Forced Return of Haitian Migrants under Executive Order 12,807: A Violation of Domestic and International Law

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Cover Page Footnote
International Law; Commercial Law; Law
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Konstitisyon sé papié, bayonet sé fè¹

Introduction

Since the large-scale migration of Haitian refugees to the United States began in the 1970s, the Haitian “boat people” have been in the news and in the courtroom. It was not until former President Bush’s “Kennebunkport Order” of May 24, 1992,² however, that the plight of the Haitian people took center stage from a humanitarian, legal, and international point of view. More specifically, the Second Circuit’s decision in Haitian Centers Council v. McNary³ set the stage for a legal battle before the United States Supreme Court. In striking down the validity of an interdiction program that forcibly repatriates Haitian aliens without first determining their refugee status, the Second Circuit relied on its interpretation of United States immigration law⁴ and on the United States’ obligations under the 1967 Protocol Relating to the Status of Refugees.⁵

The full impact of both the “Kennebunkport Order” and the decision in Haitian Centers Council cannot be fully appreciated without a glimpse into Haitian history. Thus, Part I of this Note begins with a description of the political upheaval in Haiti. Part II then describes the United States’ reaction to the Haitian migration. The Haitian Centers Council case is discussed first in Part III, which sets out the court’s analysis, and then in Part IV, which examines the significance of the decision. To complete this study of the plight of the Haitian refugees, Part V then describes the general reaction to the Bush Administration’s actions. In conclusion, this Note contends that the decision in Haitian Centers Council not only responds to a humanitarian

¹ Creole saying: “The Constitution is made of paper, bayonets are of steel.”
outcry for help, but also follows the Congressional mandate reflected in section 243(h)(1) of the Immigration and Nationality Act and honors the United States' non-refoulement obligation enunciated in the 1967 Protocol Relating to the Status of Refugees.

I. Plight of the Haitian People

In 1804, under a cry of "La Liberté ou La Mort," the Haitian people defeated the French army to become the first black republic in the world. Today, the Haitians cry out for "La Démocratie ou La Mort." Nearly two centuries after gaining their independence, the Haitian people continue to live under a government controlled by the military and continue to suffer violent and massive human rights violations. Under the regimes of François ("Papa Doc") Duvalier and his son Jean-Claude ("Baby Doc") Duvalier, the Tonton Macoutes, a secret militia created by François Duvalier, terrorized the countryside, and the Haitian people lived in fear of violence, torture, and exile.

On February 7, 1986, it appeared that the Tonton Macoutes' reign of terror was at an end when "Baby Doc" and his cronies fled the country. In 1987, the Haitian Constitution was revised to "guarantee... inalienable and indefeasible rights to life, liberty, and the pursuit of happiness, in conformity with... the Universal Declaration of Human Rights of 1948." While protecting the Haitians' freedom on paper, this constitution did nothing to prevent arbitrary detentions without arrest procedures or due process, to halt the random beatings, robberies, and rapes, nor to protect the Haitians from becoming the victims of senseless massacres. Moreover, despite official reassurances from the National Council of Government (the provisional Haitian government established after the overthrow

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6 English translation: "Liberty or Death."
7 English translation: "Democracy or Death."
9 "Papa Doc" ruled Haiti from 1957 until his death in 1971. "Baby Doc" took over after his father's death and ruled the country until February of 1986 when he was overthrown. See generally Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 701, 711-16 (1981) (prepared statement of Dr. Alexander Stepick, Sociology Department, Florida International University) [hereinafter Stepick, Immigration Reform Hearings].
14 See Refugee Repoulement, supra note 10, at 28-32.
15 Refugee Repoulement, supra note 10, at 28-32.
of Duvalier) that Haitians returning from abroad would not be harmed, these Haitians often were tortured or imprisoned. None of the promises of the National Council of Government (NCG) could be trusted. Although the NCG agreed that democratic elections were to be held under the direction of the Provisional Electoral Council (PEC), an independent branch of the government, the Haitian people would not be granted the freedom to vote. November 29, 1987, the date set for the 1987 elections, was marred by violence and bloodshed and culminated in the death of at least thirty-four people. Sham elections were finally organized by the NCG. Professor Leslie Maginat, a "puppet" of the army was "selected" as President. His presidential authority, however, was ended on June 20, 1988, when the NCG resumed power over the country.

