Centers Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992). For information regarding the pre-filing phase of the litigation, see BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF LAW STUDENTS FOUGHT THE PRESIDENT—AND WON* 27–59 (First Scribner trade paperback ed. 2006). For an overview of the litigation, see generally Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement*, in *HUMAN RIGHTS ADVOCACY STORIES* 385 (Deena R. Hurwitz et al. eds., 2009).
  2. SAW is an acronym for "Supervised Analytic Writing," a J.D. requirement at Yale Law School. *J.D. Degree Requirements*, YALE L. SCH., <https://www.law.yale.edu/study-law-yale/degree-programs/jd-program/jd-degree-requirements> (last visited Oct. 16, 2016).
  3. The full title of the clinic is the Allard K. Lowenstein International Human Rights Clinic, which at the time was co-taught by professors Harold Hongju Koh and Michael Ratner. For information about the origin of the clinic, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 *YALE L.J.* 2391, 2394 & n.17 (1994).
  4. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991); see *Haitian Ctrs. Council, Inc.*, 789 F. Supp. at 545–46 (discussing plaintiffs' res judicata argument).
  5. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).
  6. This was true. I was on three different law journals and did more source citations than all the rest of them combined.

into something I would not easily get out of. And when I was handed a 147-page rough draft that was supposed to be turned into a brief capable of being filed in a federal court within a matter of, I think, seventy-two hours or less, I said, “Oh crap.”

I sat down with my *Bluebook*, fourteenth edition, next to me and began grinding through it. I was transfixed by the elegance, the overreach—which I suppose is understandable given the circumstances—the creativity, and the challenges of the construct. I did not leave the room for three days, and I fell in love with the project of taking this ambitious, capable, brilliant, reimagined filing, and trying to help contribute in some small way to make it fit the norms of a federal court filing, rather than some late-night spit-balling session in a dorm room. So from then until graduation day, I do not believe I returned to a single class, and I was thrilled to have the opportunity to, in a small way, contribute.

I initially owned the *res judicata* argument, which was largely granted and wiped out in the temporary restraining order (TRO) and the preliminary injunction, and then the Second Circuit appeal.<sup>7</sup> After the initial TRO was granted, many other law journal weenies decided that they wanted to help with the case, and my central role as “bluebooker guy” and my role as “*res judicata* guy” pretty quickly fell away. What I was left with was, sadly, the skill I seem to have, and which folks ask me to deploy, but that I really wish were not the only thing I was known for: dealing with politicians. I’ll tell two quick stories about that. Then, I will move on to why this matters, which is of more interest to me than just telling you about myself—that is your first clue that I have not been in the Senate long enough.

#### *A. First Story: Obtaining Signatures*

I had a friend who was a fundraiser and a D.C. insider. We had a letter we were trying to get as many senators to sign as was humanly possible. At the time we had, I think, three Democratic senators’ signatures on it, but we were trying to find a way to get more. I actually jumped on a plane to D.C., crashed a Democratic Senatorial Campaign Committee event,<sup>8</sup> put on a rented tuxedo, acted like I belonged there and knew what I was doing, had a copy of the letter in my pocket, and proceeded to personally buttonhole and get signatures from five U.S. senators. And I had a blast.

I admit that it is often not a great idea to just run a letter under people’s eyes, and have them sign it without really knowing what they are signing. But in this case, I think it was a good thing. Nearly twenty-five years later, in the autumn of 2015, I sat down with a friend and far more senior colleague, a congressman elected in 1965, and at this point the longest serving member of the House, and the Dean of the Congressional Black Caucus. While he does not remember this incident at all, I remember it as if it is happening right before my eyes. Congressman John Conyers

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7. *Haitian Ctrs. Council, Inc.*, 789 F. Supp. at 546–48 (granting the TRO); *Haitian Ctrs. Council, Inc. v. McNary*, No. 92 CV 1258, 1992 WL 155853 (E.D.N.Y. Apr. 6) (issuing the preliminary injunction), *aff’d in part, vacated in part on different grounds*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

8. Ironically, the event took place in a hotel where I now go all the time for fundraisers and receptions.

made time in his office for a group of us. After repeated phone calls, meetings, and being barely tolerated by eighteen-year-old interns, or twenty-three-year-old junior staffers, we were able to meet with Conyers. He made time for us, paid attention to us, and said, "This is important. I'm going to sign on to this letter, and I'm going to call others, and I'm going to talk about it in caucus." The congressman's statement may not have solved everything, but it sure changed how I felt about the importance of what we were doing and its viability, even as our prospects in the Supreme Court were less and less bright. So I had a chance at that meeting in autumn to tell John how much that mattered to me as a very young law student, and how much that has influenced how I try to allocate my time as a U.S. senator. I try, whenever possible, to carve out time in my schedule for people who have no lobbyists, who do not represent a major money interest, who are speaking on behalf of folks who are trying to get the benefits, the justice, the engagement, and the standing in America that they deserve, but are otherwise largely being ignored.

*B. Second Story: An Unforgettable Event*

When I was an intern on the Hill for Joe Biden,<sup>9</sup> one day I went down to the lunchroom, and there was a guy sitting in the corner, weeping. His daughter, Lori Berenson, was in Peru. In his view, his daughter was mistakenly identified as having volunteered with Luminoso and she was serving a very long jail term.<sup>10</sup> He was trying to get a member of Congress, anyone in Congress, to meet with him, to take his pleas seriously: a father trying to get his daughter out of a long jail term in a distant country. After I sat and listened to him for ten minutes, I said, "I'm sorry, I'm just an intern, but I will never forget this conversation, and if I am ever in a place to try and help, I will."

