THE HAITIAN REFUGEE CRISIS AND U.S. IMMIGRATION LAW: THE EXTRATERRITORIAL SCOPE OF § 243(h) OF THE IMMIGRATION AND NATIONALITY ACT

On November 18, 1991, the United States Government forcibly repatriated 538 Haitian "boat people," perhaps to be murdered by their persecutors, without a perfunctory hearing of their claims for political asylum.[1] More than 38,000 Haitians have attempted to flee to the United States in rickety boats since the bloody 1991 coup that overthrew the democratically elected government of Jean-Bertrand Aristide.[2]

The United States Coast Guard intercepted the first boat carrying Haitians since the coup on October 28, 1991, acting in accordance with an interdiction policy formerly called the Alien Migration Interdiction Operation ("AMIO").[3] The U.S. military then placed thousands of intercepted Haitians in refugee camps at the U.S. Naval Base at Guantanamo Bay, Cuba. Despite overwhelming evidence that the Haitian boat people qualified as victims of persecution, the Bush Administration insisted that the fleeing Haitians were "economic refugees" rather than "political refugees"; this difference in status is crucial since only political refugees may seek political asylum in the United States.[4]

A public outcry followed the November 18, 1991 forced repatriation, and a day later the Miami-based Haitian Refugee Center, and others, filed suit in the United States District Court for the Southern District of Florida.[5] They contended that the repatriations violated § 243(h) of the Immigration and Nationality Act[6] ("INA"), which provides that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationali-

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1. Lancelot B. Hewitt, *Temporary Protected Status for Haitians*, N.Y.L.J., Feb. 25, 1992, at 2; Stuart Taylor Jr., *U.S. Says Take Back Your Tired, Your Poor, Etc.*, N.J.L.J., Aug. 17, 1992, at 17.

2. *U.S. Upholds Refugee Returns*, FACTS ON FILE WORLD NEWS DIGEST, Aug. 6, 1992, at 577; Taylor, *supra* note 1.

3. Hewitt, *supra* note 1. AMIO authorizes U.S. authorities to police international waters and to enforce both Haitian and U.S. immigration laws. *Id*; *see infra* note 57 and accompanying text.

4. Taylor, *supra* note 1; Hewitt, *supra* note 1.

5. Hewitt, *supra* note 1.

6. 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992).

ty, membership in a particular social group, or political opinion."[7] The district court granted injunctive relief barring the repatriation of any interdictees,[8] but the Eleventh Circuit later reversed the preliminary injunction[9] and dismissed the action.[10] The Eleventh Circuit flatly rejected the Haitian plaintiffs' claim, concluding that § 243(h) is included in Part V of the INA, and that the provisions regarding deportation in Part V only apply to aliens within the United States, not aliens found in international waters.[11]

President George Bush initially condemned the Haitian military for overthrowing President Aristide and imposing a "totalitarian dictatorship" upon the Haitians.[12] Yet, on May 24, 1992, he issued an Executive order, the "Kennebunkport Order," which allowed the Coast Guard to intercept boatloads of Haitians and escort them back to Haiti without a determination of their refugee status.[13] Under President Bush's repatriation order, U.S. authorities were no longer required to consider asylum requests from Haitian refugees intercepted in international waters.[14]

Immediately following the issuance of the Kennebunkport Order,[15] Haitian Centers Council moved for a temporary restraining order in the United States District Court for the Eastern District of New York.[16] Haitian Centers Council challenged the Government's interdiction policy as violative of § 243(h) of the INA and Article 33 of the United Nations Protocol

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7. *Id.* § 1253(h)(1).

8. Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir. 1991), *dismissed as moot*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

9. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109, 1111 (11th Cir. 1991), *dismissed as moot*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

10. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1515 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

11. *Id.* at 1510.

12. Hewitt, *supra* note 1.

13. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

14. FACTS ON FILE WORLD NEWS DIGEST, *supra* note 2.

15. Exec. Order No. 12,807, *supra* note 13.

16. Haitian Ctrs. Council v. McNary, No. 92 CV 1258, 1992 WL 155853, at *11 (E.D.N.Y. 1992) (Memorandum and Order dated June 5, 1992); *see infra* notes 293-94 (stating ultimate resolution of case).

Relating to the Status of Refugees.[17]

The district court denied relief, but harshly denounced U.S. policy.[18] On expedited appeal, the Second Circuit reversed and remanded with instructions to enter the injunction, holding that the Government's interdiction of refugees extraterritorially constituted a violation of § 243(h) of the INA.[19] The Second Circuit's decision created an explicit circuit split because of the Eleventh Circuit's ruling in *Haitian Refugee Center v. Baker*,[20] that § 243(h) did not apply to the return of refugees interdicted outside the territorial borders of the United States.

This note maintains that the United States forcible repatriation of refugees interdicted in international waters blatantly violates § 243(h) of the INA, as modified by the Refugee Act of 1980[21] in conformance with Article 33 of the United Nations Protocol.[22] Section 243(h) explicitly prohibits the Attorney General from returning refugees to a country where they might face political persecution based on race, religion, nationality, or political philosophy.[23]

Part I traces the history of U.S.-Haitian relations and the Reagan and Bush Administrations' interdiction policy. Part II examines the development and passage of the 1967 United Nations Protocol Relating to the Status of Refugees; the ramifications of the U.S. adoption of the Protocol; § 243(h) of the INA; and the Refugee Act of 1980. Part III compares the Eleventh Circuit's interpretation of § 243(h) of the INA with that of the Second

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17. *Id.* The United States became a party to the United Nations Protocol Relating to the Status of Refugees in 1968. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The United States signed the U.N. Protocol on October 4, 1968 and became derivatively bound by all of the crucial substantive provisions on November 1, 1968. Article 33 of the treaty embodies the principle of *non-refoulement*, a French term referring to the prohibition of returning refugees to territories where they might face persecution due to race, religion, nationality, social group, or political opinion. Abigail D. King, Note, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 773, 774, 779 (1988).

18. *Haitian Ctrs. Council*, 1992 WL 155853 at *12; *see infra* notes 293-94 (stating ultimate resolution of case).

19. Haitian Ctrs. Council v. McNary, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of case).

20. *Haitian Refugee Center*, 953 F.2d at 1510.

21. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)).

22. U.N. Protocol, *supra* note 17.

23. 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992).

Circuit. Part IV concludes that § 243(h) is extraterritorial in scope based on the legislative history of the United Nations Protocol, § 243(h) of the INA, and the *non-refoulement*[24] obligation imposed upon the United States by the Protocol; therefore, the Government's interception and forced repatriation of Haitian refugees is a violation of federal law.

I. THE HAITIAN REFUGEE CRISIS AND INTERDICTION

Haiti and the United States have had a political and economic relationship dating to the early part of the twentieth century. The United States occupied Haiti from 1915 to 1934, controlling the nation's currency, central banking system, police force, and to some degree, the Haitian political process.[25] In 1915, Haitian President Vilbrun Guillaume Sam's forces clashed with the rebel militia led by Rosalvo Bobo, turning the capital, Port-au-Prince, into a bloody battlefield.[26] President Sam's soldiers killed more than 160 political prisoners, including former President Orestes Zamor.[27] In retaliation, a mob murdered President Sam.[28] Citing the threat to the lives of U.S. businessmen, President Woodrow Wilson ordered the dispatch of an armored cruiser to Haiti.[29] Soon after, the U.S. Government placed the country under martial law.[30]

The United States never attempted to establish representative democracy in Haiti, but rather facilitated the election of someone who would obediently follow U.S. policy—limited to the maintenance of public order and the collection of tax receipts.[31] The U.S. Government officially withdrew from Haiti on August 15, 1934 and "the old problems of corruption and graft" quickly resurfaced.[32]

The first significant influx of Haitians into the United States occurred in 1957 as François Duvalier ("Papa Doc") "transformed

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24. *See* King, *supra* note 17, at 774; *see also* U.N. Protocol, *supra* note 17.

25. Hewitt, *supra* note 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Alex Stepick, *The Haitian Exodus: Flight from Terror and Poverty*, *in* THE CARIBBEAN EXODUS 131, 134 (Barry B. Levine ed., 1987).

32. *Id.*

Haiti into a personal instrument of power, self-aggrandizement, and terror."[33] Duvalier quickly silenced anyone who challenged his authority, and "tens of thousands of Haitians fled for their personal safety."[34] "[T]he U.S. Immigration Service [subsequently] adopted a permissive attitude toward all Haitians, did not actively pursue those who remained illegally, and rarely deported them."[35] Nevertheless, no Haitians were ever officially recognized as refugees, and even the most political of the Haitians were denied the certain asylum granted most Cuban migrants.[36]

The Kennedy Administration, hoping to remove Duvalier or ensure drastic improvements in his methods of governing, "used persuasion, aid, [and] pressure" to improve conditions in Haiti.[37] However, in the years that followed, American support of the regime grew despite the lack of evidence that Duvalier had stopped his "campaign of repression."[38] When the first recorded boatload of Haitians, a group of roughly two dozen persons, landed on Florida's southeast coast in 1963, they were denied political asylum by the Immigration and Naturalization Service ("INS") and involuntarily returned to Haiti.[39]

In 1971, the accession of Jean-Claude Duvalier ("Baby Doc") to the presidency of Haiti resulted in a marked increase of Haitian migrants to the United States.[40] Between 1972 and 1980, as many as 50,000 Haitians entered the United States by

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33. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 78-79 (1986).

34. *Id.* at 79.

35. *Id.*

36. *Id.*

> The American reception of Cuban migrants between 1965 and 1973 demonstrated how far the concept of asylum could be stretched when those seeking admission were regarded as ideologically valuable. . . . Thus, despite their numbers, the Cubans posed no insuperable problems to policy makers, who continued to . . . further cold war objectives and achieve better relations with the growing Cuban-American community. . . .
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> However, for those whose entry served no cold war purpose, but instead tended to illustrate the imperfections of American allies, the limits were geopolitical rather than practical. Thus the Haitians, the only other significant group of asylum seekers from 1965 through 1975 . . . discovered that they were automatically excludable or deportable.

Id. at 78.

37. *Id.* at 79.

38. *Id.* at 80.