During the reign of the army-dominated provisional government, violence continued to erupt throughout the country and culminated in the St. Jean Bosco tragedy in the summer of 1988. This mad assault left thirteen church parishioners dead and at least seventy wounded. A week after this massacre, a coup d'etat brought General Prosper Avril into power.

The Haitian people fared no better under President Avril's reign. On January 20, 1990, President Avril declared a state of siege, suspended four articles of the Haitian Constitution, and prohibited the entry of visas for returning Haitians. These actions brought serious international criticism from the United States, France, and Canada and the siege was ultimately lifted on January 29, 1990.

The Haitian people dared to hope for an end to the prolonged years of persecution and violence with the election of Jean Bertrand Aristide. On December 16, 1990, 2.4 million people voted in electing Aristide. The first peaceful democratic election in the country's history actually took place. The Aristide government then

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16 See LAWYERS COMMITTEE FOR HUMAN RIGHTS, VIOLATIONS OF HUMAN RIGHTS IN HAITI 45 (unpublished report to the Organization of American States) (Nov. 1980).
17 REFUGEE REFOULEMENT, supra note 10, at 26.
18 This violence is attributed to the army which controlled the CNG and which wanted to keep its power, and to the former "Duvaliéristes" who had been prohibited from holding any governmental positions by the Haitian Constitution of 1987. REFUGEE REFOULEMENT, supra note 10, at 26. See also U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1987, 510 (1988).
19 REFUGEE REFOULEMENT, supra note 10, at 26.
20 REFUGEE REFOULEMENT, supra note 10, at 26.
21 REFUGEE REFOULEMENT, supra note 10, at 27. The army attacked the St. Jean Bosco Church where Father Jean-Bertrand Aristide was speaking.
22 REFUGEE REFOULEMENT, supra note 10, at 27.
23 REFUGEE REFOULEMENT, supra note 10, at 27.
24 Id. Events which led up to the declaration of a state of siege include the torture of three well-known government opponents by the military, the massacre of an outspoken radio talk show host by two armed civilians, and the murder of an officer in the Presidential Guard. REFUGEE REFOULEMENT, supra note 10, at 27.
announced the retirement of military officials who were implicated in past human rights violations, replaced corrupt government prosecutors, and most importantly, dissolved the institution of rural section chiefs which had, in the past, been at the heart of human rights abuses in Haiti.\footnote{2} President Aristide's action, however, did not always conform with his promise to bring justice.\footnote{27} Finally, on September 27, 1991, Aristide gave a speech that arguably condoned the use of Père Lebrun\footnote{28} and other acts of vigilante justice.\footnote{29} The military seized this opportunity to denounce Aristide and his betrayal of human rights and took steps to take over the government.\footnote{30} On September 30, 1991, a bloody coup forced President Aristide to leave the country.\footnote{31} The military-controlled government then freed prisoners accused of violating human rights and reinstated the old section chief structures.\footnote{32} Haiti once more was cloaked with fear, instability, and violence.\footnote{35}

International reaction was quick to occur as the Organization of American States (OAS), lead by the United States, imposed an embargo on Haiti in October of 1991.\footnote{34} The goal of this embargo was to force the army-controlled government to reinstate President Aristide.\footnote{35} To date, the OAS embargo has not forced the current Haitian government to yield its power, and to date, it is this military-controlled government, one not recognized by the United States, that the Haitian people are attempting to flee when they brave 600 miles of shark infested waters in rickety boats in hopes of reaching a haven: the United States.

II. United States' Reaction to the Haitian Migration

A. The Reagan Administration

The 1970s marked the beginning of the Haitian migration to the

\footnote{26} Haitian: A Human Rights Nightmare, supra note 8, at 3.
\footnote{27} Haitian: A Human Rights Nightmare, supra note 8, at 4. President Aristide failed to condemn public mob violence and some of his speeches inflamed public sentiment and were seen as encouraging vigilante groups.
\footnote{28} Père Lebrun consists of placing a tire around a victim's neck and shoulders and then setting it ablaze. Haitian: A Human Rights Nightmare, supra note 8, at 4.
\footnote{29} Haitian: A Human Rights Nightmare, supra note 8, at 6.
\footnote{30} Haitian: A Human Rights Nightmare, supra note 8, at 6-7.
\footnote{31} Haitian: A Human Rights Nightmare, supra note 8, at 1.
\footnote{32} Haitian: A Human Rights Nightmare, supra note 8, at 7.
\footnote{33} See Haitian: A Human Rights Nightmare, supra note 8, at 9-62 (citing examples of extrajudicial executions, arbitrary arrests and illegal detentions, repression of the right of free expression, repressions of freedom of assembly and association, torture and mistreatment of detainees and prisoners, military interference in the judicial process, and failures to investigate and prosecute human rights violations).
\footnote{34} Haiti: Update on Recent Political Developments and Violence, NotiSur—South American and Caribbean Political Affairs, Sept. 15, 1992 [hereinafter Update].
\footnote{35} Id. (noting that the trade embargo on Haiti "has not been very firm" and describing that negotiations between Aristide and the current Haitian Prime Minister, Marc Bazin, have been more like extended conversations rather than negotiations).
By 1978, between six and seven thousand Haitian asylum cases were pending in the Miami office and by the beginning of 1981, an estimated thirty-five thousand undocumented Haitians were living in South Florida.