*C. Why It Matters*

Cut to—I'm a new senator running from reception to reception. And one day, a woman grabbed my hand, pulled it in close, and would not let me go. She said, "Do you know Alan Gross?" I said, "I'm sorry ma'am, I am not sure what we're talking about." She said, "He is my husband, and he's in jail, and he's in Cuba."<sup>11</sup> I said, "Oh, that's really bad, I am really sorry for you, ma'am." She looked at me and held my hand harder and said, "Will you do something about it?" And I said, "Oh, ma'am, I really"—

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9. I interned for Vice President Joe Biden in 1989 when he was a Delaware senator. See *Vice President Joe Biden*, WHITE HOUSE, <https://www.whitehouse.gov/administration/vice-president-biden> (last visited Oct. 16, 2016).

10. See Andrea Zarate & William Neuman, *Lori Berenson Heading Home to the U.S. from Peru*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/world/americas/lori-berenson-returns-us-peru.html>.

11. Alan Gross was arrested in 2009 for allegedly attempting to destabilize the Communist regime in the Cuban government, and released on December 16, 2014, after being held prisoner for five years. See Fernit Nirappil, *Held 5 Years by Cuba, Alan Gross Calls His First Year of Freedom 'Surreal'*, WASH. POST (Dec. 16, 2015), [https://www.washingtonpost.com/local/held-5-years-by-cuba-alan-gross-calls-his-first-year-of-freedom-surreal/2015/12/16/2435768a-a389-11e5-b53d-972e2751f433\\_story.html](https://www.washingtonpost.com/local/held-5-years-by-cuba-alan-gross-calls-his-first-year-of-freedom-surreal/2015/12/16/2435768a-a389-11e5-b53d-972e2751f433_story.html).

and I remembered that day in the lunchroom, and I remembered a lot of the spirit from the *HCC* case that brought me to this work, and said, “Ma’am, I will do my best. I will try to learn about his case, I will try to do something about it; I will try to be involved. But is he from Delaware?” “No,” she said, “but he has a cousin in Delaware.”

Sitting with Alan Gross in jail, in Havana, with Pat Leahy, was a challenging and moving experience for me.<sup>12</sup> Visiting with the leadership of the Cuban regime, and spending an afternoon with Cuban human rights activists and dissidents made for a remarkable forty-eight hours in Cuba, which was followed by my first visit to Haiti. Both trips were made with Senator Leahy, who was then the chair of the Appropriations Sub-Committee that sets the budget for our entire spending on refugees, disaster assistance, foreign aid, and on the State Department. Looking at how well or poorly the United States and international community’s money has been spent, considering the earthquake relief efforts in Haiti, visiting a refugee camp, talking to human rights groups, meeting with the new head of government and his cabinet in Haiti,<sup>13</sup> all this was quite an experience, and brought back a lot of the *HCC* case in my mind.

But my second visit to Cuba, to the Guantánamo Bay Naval Base and Detention Facility, probably had the biggest impact on me. As a group of seven, Republicans and Democrats, we toured the facility and talked to the military and the political and legal authorities over that camp.<sup>14</sup> Upon our return, we met with advocates and tried to wrestle with what the status of Guantánamo means. We tried to move forward in a way that does not enshrine or even recognize some sort of legal black hole off the shores of the United States. The important work that Judge Sterling Johnson laid out first and which many have moved forward continues, but is not yet fully finished.

The moral of this story, I guess, is when you have a friend who calls and says, “Hey, I have a thing you can work on,” roll up your sleeves and pitch in. It seems trite sometimes when folks in local politics quote Margaret Meade, “Never doubt that a small group of thoughtful, committed citizens can change the world.” But it is true, and it was my experience with this case that made the quote real to me, and persuaded me of the power of the rule of law, and of the power of a society passionately committed to human rights and to justice.

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12. Senator Patrick Leahy, (D-Vt.), and I visited Alan Gross during a trip to Cuba in February 2012 to negotiate with President Raúl Castro for Gross’ release. See Portia Siegelbaum, *Leahy and Shelby Meet with Raul Castro in Cuba*, CBSNEWS (Feb. 24, 2012, 10:38 AM), <http://www.cbsnews.com/news/leahy-and-shelby-meet-with-raul-castro-in-cuba/>.

13. The head of government with whom we met was Michel Martelly, who recently stepped down as Haiti’s president. See Frances Robles, *Michel Martelly, Haiti’s President, Departs Without a Successor*, N.Y. TIMES (Feb. 7, 2016), <http://www.nytimes.com/2016/02/08/world/americas/michel-martelly-haitis-president-departs-without-a-successor.html>.

14. Those in attendance were me, Joe Manchin (D-W. Va.); Angus King (I-Me.); Susan Collins (R-Me.); Mark Kirk (R-Ill.); Brian Schatz (D-Haw.); and Joe Donnelly (D-Ind.). *Seven Senators Visiting Guantánamo*, MIAMI HERALD (Nov. 14, 2014, 12:09 PM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article3932832.html>.

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