39. Stepick, *supra* note 31, at 137.

40. LOESCHER & SCANLAN, *supra* note 33, at 80.

boat, and thousands requested asylum.[41] Only twenty-five to fifty of the applicants were granted political asylum.[42] The rest were subjected to treatment totally unlike that offered Cuban refugees, and completely inconsistent with the explicit terms and aims of international refugee instruments.[43]

The INS initially refused "excludable" Haitian refugees (i.e. "those apprehended in the water or immediately after reaching shore") and denied any hearing on their asylum claims; but eventually the INS adopted new regulations which provided for hearings while permitting the summary disposition of the majority of asylum cases.[44] The problem with these procedures was not that they always worked to dismiss valid asylum claims, but that they revealed a double standard which many Americans found repugnant.[45] While Cuban migrants were welcomed unreservedly, the INS and the State Department concluded that Haitian migrants could not be considered valid political refugees; a conclusion that made it impossible for any individual Haitian to prove that he or she had a valid fear of persecution.[46]

The belief that only anti-Communists deserved the privilege of asylum dictated U.S. asylum policy in the 1970s and adversely affected Haitian asylum seekers.[47] However, the Carter Administration introduced a shift in U.S. refugee policy and undertook multiple human rights initiatives with respect to Haiti.[48] Although Duvalier took several steps to improve Haiti's human rights image, significant reform never occurred.[49]

In mid-1979, following an extreme deterioration of the human rights situation in Haiti, there was a dramatic increase in the flow of Haitians to the United States.[50] Nevertheless, the INS and State Department continued to characterize Haitians as "economic migrants," even though the United States had adopted a law concerning refugees in March 1980 which "clearly commit-

41. *Id.* at 80, 172.
42. *Id.* at 80.
43. *Id.*
44. *Id.* at 80-81.
45. *Id.* at 81.
46. *Id.* at 81-82.
47. *Id.* at 171.
48. *Id.* at 173.
49. *Id.*
50. *Id.* at 178.

ted the United States to adhere to international legal standards and ma[d]e asylum . . . available as a matter of right rather than discretion to any individual demonstrating that he or she was . . . a refugee."[51]

Despite the official U.S. pigeonholing of incoming Haitians, several events in the spring of 1980 forced the Government to adopt new Haitian admissions procedures.[52] The arrival of 130,000 Cuban asylum seekers from the port of Mariel and 11,000 Haitians to Florida over the course of a few months induced the first mass asylum crisis in American history.[53] On June 20, 1980, the Carter Administration issued a declaration of the new status of "Cuban-Haitian entrant."[54] This classification permitted individuals from both groups who had arrived prior to that date to remain in the United States until their status was determined.[55]

With the advent of the Reagan Administration, Attorney General William F. Smith announced the new administration's proposed immigration reform legislation.[56] In September 1981, President Reagan issued an Executive order instituting AMIO[57] to curb the influx of undocumented Haitians from the high seas.[58] The order authorized the INS, with the aid of the United States Coast Guard, "to stop Haitian and unflagged vessels on the high seas and return undocumented [aliens] bound for the U.S."[59] Once a vessel was intercepted, all individuals boarded the Coast Guard cutter where they were individually questioned by an immigration officer with the aid of a Creole interpreter. The immigration officer asked the aliens their reasons for leaving

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51. *Id.*; *see* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)).

52. LOESCHER & SCANLAN, *supra* note 33, at 179.

53. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 857 (2d ed. 1991); LOESCHER & SCANLAN, *supra* note 33, at 177.

54. LOESCHER & SCANLAN, *supra* note 33, at 186.

55. *Id.*

56. *E.g.*, *Administration's Proposals on Immigration and Refugee Policy, Joint Hearing before the House Subcomm. on Immigration, Refugees, and Int'l Law and the Sen. Subcomm. on Immigration and Refugee Policy*, 97th Cong., 1st Sess. 6 (1981).

57. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 (1988).

58. 66 Interpreter Releases 649, 650 (June 19, 1989); 67 Interpreter Releases 323, 323 (Mar. 19, 1990).

59. 67 Interpreter Releases at 323. "Haiti is the only country with which the U.S. currently has such an agreement." 66 Interpreter Releases at 650.

Haiti and those found to have a "reasonable fear of returning to Haiti" were taken to the United States to seek asylum.[60]

Only eleven of 22,940 Haitians interdicted between 1981 and 1990 were taken to the United States to pursue asylum claims.[61] "Critics charged . . . that . . . the interviews were brief and often not conducted in . . . a way which might elicit an indication of refugee status."[62] Moreover, other critics asserted that "interdiction runs afoul of the obligations under the domestic withholding provision and its international law correlative—Article 33 of the Protocol Relating to the Status of Refugees—to refrain from refoulement."[63]

The harshness of the Reagan Administration's treatment of Haitian asylum seekers was matched by the Bush Administration in the wake of a Haitian exodus that began in the fall of 1991. Jean-Bertrand Aristide, the first democratically elected Haitian President, took the oath of office in February 1991.[64] By September 30, however, the Haitian military had moved against Aristide's newly formed government, and in a bloody coup replaced him with Supreme Court Justice Joseph Nerette.[65]

The international community quickly responded to Aristide's removal, and in October 1991 the Organization of American States ("OAS") met to demand that the deposed President be reinstated.[66] President Bush issued an Executive order freezing Haitian assets in the United States and prohibiting commercial and financial contacts between the de facto Haitian Government

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60. 67 Interpreter Releases at 323. In *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present*, Gil Loescher and John Scanlan contend that distinguishing between economic and political migrants is no easy task:

> There is no way of determining who is an "economic migrant," who a "political refugee" without carefully interviewing each applicant, testing credibility and evaluating each story for consistency with known facts. Yet the exercise of such care was precisely the obligation the United States assumed in 1980 when it adopted the new Refugee Act and committed itself to the standards prevailing under international law. That obligation [was] consistently ignored by Reagan's State Department and the Immigration and Naturalization Service in their handling of Caribbean . . . asylum claims.

LOESCHER & SCANLAN, *supra* note 33, at 190-91.

61. 68 Interpreter Releases 794, 794 (July 1, 1991).

62. *Id.* at 793.

63. ALEINIKOFF & MARTIN, *supra* note 53, at 862; *see supra* note 17 (explaining the use of *non-refoulement* in Article 33 of the U.N. Protocol).

64. Hewitt, *supra* note 1.

65. *Id.*

66. *Id.*

and U.S. persons.[67] The OAS member countries followed suit and declared an economic embargo to back their demands.[68]

Acting pursuant to AMIO, the Coast Guard interdicted thousands of Haitians who were then placed in refugee camps at the U.S. Naval Base at Guantanamo Bay, Cuba while others were kept aboard Coast Guard cutters.[69] Despite overwhelming evidence that the Haitian boat people qualified as victims of persecution, the Bush Administration classified them as "economic refugees."[70] Consequently, the boat people had no legal grounds for seeking political asylum in the United States and were repatriated.[71]

Since the 1991 coup, more than 38,000 Haitians have attempted to flee to the United States in flimsy vessels.[72] While President Bush rebuked the Haitian military for ousting Aristide, he issued the Kennebunkport Order, which went a step beyond the Reagan Administration's virulent interdiction program. Not only was the Coast Guard authorized to intercept boatloads of Haitians and escort them back to Haiti, but they were to do so without even a perfunctory hearing of claims for political asylum.[73]

The Bush Administration was as unwilling as the Reagan Administration to consider aliens fleeing right-wing regimes victims of persecution. In defending the Kennebunkport Order, the Bush Administration insisted that the Haitians being summarily returned were "economic refugees" rather than "political refugees" and could not, therefore, seek asylum in the United States.[74]

II. SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT AND THE REFUGEE ACT OF 1980: A BRIEF HISTORY

Immigrants are America's roots. Except for native Indian citizens, all Americans are either immigrants or

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67. Exec. Order No. 12,779, 56 Fed. Reg. 55,975-76 (1991).
68. Hewitt, *supra* note 1.
69. *Id.*
70. *Id.*
71. *Id.*
72. FACTS ON FILE WORLD NEWS DIGEST, *supra* note 2.
73. Exec. Order No. 12,807, *supra* note 13.
74. Hewitt, *supra* note 1.

> refugees themselves or the descendants of immigrants or refugees. Yet, over the years, our memory of this unique national heritage has faded. Immigration has become a controversial issue, clouded by misunderstandings and false stereotypes, or overwhelmed by the fear of illegal immigration.[75]

A. A History of U.S. Immigration Law

The United States has accepted more refugees for permanent settlement than any other country worldwide, and even today admits over a half a million aliens a year.[76] Yet U.S. immigration history also has a dark side, and immigration laws have been characterized as discriminatory on racial and national origin grounds.[77] Immigration was encouraged with virtually no limitations in the early years of the nation's growth.[78] The nineteenth century, however, was tarnished by the birth of the Know-Nothing Party, whose adherents advocated countless immigration restrictions.[79]

Congress codified existing immigration restrictions and added new ones in the Immigration Act of 1917.[80] In 1924 Congress passed what was purported to be a permanent solution to U.S. immigration problems: the National Origins Act.[81] The National Origins Act established quotas based on the contribution of each nationality to the overall U.S. population rather than on foreign-born U.S. population.[82] Although the 1920s quota system remained intact until 1965, "U.S. immigration policy was affected

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75. COMMITTEE ON THE JUDICIARY, 96TH CONG., 1ST SESS., U.S. IMMIGRATION LAW AND POLICY: 1952-1979, REPORT TO THE SELECT COMMITTEE ON IMMIGRATION AND REFUGEE POLICY 1 (Comm. Print 1981) (statement of Sen. Edward M. Kennedy, Chairman).

76. ALEINIKOFF & MARTIN, *supra* note 53, at 39.

77. *See* Bill O. Hing, *Racial Disparity: The Unaddressed Issue of the Simpson-Mazzoli Bill*, 1 LA RAZA L.J. 21 (1983).

78. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 7 (1980).

79. RICHARD A. BOSWELL & GILBERT P. CARRASCO, IMMIGRATION AND NATIONALITY LAW 11-12 (1992).

80. IMMIGRATION ACT OF 1917, PUB. L. NO. 301, 39 Stat. 874 (repealed 1952); *see* ARNOLD H. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY 1-9 (1983).

81. Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153 (repealed 1952); ALEINIKOFF & MARTIN, *supra* note 53, at 52.

82. Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153 (repealed 1952); ALEINIKOFF & MARTIN, *supra* note 53, at 52.

by events of World War II."[83] The war transformed the nation's views regarding U.S. needs, and Congress consequently passed several enactments which eliminated the discriminatory provisions of the national origins system.[84]

During the 1950s, the United States was preoccupied with Communist expansion.[85] It was at the height of the cold war and during the restrictionist atmosphere of the era that Congress passed the McCarran-Walter bill—the Immigration and Nationality Act—effectively consolidating previous immigration laws into one coordinated statute.[86]

The INA was flawed from the beginning, containing xenophobic and anti-alien provisions such as a national origins quota system.[87] The immigration quotas of the INA prevented the United States from offering "refuge to certain nationalities, [and] it . . . made no separate provision for the admission of refugees."[88] It was not until 1965 that an effort was made to eliminate the national origins quotas.[89] Yet by the time the controversial national origins formula was abolished and the permanent refugee admission quota was written into law by the 1965 amendments,[90] the quota system's geographic, ideological and numerical stipulations were already inadequate to address the breadth of the refugee problem.[91]

In 1976, Congress passed legislation which made immigration regulations the same for countries of the Eastern and Western Hemispheres[92], but in 1978 a new law combined the ceilings for both hemispheres into a worldwide total of 290,000.[93] Neverthe-

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83. ALEINIKOFF & MARTIN, *supra* note 53, at 54.

84. *Id.*; BOSWELL & CARRASCO, *supra* note 79, at 14.

85. ALEINIKOFF & MARTIN, *supra* note 53, at 55.

86. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1157 (1988 & Supp. IV 1992)).

87. ALEINIKOFF & MARTIN, *supra* note 53, at 55.

88. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 10 (1981).

89. ALEINIKOFF & MARTIN, *supra* note 53, at 56.

90. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101-1157 (1988 & Supp. IV 1992)).

91. Anker & Posner, *supra* note 88, at 10-11.

92. Immigration and Nationality Act, Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (codified as amended in scattered sections of 8 U.S.C.).

93. Immigration and Nationality Act, Amendments of 1978, Pub. L. No. 95-412, 92 Stat. 907 (codified as amended at 8 U.S.C. §§ 1151-1153 (1988 & Supp. IV 1992)); *see* ALEINIKOFF & MARTIN, *supra* note 53, at 58.

less, the 1978 amendments did not rectify the myriad problems posed by the impact of refugee admissions on the admissions of other immigrants.[94]

B. Refugee Admissions

Following World War II, there were several legislative enactments which addressed refugee admissions. The first was the Displaced Persons Act of 1948 which admitted more than 400,000 refugees as immigrants under the immigration quota system.[95] These admissions were at the expense of quotas usually reserved for immigrants.[96] The next significant refugee provision was the Refugee Relief Act of 1953.[97] This act allowed the INS to admit 214,000 refugees without any effect on the quota system.[98]

"The legislative approach used to respond to the refugee problems which followed World War II . . . became the model for refugee relief until the major statutory enactment in 1980."[99] Two mechanisms were repeatedly used in response to refugee problems: the admission of refugees through an act of grace by Congress, or by an administrative grant of parole.[100] The parole provision of the INA was the major authority for the admission of large groups of refugees.[101] Under this provision the Attorney General possessed the discretion to parole any alien into the United States temporarily in emergencies or for public interest reasons.[102]

Despite the admission of large numbers of refugees under the

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94. ALEINIKOFF & MARTIN, *supra* note 53, at 59.

95. Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (eliminated); BOSWELL & CARRASCO, *supra* note 79, at 147.

96. Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (eliminated); BOSWELL & CARRASCO, *supra* note 79, at 147.

97. Refugee Relief Act of 1953, Pub. L. No. 203, § 1, 67 Stat. 400 (eliminated); BOSWELL & CARRASCO, *supra* note 79, at 147.

98. Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 (eliminated); BOSWELL & CARRASCO, *supra* note 79, at 147.

99. BOSWELL & CARRASCO, *supra* note 79, at 148.

100. *Id.*

101. ALEINIKOFF & MARTIN, *supra* note 53, at 59.

102. *Id.* The Attorney General's parole authority was used in dealing with large-scale emergencies because conditional-entry provisions enacted by Congress had proven to be inadequate. Yet, reliance on the parole authority was considered "an inappropriate response" to refugee crises. *Id.* at 59-60.

Displaced Persons Act of 1948 and the Refugee Relief Act of 1953, prior to 1950 there were no particular procedures for the protection of refugees who feared persecution upon return to their country.[103] The only available remedies were admission under parole or the deferral of deportation.[104] Section 243(h) of the INA involved the withholding of deportation[105] and was amended in 1950 to prevent the Attorney General from deporting a person to a country where he or she would suffer physical persecution.[106] In 1952, § 243(h) was revised to underline the discretionary nature of the Attorney General's power to withhold deportation.[107] A 1965 amendment deleted the requirement that persecution be physical.[108]

In 1968, the United States ratified the United Nations Protocol[109] adopting Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees.[110] Under the

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103. BOSWELL & CARRASCO, *supra* note 79, at 148.

104. *Id.* Deportation, or expulsion, is the removal, ejectment, or transfer of an alien who has legally or illegally entered the United States because his presence is deemed inconsistent with the public welfare. Deportation is not considered a form of punishment. Grounds for deportation from the United States are set out in section 241 of the INA, 8 U.S.C. § 1251. *Id.* at 17.

105. Withholding of deportation is a limited form of relief from being returned to a specific country where an alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992).

106. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992)); *see* BOSWELL & CARRASCO, *supra* note 79, at 148.

107. BOSWELL & CARRASCO, *supra* note 79, at 148. The amendment read: "The Attorney General *is authorized* to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to physical persecution and for such period of time as *he deems to be necessary* for such reason." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992)) (emphasis added).

108. BOSWELL & CARRASCO, *supra* note 79, at 148. The amendment added the words "'persecution on account of race, religion, or political opinion'" in lieu of "'physical persecution.'" Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992)).

109. 144 CONG. REC. 29,608 (1968); *see* U.N. Protocol, *supra* note 17, at 6225; King, *supra* note 17, at 774 n.7, 779 n.47.

110. DEBORAH E. ANKER ET AL., THE LAW OF ASYLUM IN THE UNITED STATES: A MANUAL FOR PRACTITIONERS AND ADJUDICATORS 9 (1992); United Nations Convention Relating to the Status of Refugees, *opened for signature* Jul. 28, 1951, 189 U.N.T.S. 137 [hereinafter U.N. Convention]. In *Immigration Law and Refugee Policy*, Arnold Leibowitz comments on the purpose and scope of the U.N. Convention and Protocol explaining:

> The U.N. Convention of 1951 was formulated in the specific context of postwar Europe, when millions of displaced people affected by boundary shifts

U.N. Protocol, the United States has assumed a duty not to return refugees[111] to territories where their lives or freedom might be threatened due to their race, religion, nationality, or affiliation with a particular political organization.[112] It is far from clear, however, that the United States fully understood the implications of adopting this treaty, especially in regard to § 243(h) of the INA.[113] Congress neglected to make any changes in asylum provisions because the Departments of State and Justice had convinced the Senate that the U.N. Protocol could be implemented without doing so.[114] While the Attorney General formerly possessed some discretion to withhold deportation, under § 243(h), the treaty no longer recognizes any "discretion to return an alien if he proves he is a refugee and comes within Article 33's protection against *refoulement*."[115] Despite this discrepancy, it was believed that "differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language."[116] Yet the scope of the refugee problem continued to escalate, and as the Attorney General's reliance on the use of parole authority increased, a tension resulted which prompted the legislature to enact a uniform refugee policy.[117]

It was not until 1980 that Congress and the executive branch produced a legal framework for the admission of refugees that

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> and changes of government existed in a legal limbo. The Convention sought to define the rights of these individuals, as well as the obligations of states that found themselves host to refugees for whom return to their own countries was likely to constitute at least a prison sentence—if not a death warrant. The task was conceived as a one-time obligation . . . .
>
> The limits of time and geography incorporated in the 1951 Convention proved with time to be serious constraints on the world's ability to deal collectively with refugee problems . . . . The 1967 Protocol extended the scope of the Convention by eliminating the provision that only victims of pre-1951 events were covered and by removing the geographic limitation, except where ratifiers of the Convention specifically chose to retain it.

LEIBOWITZ, *supra* note 80, at 4-2 to 4-3.

111. The U.N. Protocol definition of "refugee" is based on a "well-founded fear of persecution" on grounds of race, religion, nationality, or political opinion. U.N. Convention, *supra* note 110, at art. 1.

112. U.N. Protocol, *supra* note 17, at 6276.

113. ALEINIKOFF & MARTIN, *supra* note 53, at 761.

114. *Id.*

115. *Id.*; U.N. Protocol, *supra* note 17.

116. BOSWELL & CARRASCO, *supra* note 79, at 156.

117. Anker & Posner, *supra* note 88, at 11.

remains "the most comprehensive United States [statute] ever enacted concerning refugee admissions and resettlement": the Refugee Act of 1980.[118] The Refugee Act eliminates the ideological and geographical preference the INA had formerly extended to those fleeing persecution in communist countries or in the Middle East.[119] In addition, the legislation adopts a definition of refugee without geographic or ideological boundaries in conformance with the U.N. Protocol and Convention definition.[120] A refugee is:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[121]

While refugees were a topic of controversy and the subject of much congressional debate in the 1980s, the basic structure of the Refugee Act has remained unchanged.[122]

III. THE HAITIAN REFUGEE LITIGATION AND THE CIRCUIT COURT SPLIT

A. Haitian Refugee Center v. Baker

In September 1981, former President Ronald Reagan issued an Executive order authorizing the Coast Guard to interdict vessels suspected of carrying undocumented aliens leaving Haiti for the United States.[123] Upon interdiction of the boats, INS

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118. *Id.*; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)).

119. Known as the "seventh preference" of the INA. Immigration and Nationality Act § 203(a)(7) (1952) (repealed 1980); *see* ANKER, *supra* note 110, at 11.

120. ANKER, *supra* note 110, at 12; U.N. Convention, *supra* note 110, at chap. I, art. 1, para. A; U.N. Protocol, *supra* note 17, at art. I, § 2, 19 U.S.T. at 6225.

121. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988).

122. ALEINIKOFF & MARTIN, *supra* note 53, at 60.

123. Exec. Order No. 12,324, *supra* note 57.

officials screened the passengers to determine their status.[124] If the INS official concluded that the interdictee was an economic migrant and not a refugee, the interdictee was repatriated.[125] If the INS officer determined that the alien was a political refugee, the alien was brought to the United States to continue the asylum process.[126]

Although the United States briefly suspended the interdiction program following the overthrow of the democratically elected President of Haiti, Jean-Bertrand Aristide, it resumed the operation on November 18, 1991.[127] That same day, the United States Coast Guard repatriated 538 Haitians and public outrage immediately ensued.[128] Within twenty-four hours the Miami-based Haitian Refugee Center ("HRC") filed suit in the United States District Court for the Southern District of Florida for itself and a class represented by fourteen named plaintiffs who had been "screened-out" by INS officials.[129] Plaintiffs challenged the adequacy of the initial screening procedures and maintained, inter alia, that the repatriations violated § 243(h) of the INA which prohibits the Attorney General from deporting or returning an alien to a country if the Attorney General determines that the alien's life or freedom would be threatened due to race, religious belief, nationality, or political opinion.[130]

The district court immediately entered a temporary restraining order barring repatriation of any interdictees, while permitting the maintenance of temporary housing at the U.S. Naval Base at Guantanamo Bay, Cuba.[131] On December 3, 1991, the district court entered a preliminary injunction to continue the prohibition against Haitian repatriations,[132] but the Eleventh

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124. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1502 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

125. *Id.*

126. *Id.*

127. *Id.*

128. Hewitt, *supra* note 1.

129. Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1552, 1557 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir. 1991), *dismissed as moot*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

130. *Id.* at 1557; *see* 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992).

131. *Haitian Refugee Ctr.*, 789 F. Supp. at 1578-79.

132. The court relied on the First Amendment right of the plaintiff, HRC, to have access to interdictees, and on Article 33.1 of the U.N. Convention, which states that a Contracting State shall not "expel or return (*refouler*) a refugee to a country where his life or freedom would be threatened on account of political opinion." *Id.*; *see* U.N. Convention,

Circuit later reversed the injunction[133] and in a separate ruling unequivocally dismissed the action.[134] At the heart of the Eleventh Circuit's decision was the applicability of § 243(h)(1) of the INA to aliens who had been interdicted on the high seas and had not, therefore, been permitted to enter the United States.[135]

Two issues reviewed on appeal elaborate the Eleventh Circuit's interpretation of the scope of § 243(h). First, the court considered whether the United States District Court for the Southern District of Florida erred in granting preliminary injunctive relief on HRC's claim that the Administrative Procedure Act[136] ("APA") authorizes judicial review of defendant's actions under the law of the U.N. Protocol,[137] the Executive Order,[138] the INA,[139] the Refugee Act,[140] and the INS Guide-

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supra note 110.

However, the district court ultimately held that the interdictees had no rights under the U.S. Constitution, and that the protections afforded by the Refugee Act and the INA were restricted to aliens within the United States. *Haitian Refugee Ctr.*, 953 F.2d at 1503-04.

133. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109, 1111 (11th Cir. 1991), *dismissed as moot*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992). The defendants appealed the part of the district court's order granting injunctive relief on HRC's First Amendment claim and on its claim under Article 33 of the U.N. Protocol. The Eleventh Circuit held that Article 33 of the U.N. Protocol was not self-executing and did not give rise to any rights enforceable by the plaintiffs; and that the injunctive relief granted by the district court did not require the defendants to permit HRC access to refugees, but rather enjoined the defendants from repatriating them. *Id.* at 1110-1111.

134. *Haitian Refugee Ctr.*, 953 F.2d at 1498. In late January 1992, the U.S. Government sought emergency relief from the Eleventh Circuit asserting that the bar to repatriations was aggravating the refugee crisis by indirectly encouraging Haitians to take to the seas. The Government filed an application for stay which was granted, pending the Eleventh Circuit's decision of the Government's appeal. Haitian Refugee Ctr. v. Baker, 112 S. Ct. 1072 (1992). The repatriations resumed and a few days later, the Eleventh Circuit reversed the remaining injunctions and ordered dismissal of the action. *Haitian Refugee Ctr.*, 953 F.2d at 1515.

135. *Haitian Refugee Ctr.*, 953 F.2d at 1506.

136. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988).

137. U.N. Protocol, *supra* note 17.

138. Exec. Order No. 12,807, *supra* note 13.

139. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended 8 U.S.C. §§ 1101-1157 (1988 & Supp. IV 1992)).

140. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)).

lines.[141] Second, the court considered whether the district court erred in denying preliminary injunctive relief on HRC's claims to independently enforceable rights under the Executive Order, the INA, the Refugee Act, the INS Guidelines, and customary international law.[142]

The Eleventh Circuit began its analysis by holding that the plaintiffs had no right to judicial review of defendant's alleged violation of § 243(h) because the INA provides rights of review only for aliens who have reached U.S. borders.[143] The court relied heavily on the fact that § 243(h) is included in Part V of the INA, which involves the deportation of aliens, and asserted that these deportation provisions apply only to aliens within the United States.[144] Next, the court emphasized that § 242(b) of Part V[145] establishes procedures for determining the deportability of an alien, and specifically states that it only applies to aliens "in the United States."[146] The Eleventh Circuit concluded that: since § 243(h) is located in Part V, and since § 242(b) of Part V, inter alia, may only be applied to aliens who present themselves at U.S. borders, the legislature could only have intended that § 243(h) be limited in a similar fashion.[147]

HRC also claimed that the APA authorized judicial review of the defendant's actions under Ronald Reagan's Executive Order.[148] HRC conceded that the President had broad discretion-

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141. INS Operations Instructions (OI) 207.1-207.10, 208.1-208.15, 209.1-209.6, *reprinted in* 9 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE, APPENDIX (rev. ed. 1993).

142. *Haitian Refugee Ctr.*, 953 F.2d at 1505.

143. *Id.* at 1506. Judge Hatchett, in his dissent, stated:

> [T]he majority simply accepts the government's contention that these refugees have no enforceable rights in an American court because they have not reached the continental United States. . . . The government makes the "outside the United States" argument, and the majority accepts it, although everyone in this case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. . . . The majority accepts a pure legal fiction when it holds that these refugees are in a different class from every other "excludable alien" because Haitians, unlike other aliens from anywhere in the world, are prevented from freely reaching the continental United States.

Id. at 1515-16 (Hatchett, J., dissenting).

144. *Id.* at 1506.

145. 8 U.S.C. § 1252(b).

146. *Id.* §§ 1251, 1252(b).

147. *Haitian Refugee Ctr.*, 953 F.2d at 1506.

148. *Id.* at 1507.

ary authority in excluding aliens under 8 U.S.C. § 1182(f), and that his Executive Order was not reviewable under the APA.[149] However, plaintiffs argued that the President's subordinates did not carry out his directive and that their failure to do so was subject to judicial review.[150] The court responded that the "logical extension" of plaintiffs' argument would make all of the President's discretionary decisions reviewable except in matters undertaken without the aid of subordinates.[151]

HRC's second argument regarding President Reagan's Executive Order was more substantial, and not dismissed so quickly by the court. HRC maintained that the defendant's screening procedure violated § 243(h), which states that the Attorney General shall not deport or return an alien if it is determined that he or she will be subject to persecution.[152] HRC claimed that the INS and Coast Guard officials violated the Executive Order's requirement that "no person who is a refugee will be returned without his consent."[153] HRC's allegation was, according to the Eleventh Circuit, that the agency failed to adhere to its own binding regulations.[154] The court reasoned, however, that since the determination of refugee status rests solely with the INS officer, and the order did not constrain the officer's discretion in regard to who qualified as a refugee, "it [could not] provide [the] court with any 'meaningful standard against which to judge the . . . exercise of discretion.'"[155]

HRC also contended that the INA, international treaties, and the INS Guidelines restricted INS officers' discretion concerning refugee status.[156] The Eleventh Circuit refuted the assertion that any of these instruments might constrain INS officials' discretion, and once again asserted that the INA did not extend extraterritorially.[157] The court next stated that although Article 33 of the U.N. Protocol provided that no refugee would be returned to a country if he had a well-founded fear of persecution,

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149. *Id.*
150. *Id.*
151. *Id.* at 1507 n.5.
152. *Id.* at 1507.
153. *Id.* at 1508 (quoting Exec. Order No. 12,324, *supra* note 57).
154. *Id.* (citation omitted).
155. *Id.* (citation omitted).
156. *Id.*
157. *Id.*

it did not lay out any standards against which to assess procedures plaintiffs had complained about.[158] Nor did the INS Guidelines provide any meaningful standards for judicial review.[159] The Eleventh Circuit concluded its discussion of this issue stating that there were no "'binding regulations' which limit[ed] agency discretion in such a way as to permit meaningful judicial review."[160]

In regard to the second issue, the Eleventh Circuit flatly refused to recognize that the plaintiffs possessed any independently enforceable rights under the INA, the Refugee Act, the Executive Order, or INS Guidelines.[161] The court stated that § 243(h) was found within Part V of the INA, which addresses deportation and adjustment status, and that these provisions only apply to aliens within the United States.[162] The court next emphasized that the Refugee Act of 1980 added the INA's asylum provision, which is also restricted by its terms to aliens within the United States or at its borders,[163] and that aliens interdicted on the high seas cannot, therefore, assert a claim based on the INA or Refugee Act.[164]

The Eleventh Circuit remanded the case to the district court with orders to dismiss the action because the complaint failed to state a claim upon which relief could be granted.[165] HRC immediately filed a petition for a writ of certiorari.[166] In opposing certiorari, the Solicitor General represented to the Court that, "'screened-in' individuals would be brought to the United States

158. *Id.*

159. *Id.*

160. *Id.* (citation omitted).

161. *Id.* at 1509.

162. *Id.* at 1510.

163. *Id.* (Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), states: "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum.").

164. *Id.* HRC attacked this argument by insisting that the language of the asylum provision should be read to include "a land border or port of entry *or* its functional equivalent." *Id.* Plaintiffs contended that because the United States is reaching out into international waters via its interdiction program, it, in effect, extended its borders. The court did not explore the implications of the interdiction program, and simply refused to interpret the statute in this fashion. *Id.* at 1510-11.