Even though Haitians constituted less than two percent of the illegal immigrants to the United States, on September 29, 1981, the Reagan Administration announced the creation of its interdiction program. Having determined that the ongoing migration to the United States had become "a serious national problem detrimental to the interests of [our country]," President Reagan authorized the Secretary of State to enter into "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States" and ordered the United States Coast Guard to intercept vessels on the high seas and to "return the vessel and its passengers to the country from which it came . . . ." Finally, and most importantly, while seeking to curb illegal migration to the United States, the Reagan Administration recognized and honored the "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland" and provided that "no person who is a refugee will be returned without his consent."

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37 Haitian Refugee Center v. Smith, 676 F.2d 1023, 1029 (5th Cir. 1982). Due to the uncertainty as to asylum procedures applicable to excludable aliens, the immigration law judges were reluctant to hold these hearings. A backlog developed and the INS implemented an accelerated program to process Haitian asylum cases. Prior to the program, between one and ten hearings were held per day; after the implementation of the program, there were as many as eighty deportation hearings per day. Id. at 1029-31.

Under this INS program, the few attorneys and volunteers that were available to help the Haitian people did not have adequate time to prepare the cases. Id. at 1031. Inadequate legal representation combined with incomplete asylum applications and poor translation culminated in a program which "in its planning and executing [was] offensive to every notion of constitutional due process and equal protection." Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 532 (S.D. Fla. 1980), modified sub. nom., Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).
38 Nelson, 711 F.2d at 1464.
43 The term vessel included "vessels without nationality, vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 . . . and vessels of foreign nations with whom [the United States] has arrangements authorizing the stop[ping] and board[ing] of such vessels." Reagan Exec. Order, supra note 40, §§ 2, 3.
44 Reagan Exec. Order, supra note 40, § 2(c)(3).
45 Reagan Exec. Order, supra note 40, § 3.
46 Reagan Exec. Order, supra note 40, § 2(c)(3).
Along with the creation of this interdiction program, the United States entered into an agreement with Haiti on September 23, 1981.\textsuperscript{47} By way of exchange of notes, the two governments agreed to "stop the clandestine migration of numerous residents of Haiti to the United States."\textsuperscript{48} The Haitian government consented to the detention on the high seas of Haitian flagged vessels, authorized the Coast Guard to determine the status of those persons on board, and agreed to the "selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti."\textsuperscript{49} The United States also agreed to the presence of a representative of the Haitian Navy to act as a liaison aboard any United States vessel involved in the interdiction of Haitian vessels.\textsuperscript{50} Most significantly, this agreement recognized the "international obligations mandated in the Protocol relating to the Status of Refugees done in New York 31 January 1967,"\textsuperscript{51} and explicitly provided that "the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."\textsuperscript{52} Finally, the Haitian Government assured that it would not prosecute "Haitians returned to their country and who are not traffickers."\textsuperscript{53}

In the implementation of this interdiction program, the Immigration and Naturalization Service (INS) issued guidelines setting forth the procedures the Coast Guard was to follow during the interdiction and repatriation of the Haitian people.\textsuperscript{54} According to these guidelines, the Coast Guard must ensure that "the United States is in compliance with its obligations regarding actions towards

\begin{footnotesize}
\bibitem{Agreement} Agreement Establishing Interdiction and Selective Return of Haitian Migrants and Vessels, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3359, 3359 [hereinafter U.S.-Haiti Agreement]. At the time of this agreement, Jean-Claude Duvalier was ruling the country. It should be noted that Haiti is the only country with which the United States has such an interdiction agreement.

\bibitem{Id} Id.