165. *Id.* at 1515.

166. *Haitian Refugee Ctr.*, 112 S. Ct. at 1245.

so that they could file applications under the [INA] for asylum."[167] These individuals would then have the opportunity for a full adjudicatory determination of whether they satisfied the statutory standard of being a "refugee" and otherwise qualified for the discretionary relief of asylum.[168]

The Supreme Court denied HRC's application for stay and petition for certiorari on February 24, 1992.[169] Only five days later respondents contravened their representation and began denying process to "screened-in" Haitians who had tested positive for communicable diseases.[170]

B. Haitian Centers Council v. McNary

A little over three weeks later, a new team of lawyers including Michael Ratner, a staff attorney at New York's Center for Constitutional Rights, Harold Hongju Koh, a professor at Yale Law School, and lawyers from the New Haven-based Haitian Centers Council, filed suit in federal court in Brooklyn, New York.[171] The attorneys for the Haitians sought the right to counsel for those Haitians detained at Guantanamo Naval Base who had already gained permission to come to the United States and apply for political asylum.[172] The district court entered a preliminary injunction on April 6 that required the Government to grant respondent organizations "access" to the individual interdictees housed at Guantanamo.[173] Further, the court enjoined the Government from repatriating "screened-in" interdic-

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167. Haitian Ctrs. Council v. McNary, 969 F.2d 1350, 1356-57 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of *McNary* case). Individuals found to have a credible fear of persecution if returned to Haiti are "screened-in," and are eligible for transfer to the United States to pursue an asylum claim. *Id.* at 1354.

168. *Id.* at 1354.

169. *Haitian Refugee Ctr.*, 112 S. Ct. at 1245.

170. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1332-33 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of *McNary* case). Process was denied to Haitians with communicable diseases, as distinct from Haitians in general, as they were the only group of Haitians permitted to remain in U.S. territory (Guantanamo Bay, Cuba). Other interdicted Haitians were intercepted at sea and sent back to Haiti. *Id.*

171. Rosalind Resnick, *Haitian Brigade in Action*, NAT'L L.J., June 15, 1992, at 28.

172. *Id.*

173. Haitian Ctrs. Council v. McNary, No. 92 CV 1258, 1992 WL 155853, at *10 (E.D.N.Y. 1992) (Memorandum and Order dated April 6, 1992); *see infra* notes 293-94 (stating ultimate resolution of case).

tees without first allowing them to communicate with counsel.[174]

On May 24, 1992, President Bush issued the Kennebunkport Order, which allowed the Coast Guard to intercept boatloads of Haitians and return them to Haiti[175] where their lives or freedom would be threatened. A few days later, Ratner and Koh hurriedly returned to court to challenge President Bush's policy of turning back Haitian boat people without a hearing.[176] On May 27, 1992, Haitian Centers Council applied for a temporary restraining order to bar implementation of the President's Executive Order, but the district court denied relief.[177]

Two months later, the Second Circuit held that the Executive's unprecedented policy of "reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors," directly violated the plain language of § 243(h)(1) of the INA.[178] The Second Circuit's decision that § 243(h) of the INA was an available source of relief for Haitian refugees interdicted in international waters created an explicit circuit split with the Eleventh Circuit because of its ruling in *Haitian Refugee Center v. Baker*.[179]

The Second Circuit began its analysis of § 243(h) by a comparison of its text before and after 1980. The court noted that the new statute made three significant changes: 1) the Attorney

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174. *Id.*

175. Exec. Order No. 12,807, *supra* note 13.

176. Resnick, *supra* note 171.

177. Haitian Ctrs. Council v. McNary, No. 92 CV 1258, 1992 WL 155853, at *11-12 (E.D.N.Y. 1992) (Memorandum and Order dated June 5, 1992); *see infra* notes 293-94 (stating ultimate resolution of case). While the district court denied relief, it condemned the change in U.S. policy stating:

> It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of *non-refoulement*. As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions. . . .

Id. at 12.

178. Haitian Ctrs. Council v. McNary, 969 F.2d 1350, 1361 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of case).

179. The Second Circuit held that the plaintiffs were not bound by the Eleventh Circuit's ruling in *Haitian Refugee Ctr. v. Baker* because that case involved different parties and circumstances. *Haitian Ctrs. Council*, 969 F.2d at 1355-57.

General's obligations under the new § 243(h) were mandatory instead of discretionary; 2) the statute now applied to "any alien," rather than "any alien within the United States"; and 3) rather than authorizing the Attorney General to "withhold deportation," it declares that he "shall not deport or return" any alien who may face persecution upon return to his or her country.[180] The court stated that the statute presented two problems of construction and interpretation.[181] The first problem identified was deciding if Haitians interdicted in international waters fell within the scope of "any alien" in § 243(h).[182] If so, it next needed to determine whether intercepting Haitians in international waters and repatriating them constituted the "return" of an alien prohibited by § 243(h).[183]

The Second Circuit quickly resolved the first of these problems by holding that the plaintiffs clearly fell within the plain meaning of the congressional definition of "any alien."[184] In response to the Government's initial argument that the laws of the United States have no extraterritorial application, the Second Circuit stated that "[C]ongress knew 'how to place the high seas within the jurisdictional reach of a statute'. . . and it did so here by making § 243(h)(1) apply to 'any alien' without regard to location."[185] However, the court added that absent the Government's proactive intervention in this instance, § 243(h)'s ban on "return" of aliens to their persecutors could not be invoked by individuals beyond U.S. borders.[186]

The Government's second argument directed the court's attention to § 243(h)(2)(C) of the INA,[187] which states that the provisions of § 243(h) shall not apply if there are serious grounds for suspecting that an alien has committed a grave nonpolitical crime outside the United States prior to his or her arrival in the United States.[188] The Government argued that the phrase, "prior to the arrival of the alien in the United States," signified

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180. *Id.* at 1357-58.
181. *Id.* at 1358.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* (citation omitted).
186. *Id.* at 1358-59.
187. 8 U.S.C. § 1253(h)(2)(C) (1988).
188. *Id.*; *Haitian Ctrs. Council*, 969 F.2d at 1359.

that § 243(h) could not apply to aliens who have not yet arrived in the United States.[189] The court pointed out that the Government's reading of the statute would entail reading the words "within the United States" back into § 243(h) which would be contrary to Congress's decision to eliminate them in 1980.[190]

The Government's third argument for not reading the statute literally was that § 243(h) is located in Part V of the INA whose provisions deal with the deportation and adjustment of status of aliens within the United States.[191] The Second Circuit quickly dismissed this argument declaring that in addition to ignoring the plain language of § 243(h), it ascribed unwarranted weight to the location of the provision.[192]

Having concluded that Haitians interdicted in international waters fell within the scope of "any alien" in § 243(h), the Second Circuit inquired whether the Government's interception and forcible repatriation of Haitian refugees was a "return" of those refugees to their persecutors in violation of § 243(h) of the INA.[193] The court held that it was, based on the "ordinary meaning" of the statute.[194] The court noted that the statute declares "the Attorney General shall not . . . return any alien to a country" where that alien would be persecuted, but there is no indication of where the alien must or must not be returned from.[195] The alien, therefore, could be anywhere, "within or without the United States."[196]

Next, the Second Circuit compared this language to that of President Bush's Kennebunkport Order[197] which instructed the Coast Guard to "return the vessel and its passengers *to* the

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189. *Id.* (quoting 8 U.S.C. 1253(h)).

190. *Id.*

191. *Id.*

192. *Id.* The court explained that the statute's location in Part V was its original placement before 1980 when § 243(h) only applied to "deportation." Since 1980, § 243(h) applies to "deportation" as well as "return"; deportation is necessarily limited to aliens "in the United States," and return applies to all aliens wherever they are located. The fact that § 243(h) is surrounded by sections which have no extraterritorial application has no bearing on the proper interpretation of this section, according to the Second Circuit. *Id.* at 1360.

193. *Id.* at 1360.

194. *Id.*

195. *Id.* at 1360-61 (quoting 8 U.S.C. 1253(h)).

196. *Id.* at 1361.

197. Exec. Order No. 12,807, *supra* note 13.

country from which it came."[198] The court deduced from the plain meaning of the President's words that the "return" indicated was to a persecuting country.[199] Further, it concluded that the interdiction of refugees in international waters, and their return without a determination of whether they may face persecution, violated § 243(h) of the INA.[200]

The Government rebutted the Second Circuit's reading of § 243(h) by maintaining that the 1980 amendment to this section simply adopted the language of Article 33 of the U.N. Protocol which "prohibits the 'return' only of refugees who have entered the territory of the contracting state."[201] The Second Circuit countered this assertion with a detailed analysis of the purpose and language of the U.N. Protocol.[202] The court began with a review of the U.N. Protocol's language maintaining that the plain meaning of treaty terms controls unless the result is contrary to the intent of the signatories.[203] Next, the court reasoned that the word "return" in Article 33 means "return" regardless of from where the refugee is to be returned.[204] The court elaborated not only the purpose of Article 33, but that of the U.N. Convention to substantiate its reading.[205] The court noted that the purpose of Article 33 "is to prevent all 'refugees,' . . . from being put into the hands of those who would persecute them," while the Preamble to the U.N. Convention states that the United Nations has "endeavored to assure refugees the widest possible exercise of . . . fundamental rights and freedoms."[206] According to the court, the Government's narrow reading would not further either

198. *Haitian Ctrs. Council*, 969 F.2d at 1361 (quoting Exec. Order No. 12,807, *supra* note 13).

199. *Id.*

200. *Id.*

201. *Id.* (quoting U.N. Protocol, *supra* note 17).

202. *Id.* at 1363.

203. *Id.* at 1362.

204. *Id.* (quoting United States v. Stuart, 489 U.S. 353, 365-66 (1989)). The court explained that just as with § 243(h), the emphasis in Article 33 is to where the refugee is to be returned. According to the U.N. Protocol a "refugee" is "any person who . . . owing to a well-founded fear of being persecuted . . . is outside the country of his nationality." U.N. Protocol, *supra* note 17. The court held that a "refugee" under the U.N. Protocol, as with "any alien" under § 243(h), is defined in relation to past location as opposed to present location and consequently, Article 33's prohibition against return clearly applies to all refugees, regardless of their locale. *Haitian Ctrs. Council*, 969 F.2d at 1362.