\bibitem{Id} Id. at 3559-3561.

\bibitem{Id} Id. at 3560.

\bibitem{Id} Id. at 3559. The United States Department of State repeatedly emphasized that those who have a well-founded fear of persecution would not be returned to Haiti. Robert Gellbard, Deputy Assistant Secretary for Inter-American Affairs, U.S. Response to Recent Haitian Exodus (Nov. 18, 1991), in DEP'T. ST. DISPATCH, Nov. 25, 1991 [hereinafter Gellbard Dispatch]. However, the screening process utilized may not be adequate to determine refugee status. Although the State Department stated that "there is no history of [the repatriated Haitians] being persecuted," there is documented evidence to the contrary. See \textit{Refugee Refolement}, supra note 10, at 33-48 (describing specific cases of Haitians who were "screened out" by the Coast Guard and denied the opportunity to claim asylum but who in fact were fearful of political persecution and would thus qualify as refugees).

\bibitem{U.S.-Haiti Agreement} U.S.-Haiti Agreement, supra note 47, at 3560.

\bibitem{U.S.-Haiti Agreement} U.S.-Haiti Agreement, supra note 47, at 3560.

\bibitem{Haitian Refugee Center} Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1501-02 (11th Cir.) (per curiam), cert denied, 112 S. Ct. 1245 (1992) (citing INS, INS ROLE AND GUIDELINES FOR INTERDICTION AT SEA (guidelines issued under an unpublished directive dated Oct. 6, 1981, amended Mar. 1, 1988) [hereinafter INS GUIDELINES]).
\end{footnotesize}
refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, or membership within a particular social group or political opinion."55 If this initial screening by the Coast Guard indicates that a Haitian may qualify for refugee status, a second interview is required.56 Although this second interview is to be conducted out of the hearing of other persons, little other guidance is provided for the INS officials.57 Under this kind of minimal screening, only six Haitians have been allowed to come to the United States to present asylum claims.58 Between 1981 and 1990, 21,455 interdicted Haitians were repatriated to Haiti.59

B. The Bush Administration

Following the overthrow of Aristide, the Bush Administration temporarily halted the interdiction program. This repatriation program, however, was reinstated on November 18, 1991, when the Administration sought to deter Haitians from risking their lives by "taking to the sea in unseaworthy boats."60 Since then, thousands upon thousands of Haitians have been interdicted.61 In order to deal with this large-scale migration, the United States used its base at Guantanamo, Cuba as a human sanctuary.62 Following the directives of the Reagan Executive Order,63 the Haitians at the base were interviewed in order to identify those with credible claims for asylum.64 Haitians with such credible claims were "screened in" and were to be brought to the United States so that they could file an application

55 Id. at 1501.
56 Id. at 1502. Although the United Nations High Commissioner for Refugees observed these interviews and recommended that the INS officers interview each Haitian privately in a place where he can express himself freely and cannot be overheard, this recommendation has not been heeded. The few brief questions asked by the Coast Guard may not be sufficient to determine whether a Haitian qualifies for refugee status. See Refugee Refoulement, supra note 10, at 20-25.
57 Baker, 953 F.2d at 1502.
58 Refugee Refoulement, supra note 10, at 23. Of those six Haitians, two had lived in the United States and were therefore somewhat familiar with the American legal process, and three were educated teachers who were able to articulate their claims. Id.
59 Refugee Refoulement, supra note 10, at 23.
63 See supra notes 40-46 and accompanying text.
64 McKinley Statement, supra note 62.
under the Immigration and Nationality Act. Those Haitians who did not satisfy the threshold standard for refugee status were "screened out" and were to be repatriated to Haiti.

On May 24, 1992, President Bush noted that "there continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally." The Bush Administration's solution was to implement the "Kennebunkport Order." This executive order effectively revoked the interdiction program of the Reagan Administration, and replaced it with new interdiction and repatriation directives.

Although both the Reagan Interdiction Program and President Bush's "Kennebunkport Order" share the same objective of controlling the influx of Haitian migration, the programs are radically different in their treatment of refugees. While the Reagan Administration sought to abide by its international obligations to seek out and protect political refugees, the Bush Administration declared that "the international obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States." Therefore, this order is not to be construed to "require any procedures to determine whether a person is a refugee," and illegal Haitian migrants intercepted on the high seas are to be repatriated to Haiti without any kind of screening or interviewing process, regardless of the fact that they may be political refugees. The Bush Administration defended this order by stating that an essential element of this policy is to safeguard human life and by engaging in the presumption that "most of the [Haitian] people are seeking better economic opportunity" and hence do not qualify for political asylum. During the first seven months of 1992, the United Nations High Commissioner for Refugees reported that the U.S. Coast Guard intercepted 38,315 Haitians.