205. *Haitian Ctrs. Council*, 969 F.2d at 1363.

206. *Id.* (quoting U.N. Convention, *supra* note 110).

purpose.[207]

The Government presented several arguments to refute a literal reading of the text of § 243(h) maintaining that the insertion of the French verb *"refouler"* after the word "return" in Article 33 implied the ejection of an alien "from within the territory of the Contracting State."[208] However, the court ultimately decided that the French text of the Refugee Convention undercut the Government's reading; "the French text ('*Aucun des États Contractants n'expulsera ou ne refoulera*'), by using '*ou*', meaning 'or', conclusively shows that expel (*expulsera*) and return (*refoulera*) are to be read disjunctively, not as a 'unitary whole' [as urged by the government]."[209]

The Government's final attack on the interpretation of Article 33 relied on the negotiating history of the U.N. Convention and Protocol.[210] The Government highlighted a dissenting member's view that the possibility of mass migrations across frontiers was not covered by Article 33, and pointed out that this view had been placed on record.[211]

In response to the Government's reliance on the negotiating history of the U.N. Protocol, the Second Circuit held that "even if we were to turn statutory construction on its head, and look to the words of the statute only when the legislative history is unclear," the court would make the same determination: Article 33 applies to all refugees, just as § 243(h) of the INA applies to all aliens, regardless of location.[212]

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207. *Id.*
208. *Id.*
209. *Id.* (first emphasis added).
210. *Id.* at 1365.
211. *Id.*
212. *Id.* at 1366.

IV. THE EXTRATERRITORIAL SCOPE OF SECTION 243(h): THE OBJECTIVES OF THE REFUGEE ACT, THE UNITED NATIONS PROTOCOL, AND THE UNITED STATES NON-REFOULEMENT OBLIGATION

A. The Legislative and Negotiating History of the Refugee Act of 1980 and Article 33 of the United Nations Protocol

In their examination of the language of § 243(h), both the Eleventh and the Second Circuits compared the text of the statute prior to the Refugee Act of 1980 with the amended version. Both courts noted that the amended version adopted the language of Article 33 of the U.N. Protocol, but only the Second Circuit chose to consider briefly some of the negotiating history of Article 33 of the U.N. Protocol, as well as the Refugee Act's legislative history and purpose.

The use of legislative history to interpret statutes "is now normal practice in the federal system," but there exist no formal rules or guidelines concerning its use.[213] Although legal scholars argue about approaches to legislative history, most agree that it is appropriate to use it in construing statutes whose language is diffuse or ambiguous.[214] The controversy regarding the extraterritorial scope of § 243(h) of the INA is due to the myriad interpretations which may be assigned phrases and words such as "any alien" or "return." In light of several significant changes in the vocabulary of § 243(h) in 1980, it is not only appropriate, but indeed necessary to examine the legislative history and purpose of § 243(h) which involves both the Refugee Act of 1980, and the U.N. Protocol.

1. The Refugee Act of 1980

The Refugee Act of 1980 gives statutory reinforcement to the United States commitment to human rights and humanitarian concerns by providing a nondiscriminatory definition of refugee

213. W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 383 (1992).

214. *Id.* at 384-86, 388.

conforming to that used in the U.N. Convention and Protocol.[215] The Conference Report, eventually adopted by the Senate and the House, stated that the purpose of the Act was "to respond to the urgent needs of persons subject to persecution in their homelands . . . [and] that it [was] the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."[216] The Conference Report asserted that the bill had six objectives:

> First, . . . [the] new definition [of refugee] eliminate[d] the geographical and ideological restrictions applicable to refugees . . . since 1952 . . . . Second, the conference report finally establishe[d] a statutory scheme for the admission of refugees in both normal flow and emergency situations . . . justified by "grave humanitarian concerns." Third, the report adopt[ed] the detailed . . . provisions regarding consultation with Congress. . . . Fourth, the conference report . . . adopt[ed] . . . language which [made] it explicitly clear that the Attorney General's parole authority should not be used to admit groups of refugees . . . . Fifth, . . . all refugees—both normal flow and emergency situation—should be admitted by the Attorney General as "refugees," not as lawful permanent residents . . . . Finally, [that] the . . . provisions relating to asylum and withholding of deportation . . . [were] consistent with [the United State's] international obligations under the United Nations Convention and Protocol . . . .[217]

Thus, in addition to the new definition of "refugee" conforming to the U.N. Protocol, the legislation established realistic provisions governing the admission of refugees, fixed a new refugee admission status, prohibited parole authority in § 212(d)(5) to admit groups of refugees, and, for the first time, clearly defined the asylum provision in United States immigration

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215. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)); 126 CONG. REC. 4499 (1980) (statement of Rep. Holtzman); U.N. Protocol, *supra* note 17. The United States ratified the U.N. Protocol on October 4, 1968. 114 CONG. Rec. 29,608 (1968).

216. H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 1 (1980).

217. 126 CONG. REC. 4499-4500 (1980) (statement of Rep. Holtzman).

law.[218]

In accordance with the humanitarian goal of "provid[ing] a permanent and systematic procedure for the admission . . . of refugees of special humanitarian concern,"[219] § 243(h) of the INA requires the Attorney General to withhold deportation of an alien who demonstrates that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[220] The 1980 Refugee Act amended the withholding of deportation provision,[221] § 243(h).[222]

Prior to 1980, § 243(h)(1) read as follows:

> The Attorney General *is authorized* to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.[223]

In 1980, Congress amended the section to read:

> The Attorney General *shall not* deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, member-

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218. 126 CONG. REC. 3757 (1980) (statement of Sen. Kennedy).

219. H.R. CONF. REP. NO. 781, *supra* note 216, at 1.

220. 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV 1992). To qualify for the entitlement to withholding of deportation, an alien must prove that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. INS v. Stevic, 467 U.S. 407, 429-30 (1984).

221. INS v. Cardoza-Fonseca, 480 U.S. 421, 428-29 (1987). Asylum and withholding of deportation are two distinct forms of relief. There is no entitlement to asylum; it is only granted to eligible refugees pursuant to the Attorney General's discretion. Once granted, asylum offers broad benefits. Section 243(h) relief, on the other hand, is "country specific," and while the applicant might be protected from deportation for a period of time, that section would not prevent his exclusion or deportation to any other hospitable country under § 237(a). When granted asylum, however, the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to § 209 of the Act, after one year's residence in the United States. *Id.* at 421 n.6 (quoting *In re* Salim, 18 I. & N. 311, 315 (1982)).

222. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1988 & Supp. IV 1992)).

223. 8 U.S.C. § 1253(h) (1965) (amended 1980) (emphasis added).

ship in a particular social group, or political opinion.[224]

The new statute effects the following changes: it removes the Attorney General's discretion from § 243(h) proceedings by making the provisions of the new section obligatory;[225] the protections of this section are extended to apply in exclusion as well as deportation hearings;[226] it applies to "any alien" rather than "any alien within the United States"; and it enlarges the bases of persecution to include "nationality and membership in a particular social group."[227] All of these changes further the humanitarian aims of the Refugee Act by broadening the geographical and ideological ambit of the statute.

In *Haitian Refugee Center v. Baker*, plaintiffs maintained that the 1980 amendment to § 243(h) demonstrated that Congress wished to extend the section's scope.[228] Plaintiffs argued that the addition of the words "or return" and the deletion of the words "within the United States," indicated that Congress intended to expand the application of the statute to aliens beyond U.S. borders.[229] The Eleventh Circuit stated that it disagreed with this interpretation emphasizing that § 243(h) is found in Part V of the INA, which deals with deportation and adjustment status, and that these provisions only apply to aliens within the United States.[230] In light of the express deletion of "within the United States" from § 243(h) after 1980, this reasoning is not particularly persuasive.

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224. 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV 1992) (emphasis added).

225. *Cardoza-Fonseca*, 480 U.S. at 429.

226. Deborah Anker and Michael Posner distinguish exclusion from deportation hearings in *The Forty Year Crisis: A Legislative History of the Refugee Crisis*, explaining:

> The INA makes a fundamental distinction between those aliens who have effected an entry into the U.S. (whether with a visa or without a visa and without being inspected by immigration officers) and those who have attempted but have not accomplished a formal entry. The former if alleged to be in violation of their status are subject to deportation proceedings under 8 U.S.C. § 1252 (1952). The latter are subject to exclusion proceeding[s] under 8 U.S.C. § 1226 (1952).

Anker & Posner, *supra* note 88, at 40 n.144; *see also* DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW 53-54 (1992).

227. Anker & Posner, *supra* note 88, at 45.

228. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1509 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

229. *Id.* at 1509-10.

230. *Id.* at 1510.

The elimination of the geographical restriction formerly imposed by the prepositional phrase "within the United States" and its application to "any alien" is one of the most striking changes in the text of the statute. In determining if Haitians interdicted in international waters came within the scope of "any alien," the Second Circuit examined § 101(a)(3) of the INA[231] which defines an "alien" as an individual who is not a citizen or national of the United States.[232] Since Haitians are clearly not citizens or nationals of the United States, the court concluded that they are designated by the term "any alien" used by Congress.[233]

The Second Circuit's plain language argument was convincing and became even more powerful when the court emphasized the express omission of the limiting words "within the United States."[234] Congress's deletion of this restrictive phrase corresponds to the articulated objective of the Refugee Act: "to respond to the urgent needs of persons subject to persecution in their homelands, . . . [and] to promote opportunities for resettlement or voluntary repatriation. . . . "[235] The Second Circuit's liberal reading of "any alien" embraced the fundamental purpose of the Refugee Act by assuring refugees relief from persecution and providing them "resettlement opportunities . . . to the fullest extent possible."[236]

While the Second Circuit considered several other changes, it did not explore the implications of the expanded base of persecution which "represented [a] movement[ ] towards consonance with the U.N. Convention."[237] The addition of "nationality" and "membership in a particular social group" forces the Attorney General to weigh a wider range of factors in ascertaining whether or not an alien may face persecution if repatriated. If it were discovered that a Haitian socialized with individuals who publicly or privately supported the government of Jean-Bertrand Aristide,

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231. 8 U.S.C. § 1101(a)(3) (1988 & Supp. IV 1992).

232. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1358 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of case).

233. *Id.*

234. *Id.* at 1359.

235. H.R. CONF. REP. NO. 590, 96th Cong., 2d Sess. 1 (1980).

236. H.R. CONF. REP. NO. 781, *supra* note 216, at 1.

237. Anker & Posner, *supra* note 88, at 45.

he or she would most likely face persecution if repatriated.[238]

The Attorney General must appreciate the significance of such social ties and act accordingly. The obligations of the Attorney General under the amended version of § 243(h) require, therefore, a more broadly-based and sensitive evaluation during the initial screening process. This should necessarily increase the odds that Haitian interdictees fall within the Attorney General's threshold determination for the withholding of deportation. The present U.S. policy of repatriating Haitian interdictees without a perfunctory screening of their status ignores this expanded base of persecution, and is a gross violation of § 243(h) of the INA.

2. The United Nations Protocol

One of Congress's primary objectives in promulgating the 1980 Refugee Act was to bring the U.S. refugee law into conformance with the U.N. Protocol.[239] The House of Representatives Conference Report specifically stated that the House provision on asylum and withholding of deportation would be adopted in amending § 243(h) because it was based directly on the language of the U.N. Protocol, and "it is intended that the provision be construed consistent with the Protocol."[240]

Section 243(h) of the INA was revised to conform its language to Article 33[241] of the U.N. Protocol[242] which states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[243]

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238. The New York based Lawyers Committee for Human Rights published a 62 page report after a 10 day fact-finding mission in August 1992 which revealed that at least 1,000 people have been summarily executed without trial, and as many as 3,000 have died since the military coup. The report states that, "[h]arassment and intimidation of journalists, human rights observers, lawyers and priests, religious sisters and brothers, students, pastors and grass-roots leaders i[s] intense and constant." David Augsburger, *Haitian Call for World Solidarity*, FOUR COUNTY CATHOLIC, Feb. 1993, at 3.

239. Anker & Posner, *supra* note 88, at 46.

240. H.R. REP. No. 781, *supra* note 216, at 20.

241. "Article 33" refers to Article 28 in the Draft Convention.

242. INS v. Stevic, 467 U.S. 407, 421 (1984).

243. U.N. Protocol, *supra* note 17, at 6276 (emphasis added).

Section 243(h) similarly reads:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[244]

There are several significant changes from Article 33 to § 243(h) which entail: 1) who is bound by the provision; 2) the choice of the verbs "deport" instead of "expel"; 3) the deletion of "*refouler*" after "return"; 4) the selection of "to a country" instead of "to the frontiers of territories"; and 5) the change of "refugee" to "any alien."

Whether it is a contracting state who is bound to return a refugee in the case of the U.N. Protocol, or the Attorney General in the case of § 243(h), the obligations of both provisions are mandatory. Neither a contracting state nor the Attorney General may return a refugee or alien who might face persecution in their native land. The overriding humanitarian concerns of admitting any aliens who possess well-founded fears of persecution are apparent in the text of a session of the Ad Hoc Committee on Statelessness and Related Problems[245] which adopted the language of Article 33.[246] The Belgian delegate asserted that if it were ever absolutely essential to refuse admittance to a refugee, even for reasons of national security, it would always be possible to direct him to territories where his life or his freedom would not be threatened.[247] The American delegate supported the Belgian delegate's view, recognizing that even when there were urgent reasons of national security a state could easily avoid turning back a refugee to a territory in which he would be in danger.[248] Article 33 clearly does not permit a contracting state to turn back a refugee, even one who potentially poses national security concerns, if the refugee's life or freedom would be at risk.

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244. 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992).

245. *Ad Hoc Committee on Statelessness and Related Problems*, U.N. ESCOR, 1st Sess., 20th mtg. at 1, U.N. Doc. E/AC.32/SR.20 (1950).

246. *Id.* at 2-3.

247. *Id.* at 4.

248. *Id.* at 4, 9.

Similarly, the language in § 243(h) indicates that the Attorney General is prohibited from deporting or returning an alien to a country where he would face persecution.

The verbs "expel," and especially "return" and *"refouler"*[249] provoked a great deal of discussion during the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.[250] The Swiss delegate suggested that "expulsion" referred to a refugee who had already been admitted to the territory of a country, while *"refoulement"*[251] had a vaguer meaning, and could not be applied to a refugee who had not yet entered the territory of a country.[252] The Swiss delegate explained that Article 33 implied the existence of two classes of refugees: refugees who were likely to be expelled, and those who were likely to be returned.[253] He asserted that the Swiss Government considered that the word "return" applied exclusively to refugees who had already entered a country, and according to that interpretation, states were not compelled to allow large groups of persons claiming refugee status to cross its borders.[254]

The delegates from the Netherlands and Italy were also hesitant about assuming obligations concerning mass influxes of refugees who might endanger public security.[255] The Belgian delegate construed Article 33's prohibition against the return of refugees to the frontier as applying to individuals but not to large groups.[256] The Dutch delegate later suggested that the Swiss reading be adopted because the Netherlands Government could not accept any legal obligations with respect to large groups of refugees seeking access to its territory.[257] While there was no consensus on this point, the president of the committee ruled that the interpretation given by the Dutch delegate be placed on the

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249. French verb meaning to return, drive back (people), or expel immigrants, refugees. *Pousser en arrière, faire reculer, refluer (des personnes), refouler des immigrants, des réfugiés.* PAUL ROBERT, LE GRAND ROBERT, DICTIONNAIRE ALPHABÉTIQUE & ANALOGIQUE DE LA LANGUE FRANÇAISE, TOME VIII, at 152 (1986).

250. *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. GAOR, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 6-26 (1951).

251. French noun meaning return, pressing back, or driving back. ROBERT, *supra* note 249, at 151.

252. U.N. Doc. A/CONF.2/SR.16, *supra* note 250, at 6.

253. *Id.*

254. *Id.*

255. *Id.* at 11.

256. *Id.* at 12.

257. *Id.* at 21.

record.[258]

The Second Circuit attacked the Government's reliance on this passage in *Haitian Centers Council v. McNary* by underscoring the ambiguity of this slice of legislative history. The court emphasized that the refusal by the Dutch delegate to accept legal obligations regarding the mass migrations of refugees, "would not have meant that his country could go beyond the negative act of closing its border and take the affirmative steps of seizing refugees approaching the border and forcibly carrying them back to the custody of those from whom they are fleeing."[259] The Second Circuit ultimately held that this passage was merely the recording of a dissenting member's views, and thereby adopted the opinion of the amicus, Office of the United Nations High Commissioner for Refugees.[260]

The logic of this conclusion appears to rely on the fact that member nations vote for the adoption of particular suggestions. Immediately following the recording of the Dutch delegate's interpretation, the president of the committee made two recommendations which were unanimously adopted by the committee.[261] It cannot be assumed, therefore, that the recording of an interpretation by a dissenting member is synonymous with its unanimous adoption by the committee.

Despite the express wishes of the Swiss delegate, the states represented at the conference did not take a unanimous position regarding the meaning of the word "return" or *"refouler."* The French verb *"refouler"* comes from the verb *"fouler"* which means "to crush something which offers little resistance; to press something repeatedly with the hands, the feet, or a tool."[262] Used transitively, the verb *"refouler"* denotes moving someone or

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258. *Id.*

259. Haitian Ctrs. Council v. McNary, 969 F.2d 1350, 1366 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); *see infra* notes 293-94 (stating ultimate resolution of case).

260. *Id.* at 1365.

261. U.N. Doc. A/CONF.2/SR.16, *supra* note 250, at 22.

262. É. LITTRÉ, DICTIONNAIRE DE LA LANGUE FRANÇAISE, TOME DEUXIÈME, at 1750-51 (1883); PAUL ROBERT, LE GRAND ROBERT, DICTIONNAIRE ALPHABÉTIQUE & ANALOGIQUE DE LA LANGUE FRANÇAISE, TOME IV, at 658 (1989). *Écraser une chose qui n'oppose guère de résistance. Presser (qqch.) en appuyant à plusieurs reprises, avec les mains, les pieds, un outil.*

something backward by pushing him, her, or it.[263] Used intransitively, it signifies falling back under pressure or force.[264] The meaning of "*refouler*" in the context of Article 33 does not have the vague meaning that the Swiss delegate proposed due to its position immediately after "return." Given this idea of forceful movement backward, the verb "*refouler*" presents the idea of an assisted placement to somewhere a refugee has already been; the emphasis is on past locale, not present. It is entirely possible that a refugee could be forced to retreat before he had successfully effected an entry into a given territory.

In addition, "return" and "*refouler*" are only one of two options for a Contracting State. As pointed out by the Second Circuit in *Haitian Centers Council v. McNary*, "return" and "*refouler*" are connected to "expel" by the conjunction "or," and if they are not distinguished from "expel" one is left with, "[n]o Contracting State shall expel or expel. . . ."[265] The Second Circuit explained that the terms "expel" and "return" ("*refouler*") were two completely different concepts, and that "expel" was a term of art designating a more formal process which was distinguishable from *refoulement*.[266] A similar distinction may be drawn between the verbs "deport" and "return" in § 243(h) of the INA. Whereas deportation expels an alien who has already entered the country legally or illegally, returning an alien simply means placing him somewhere he has already been, regardless of where he is presently.

Finally, the choice of the term "any alien" just as with "a refugee" is significant in that it rids itself of any geographical restrictions. During a session of the Ad Hoc Committee on Statelessness and Related Problems, the representative from Israel raised the problem of refugees who might not come within the framework of the convention.[267] In discussing Article 24 relating to expulsion and non-admittance, the U.S. delegate declared that simply because the convention chose not to deal with the right of asylum, it did not follow that the convention

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263. ALDOLPHE HATEFELD ET AL., DICTIONNAIRE GÉNÉRAL DE LA LANGUE FRANCAISE DU COMMENCEMENT DU XVIIE SIÈCLE JUSQU'À NOS JOURS, TOME SECOND 1902 (1920). *Verbe transitif. Faire reculer en foulant. Verbe intransitif. Reculer sous l'effort d'une pression.*

264. *Id.*

265. *Haitian Ctrs. Council*, 969 F.2d at 1363.