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66 Id.

67 Kennebunkport Order, supra note 2 at Intro. § 4.


69 Kennebunkport Order, supra note 2, § 4.

70 Kennebunkport Order, supra note 2, § 3.

71 Kennebunkport Order, supra note 2, § 3.

72 McKinley Statement, supra note 62.

73 McKinley Statement, supra note 62.

74 International obligations relating to refugees protect only "political" and not "economic" refugees. See infra notes 89, 116-18 and accompanying text.

75 UPDATE, supra note 34.
III. Challenge to the Legality of President Bush's Interdiction Program

A. Facts and Background

Prior to the institution of President Bush's Executive Order, Haitian Centers Council challenged the procedures of the 1981 Interdiction Program instituted by Ronald Reagan. The plaintiffs sought a preliminary injunction to restrain the defendants from: (1) denying the plaintiff Haitian Service Organizations access to their clients for the purpose of providing the Haitians with legal counsel, advocacy, and representation; (2) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen being held at Guantanamo Bay, on U.S. Coast Guard Cutters, or on territory subject to United States jurisdiction, who was "screened out" without advice of counsel; and (3) returning to Haiti any Haitian citizen who was "screened out" without the benefit of advice of counsel. In addition, the plaintiffs challenged the actions under the interdiction program claiming violations of United States immigration statutes, the first and fifth amendments of the United States Constitution, and the Administrative Procedure Act. The preliminary injunction was granted by the district court and was stayed by the Supreme Court pending disposition of the appeal by the United States Court of Appeals for the Second Circuit. On appeal, the Second Circuit affirmed the issuance of the preliminary injunction.

76 Haitian Centers Council, Inc. v. McNary, 789 F. Supp. 541 (E.D.N.Y.), aff'd as modified, 969 F.2d 1326 (2d Cir. 1992), cert. denied, 61 U.S.L.W. 3256 (U.S. Oct. 5, 1992) (HCC 1). The plaintiffs in the case included: Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization (the "Haitian Service Organization"); individual Haitians who were "screened in"; individual Haitians who were "screened out"; and the "immediate relatives" of these Haitians. Id.

77 Initially, Guantanamo Bay was used as a humanitarian sanctuary to accommodate the thousands of Haitians interdicted at sea. Once at the Base, the "screened in" Haitians were to be transported to the United States so they could process their claims for asylum. However, on February 29, 1992, Grover Joseph Reeves, General Counsel of the INS, circulated a memorandum authorizing "de facto" asylum proceedings at Guantanamo Bay. While these proceedings were to be "identical in form and substance" to the ones conducted in the United States, the Haitians were not able to receive legal advice during such proceedings. Id. at 1345.

78 The defendants consisted of: Gene McNary, Commissioner of the Immigration and Naturalization Services; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay. HCC 1, 789 F. Supp. 541.

79 Id. at 542.

80 HCC 1, 969 F.2d at 1332. The district court determined that collateral estoppel did not bar this present action and found that there were serious questions going to the merits with regards to the first and fifth amendment claims, but found no statutory relief under the INA. HCC 1, 789 F. Supp. at 546-47.

81 HCC 1, 789 F. Supp. at 548.

granted by the district court. 83 The appeals court refused to apply the doctrine of collateral estoppel 84 and agreed that the “screened in” Haitians could avail themselves to the protections afforded by the fifth amendment. 85 This decision, however, was in effect rendered moot by President Bush’s “Kennebunkport Order.”

B. The Second Round

On May 28, 1992, four days after President Bush’s Executive Order directing the Coast Guard to intercept boatloads of Haitian refugees on the high seas and to repatriate them forcibly, a class action was brought on behalf of all refugees who possessed credible fears of persecution upon their return to Haiti or who were repatriated under this Order. 86 The plaintiffs 87 challenged the government’s actions under this new interdiction program as violative of: (1) section 243(h)(1) of the Immigration and Nationality Act (INA); 88 (2) Article 33 of the 1951 Convention Relating to the Status of Refugees; 89 (3) the 1981 U.S.-Haiti Executive Agreement; 90 (4) the Administrative Procedure Act; 91 and (5) the equal protection component of the fifth amendment’s due process clause. 92 This class sought a temporary restraining order to prevent the defendants 93 from repatriating, under this Order, any interdicted Haitian whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or

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83 The Second Circuit modified the injunction by vacating that portion which required defendants to allow the “screened in” plaintiffs to have access to attorneys at Guantanamo Bay, but upholding the portion that prevented defendants from processing or repatriating “screened in” Haitians at Guantanamo Bay without providing them access to legal counsel. HCC I, 969 F.2d at 1347.