266. *Id.*

267. U.N. Doc. E/AC.32/SR.20, *supra* note 245, at 11.

would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties.[268] According to the conference minutes, he stated:

> Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.
>
> Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.[269]

The term "refugee" in Article 33 reflects this concern and encompasses all "refugees," not simply those who enter the territory of a contracting state.[270] The expression "any alien" of § 243(h) similarly applies to aliens within or without United States territories and is supported by the aim of Article 33 and the entire U.N. Protocol—to prevent refugees "from being put into the hands of those who would persecute them" and "'to assure refugees the widest possible exercise [of their] fundamental rights and freedoms.'"[271]

B. The Non-Refoulement Obligation and the United States Interdiction Program

1. The *Non-Refoulement* Obligation

On October 4, 1968, the United States ratified the U.N. Protocol adopting Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees.[272] In ratifying the U.N. Protocol, the United States assumed an international obligation not to return aliens to a country where their lives or

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268. *Id.*

269. *Id.* at 11-12.

270. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 11, 58 (1992).

271. *Haitian Ctrs. Council*, 969 F.2d at 1363 (citation omitted).

272. 114 CONG. REC. 29,608 (1968); *see* ANKER, *supra* note 110, at 9; U.N. Protocol, *supra* note 17, at 6225.

freedom would be threatened "on account of . . . race, religion, nationality, membership in a particular social group or political opinion."[273] This international obligation entails the principle of *non-refoulement* which prohibits the return of refugees to territories where their lives or freedom would be threatened.[274]

Although the INS has refuted the existence of a *non-refoulement* obligation, the U.N. Protocol supplements and incorporates the substantive provisions of the U.N. Convention Relating to the Status of Refugees—a treaty and therefore, part of the supreme law of the land.[275] As such this treaty is self-executing and has the force and effect of law, law duly ratified by Congress.[276]

"Provisions of a self-executing treaty become law within the ratifying country upon ratification."[277] If a treaty is ratified without a declaration as to its self-executing status, the matter becomes one for the courts to consider the parties' intent, legislative history, and the content of a treaty.[278] Since the U.N. Protocol is a multilateral treaty, the member states' intent is not easily determined.[279] However, the subject matter and the negotiating history of the U.N. Protocol support the contention that the treaty and the *non-refoulement* provision are self-executing.[280]

A treaty is self-executing in regard to subject matter if its provisions do not require legislative action such as the appropriation of money or the imposition of sanctions.[281] The *non-refoulement* provision of the U.N. Protocol is self-executing because it demands "neither material assistance nor . . . funds and therefore should operate of itself, without the aid of . . .

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273. U.N. Protocol, *supra* note 17, at 6577; ANKER, *supra* note 110, at 9.

274. King, *supra* note 17, at 774 (quoting U.N. Convention, *supra* note 110, 189 U.N.T.S. at 176).

275. U.S. CONST. art. VI, cl. 2; King, *supra* note 17, at 778; LEIBOWITZ, *supra* note 80, at 4-30.

276. LEIBOWITZ, *supra* note 80, at 4-30 (quoting *In re* Dunar, 14 I. & N. 310 (1973)); *see* United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) (stating that Article VI of the United States Constitution declares treaties made under the authority of the United States to be the supreme law of the land, and that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing).

277. King, *supra* note 17, at 779.

278. *Id.* at 780.

279. *Id.*

280. *Id.* at 781.

281. *Postal*, 589 F.2d at 877.

legislation."[282] The negotiating history of the U.N. Protocol also supports the assertion that the *non-refoulement* provision is self-executing because the Departments of State and Justice assured the Senate, while it was considering ratification, that the Protocol could be implemented without any changes in immigration laws.[283] Finally, the U.N. Protocol forbids member states from eliminating or modifying the *non-refoulement* provision, lending further support to its self-executing nature.[284]

The passage of the Refugee Act in 1980 brought U.S. refugee law into conformance with the U.N. Protocol[285] by § 243(h)'s acknowledgment and incorporation of the U.S. *non-refoulement* obligation.[286] The principle of *non-refoulement* emphasizes where refugees may not be returned to—territories where their lives or liberty may be threatened—rather than where refugees are to be returned from—anywhere inside or outside the United States. The United States is thus forbidden "from laying [its] hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution" under the U.N. Protocol and § 243(h) of the Refugee Act.[287]

2. The U.S. Interdiction Program

The U.S. interdiction program[288] and President Bush's Executive Order[289] authorizing the forced repatriation of Haitian refugees intercepted in international waters, violate § 243(h) of the INA which applies to all aliens regardless of location. Furthermore, the Government's policy has contributed to the

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282. King, *supra* note 17, at 781.

283. *Id.* at 781-82; ALEINIKOFF & MARTIN, *supra* note 53, at 761.

284. King, *supra* note 17, at 782-83.

285. 125 CONG. REC. 23,232 (1979) (statement of Sen. Kennedy).

286. 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992); King, *supra* note 17, at 787.

287. *Haitian Ctrs. Council*, 969 F.2d at 1369 (Newman, J. & Pratt, J., concurring). Even if one were to argue that the Refugee Act represents legislation designed to implement the provisions of the U.N. Protocol which are not self-executing, the federal statute incorporates the *non-refoulement* obligation of Article 33 with which the United States is bound to comply.

288. Interdiction, formally AMIO, was instituted as a result of a bilateral agreement between the United States and Haiti, and an Executive Order issued by President Reagan in September 1991. The order authorizes the INS, with the assistance of the Coast Guard, to suspend the entry of undocumented aliens from the high seas. 66 Interpreter Releases 649, 650 (June 19, 1989); *see supra* notes 58-59 and accompanying text.

289. Exec. Order No. 12,807, *supra* note 13.

systematic subversion of the humanitarian purpose of the Refugee Act; over 21,000 Haitians have been intercepted on the high seas and improperly returned to Haiti since the passage of the Act.[290]

The Executive's affirmative action of reaching out into international waters, interdicting Haitian refugees, and summarily returning them to their persecutors extends the jurisdictional arm of U.S. law and violates the legal obligation of *non-refoulement*. The Government insists that § 243(h) and the *non-refoulement* provision of the U.N. Protocol are inapplicable in the case of interdicted Haitians, and "appl[y] only to persons [who] are actually in the U.S."[291] However, by intercepting Haitian refugees on the high seas, the Government has thwarted their possible entry into the United States. The Government's underlying contention is that as long as the Coast Guard prevents Haitian refugees from "entering" the United States, the Government is not bound to comply with the *non-refoulement* provision or the federal statute. While preventing the entry of Haitian refugees may be inherently unjust and contrary to the norms of international law, the summary return of these refugees to their persecutors violates § 243(h) of the INA and the principle of *non-refoulement*.

CONCLUSION

The Executive's policy of interdicting Haitian refugees in international waters and forcibly returning them to a country where their lives or liberty would be threatened on account of political opinion is in violation of § 243(h) of the Immigration and Nationality Act and Article 33 of the U.N. Protocol. The United States ratified the U.N. Protocol on October 4, 1968 and thus became derivatively bound to comply with all the substantive provisions of the U.N. Convention Relating to the Status of

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290. THE LAWYERS COMM. FOR HUMAN RIGHTS REFUGEE PROJECT, THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 1 (1990). The report argues:

> This humanitarian purpose [of the Refugee Act], however, has often been subverted by political considerations. . . . While the average approval rate for asylum applicants under the Refugee Act has been about 25 percent, the rate for those who fled from Communist or Communist-dominated countries has traditionally been from 50 to 80 percent, depending on the nationality.

Id.

291. 66 Interpreter Releases 649, 651 (June 19, 1989).

Refugees.

Section 243(h), in conformance with Article 33, explicitly prohibits the Attorney General from returning a refugee to a country where he might face political persecution based on race, religion, nationality, membership in a particular social group, or political philosophy. The Eleventh Circuit held that the deletion of the phrase "within the United States," from § 243(h), did not expand the statute's scope to include aliens interdicted on the high seas who had not yet "entered" the United States. In a thoughtful, lucid decision, the Second Circuit concluded that the plain language of § 243(h) prohibited the Government's return of aliens to their persecutors, no matter where those actions occur, and the court struck down the Bush policy of forced repatriation. The Government immediately filed a petition for a writ of certiorari which was granted on June 28, 1993.[292] In an 8-1 decision, *Sale v. Haitian Centers Council,* the Supreme Court approved the government's policy of forced return, holding that neither § 243(h) nor the plain language of Article 33 of the U.N. Protocol applied to Haitians interdicted in international waters.[293] The sole dissenter, Justice Harry Blackmun, challenged the majority's contentions that the summary return of Haitians was legal "because the word 'return' does not mean return, . . . because the opposite of 'within the United States' is not outside the United States, . . . and because the official charged with controlling immigration [the Attorney General] has no role in enforcing an order to control immigration."[294]

The forced repatriation of Haitian refugees does not comport with nor enforce the international humanitarian aims of § 243(h) and the U.N. Protocol. The legislative history of § 243(h) and the U.N. Protocol emphasize the policy of providing assistance and resettlement opportunities to refugees to the greatest extent possible. Further, the statute's textual changes after the passage of the Refugee Act of 1980 demonstrate a congressional intent to expand the scope of the statute to include aliens beyond the borders of the United States. Finally, the United States is bound to honor the principle of *non-refoulement* under § 243(h) and the U.N. Protocol.

Professor Harold Hongju Koh, counsel for the Haitians in *Sale*

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292. 113 S. Ct. 3028 (1993).

293. Sale v. Haitian Centers Council, 113 S. Ct. 2549, 2552 (1993).

294. *Id.* at 2568 (citation omitted).

v. Haitian Centers Council, recently reviewed the decision. He labeled it "an embarrassing one for a nation of immigrants" and questioned the Court's "dismissive attitude toward international law."[295] He asked, "If the United States is to continue as the world's only superpower, how long can its highest court persist in deciding international cases indifferent to the principles of comity, sanctity of treaty and respect for human rights that must form the bedrock of any new world order?"[296]

A response to this question will surely surface in the wake of future influxes of refugees whether they are Bosnians, Chinese, or Latinos, at which time the narrow purview of this decision must be embraced or rejected.

Bridgette Ellen Hickey

295. Harold H. Koh, *No Vacancy In the Land of Liberty*, CONN. L. TRIB., Aug. 2, 1993, at 23.

296. *Id.*