84 The defendants argued that this action was barred by the Eleventh Circuit’s previous decision in Haitian Refugee Center v. Baker. The Second Circuit determined that the class defined in the Florida action was “overly broad” and that the issues presented in this case were not actually litigated. Id. at 1337.

85 Id. at 1345.


87 The plaintiffs are the same as found in HCC I. See supra note 76.

88 Section 243(h)(1) of the INA now 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.” 8 U.S.C. § 1253(h) (Supp. 1992).

89 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (1954) [hereinafter United Nations Convention]. Article 33.1 prohibits the “ . . . return (refoyer) [of] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.” Id.

90 See supra note 47 and accompanying text.


93 The defendants are the same as found in HCC I. See supra note 78.
political opinion.\textsuperscript{94}

The district court construed the plaintiffs' motion as an application for a preliminary injunction and denied the injunction.\textsuperscript{95} While stating its astonishment at a government interdiction program that "return[s] Haitian refugees to the jaws of political persecution, terror, death, and uncertainty"\textsuperscript{96} the court found section 243(h) of the INA inapplicable to Haitian aliens interdicted on high seas. The district court also concluded that, notwithstanding the explicit mandatory language of Article 33, the Protocol was not self-executing and did not afford the Haitian refugees protection.\textsuperscript{97}

The plaintiffs appealed this decision to the Second Circuit, again arguing that the current interdiction program violated section 243(h) of the INA, Article 33 of the Refugee Convention, the 1981 U.S.-Haiti Agreement, the Administrative Procedure Act, and the fifth amendment's equal protection component.\textsuperscript{98} The defendants rebutted these claims and further asserted that (1) this action was barred by collateral estoppel and (2) that the Executive Order was within the President's constitutional powers as commander-in-chief and his inherent authority over foreign relations, and was issued under authorization from Congress.\textsuperscript{99}

\textbf{C. Striking Down President Bush's Executive Order}

On July 29, 1992, the Second Circuit reversed the district court's denial of a preliminary injunction in a 2-1 decision.\textsuperscript{100} Engaging in de novo review,\textsuperscript{101} the court first addressed the government's contention that the plaintiffs were barred from litigating this case due to the Eleventh Circuit's recent decision in Haitian Refugee Center \textit{v. Baker}.\textsuperscript{102} In rejecting the government's collateral estoppel argument, the court held that neither those plaintiffs who would be


\textsuperscript{95} In order to succeed on a motion for a preliminary injunction, the moving party must demonstrate: (1) irreparable harm should the injunction be denied, and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. \textit{id. at *4}. The district court determined that although the plaintiffs made a substantial showing of irreparable harm, they were unlikely to succeed on the merits. \textit{id.}

\textsuperscript{96} \textit{id. at *5}.

\textsuperscript{97} \textit{id. at *4-5}. The other issues raised by the plaintiffs were not addressed.


\textsuperscript{99} \textit{id.}

\textsuperscript{100} \textit{id. at 1368}.

\textsuperscript{101} Defendants did not challenge the district court's finding that the plaintiffs made a substantial showing of irreparable harm, the only issue being the district court's construction of the law. Since only questions of law were raised on appeal, de novo review is to be applied. \textit{id. at 1354}.

\textsuperscript{102} 953 F.2d 1498 (11th Cir.), \textit{cert. denied}, 112 S. Ct. 1245 (1992).
screened in, nor those plaintiffs who would be screened out, but who
are being intercepted under the new interdiction program, represent
the same class of plaintiffs represented in the *Baker* litigation.\textsuperscript{105} Furthermore, regarding the plaintiffs that were arguably members of the
*Baker* class, the court found the Executive Order to represent an in-
tervening change in circumstance that warrants a new
determination.\textsuperscript{104}

The court then proceeded to address the merits of the plaintiff’s
claim under section 243(h) of the INA.\textsuperscript{105} Noting the 1980 amend-
ments to section 243(h), the court placed particular emphasis on the
plain language of section 243(h)(1) which now 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 that such
alien’s life or freedom would be threatened in such country on ac-
count of race, religion, nationality, membership in a particular social
group, or political opinion.\textsuperscript{106}

The court pointed out that the amendments served to strip the At-
torney General of his discretionary power, to make the statute apply
to “any alien” rather than to “any alien in the United States”, and to
forbid the Attorney General to “deport or return any alien” rather
than to “withhold deportation of any alien.”\textsuperscript{107} Thus, concluded the
court, if the plaintiffs in this case fit within the definition of “any
alien,” and if the interdiction and repatriation of the Haitians on the
high seas amounts to a “return” under the statute, then the Bush
Executive Order violates U.S. law.

In determining the meaning of “any alien”, the court noted that
section 101(a)(3) of the INA\textsuperscript{108} makes it plain that aliens are aliens
regardless of where they are located.\textsuperscript{109} The government’s conten-
tion that U.S. laws should not be applied extraterritorially was inap-
plicable in this context because Congress explicitly addressed this
issue and purposely made the statute applicable to “any alien.”
Moreover, it was unimportant that section 243(h)(2) specifically
applied to an alien within the United States.\textsuperscript{110} Section 243(h) distin-
guished between two groups of aliens: those within the United

\textsuperscript{103} *HCC II*, 969 F.2d at 1355.

\textsuperscript{104} *Id.* at 1356.

\textsuperscript{105} The only issue decided by this court on appeal is whether section 243(h) of the
INA applies outside of the United States territorial waters. The court did not address the
other claims.


\textsuperscript{108} 8 U.S.C. § 1101(a)(3) (1992). An alien is defined as “any person not a citizen or
national of the United States.” *Id.*

\textsuperscript{109} *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1358 (2d Cir. 1992), cert.

\textsuperscript{110} *Id.* at 1359.
States and all others. Subsection (2) of this statute reflected Congress' intent to preserve this distinction for the limited purpose of the "serious nonpolitical crime" exception. It was also unimportant that section 243(h) was located in Part V of the INA dealing primarily with deportation and adjustment of status because this reflects the original placement of the statute prior to the amendments when section 243(h) applied only to deportation.

The Second Circuit proceeded to conclude that the word "return" prohibits the government from intercepting and forcibly repatriating Haitians on the high seas. Since the INA does not define the word "return," it should be given its plain meaning: "to bring, send, or put (a person or thing) back to or in a former position." The court placed particular emphasis on the fact that Congress did not mention where the alien must be returned "from," rather, the emphasis was on the place the alien was to be returned "to."

Article 33 of the United Nations Convention Relating to the Status of Refugees provided further support for this conclusion. Article 33.1 prohibits the "... return (refouler) [of] 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 in a particular social group, or political opinion." This non-refoulement obligation also emphasizes the place the refugee is to be returned "to." Furthermore, the definition of a "refugee" supports this conclusion. Having defined a "refugee" as "any person who owing to a well-founded fear of being persecuted ... is outside the country of his nationality ...", this provision is similar to the INA's definition of "any alien." The focus is not on a person's current location, but rather on his past location. Based on its interpretation of section 243(h), the Second Circuit found that the plain language of section 243(h)(1) of the INA "clearly prohibits the United States from returning aliens to their persecutors, no matter where in the world those actions are.

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111 Section 243(h)(2)(C) directs that the provisions of 243(h)(1) are inapplicable when there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States. 8 U.S.C. § 1253(h)(2)(C) (Supp. 1992).
112 HCC II, 969 F.2d at 1359-60.
113 Id. at 1360-67.
114 Id. at 1360.
115 Id. at 1360-61.
116 Id. at 1361.
117 Id. at 1361 (quoting from the United Nations Convention, supra note 89).
118 HCC II, 969 F.2d at 1362-63.
119 Id. at 1362 (quoting from the Protocol, supra note 5, 19 U.S.T. at 6225).
120 Id.
IV. Significance of the Case

The Second Circuit’s interpretation of section 243(h) of the INA has obvious significance to the thousands of Haitian refugees who are being forcibly repatriated to a country where they continue to face persecution. Despite the government’s contention that the Haitians are fleeing “economic” conditions, reports of abuse, torture, and massacres continue to pour into the United States.122 While this humanitarian component is arguably the most important aspect of the Second Circuit’s ruling, this decision also presents two legally significant issues to the Supreme Court. As a matter of statutory interpretation, the Supreme Court must resolve whether section 243(h) of the INA applies extraterritorially to protect would-be refugees interdicted on the high seas. Secondly, this case may test the Court’s view regarding the extent to which lower courts can review Presidential orders in the area of foreign policy.

A. Statutory Interpretation of Section 243(h): Resolving a Circuit Split

While the Second Circuit maintains that section 243(h) applies extraterritorially to protect Haitian refugees interdicted on the high seas,123 the Eleventh Circuit contends that this statute protects only aliens who have reached United States territory.124 It is the Second Circuit’s interpretation in Haitian Centers Council, however, that is consistent with congressional intent and with the international obligations of the United States.

The 1980 amendments to section 243(h) of the INA reflect Congress’ desire to effectuate a change in United States immigration law, and more importantly reflect a desire to conform to the United States’ obligations under the United Nations Protocol Relating to the Status of Refugees. Before 1980, section 243(h) of the INA 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

121 Id. at 1367.
122 See UPDATE, supra note 34 (stating that since the coup, the armed forces and police have murdered approximately 5,000 Haitians, arbitrarily detained 4,000, wounded or beaten 2,000, and conducted more than 1,800 warrantless searches); Haiti Police Seize 150 Forced Home, TORONTO STAR, Aug. 14, 1992, at A1 (Haitians forcibly repatriated under the Bush Interdiction Program were detained and taken for “questioning” by the Haitian police); HAITI: A HUMAN RIGHTS NIGHTMARE, supra note 8 (describing the continued state of violence in Haiti since the overthrow of President Aristide in 1991).
123 HCC II, 969 F.2d at 1357-67.
political opinion and for such period of time he deems to be necessary for such reason.

After the 1980 amendments, section 243(h)(1) reads:

The Attorney General shall not deport or return any alien (other than an alien described in § 1251(a)(4)(D) of this title) 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.\textsuperscript{125}

The statutory interpretation given to these amendments must reflect and give effect to Congress' apparent goals.

Of particular importance to this case are the amendments that prohibit the "return"\textsuperscript{126} of "any alien." The meaning of the term "alien" is easily determined because Congress has defined it explicitly to refer to "any person not a citizen or national of the United States,"\textsuperscript{127} regardless of location.\textsuperscript{128} The dissent in \textit{Haitian Centers Council} offers two arguments against such an interpretation.\textsuperscript{129} First, the dissent notes that the term "any alien" was used in the statute prior to the 1980 amendments and that at that time, there was no question of its extraterritorial application.\textsuperscript{130} The dissent fails to note, however, that prior to 1980 the statute specifically applied to "any alien within the United States."\textsuperscript{131} It was under Congress' use of an express geographical limitation that the courts construed the statute to apply only to aliens within United States territory. Such previous interpretations do not lend support to the conclusion that the definition of the term "alien" in and of itself depends upon location. On the contrary, the use of an explicit geographical limitation next to the word "alien" indicates legislative intent that the term "alien," if used without any limitations, extends to people inside and outside the United States.

Even the \textit{Baker} court implicitly accepts this view. Though concluding that section 243(h) applied only to "aliens within the United States," the Eleventh Circuit stated that the amendments did not

\textsuperscript{126} It should be noted that \textit{HCC II} and \textit{Baker} are the first cases to address the meaning of the world "return." Previous case law addressed the deportability aspect of the statute.
\textsuperscript{128} Since the plain language of the statute answers the question, the court looks to other canons of construction only to determine whether there is a "clearly expressed legislative intention" contrary to that language, which would require [the court] to question the strong presumption that Congress expresses its intent through the language it chooses. \textit{Haitian Centers Council v. McNary}, 969 F.2d 1350, 1358 (2d Cir. 1992) (quoting United States v. James, 478 U.S. 597, 606 (1986)), \textit{cert. granted}, 61 U.S.L.W. 3082 (U.S. Oct. 5, 1992) (\textit{HCC II}).
\textsuperscript{129} While the Government put forth several arguments against an all-encompassing definition of an alien and while these arguments were addressed and rejected by Judge Pratt, the dissent did not criticize the decision reached by Judge Pratt on those issues. For Judge Pratt's analysis of the Government's arguments see \textit{HCC II}, 969 F.2d at 1357-1360.
\textsuperscript{130} \textit{HCC II}, 969 F.2d at 1374 (Walker, J., dissenting).
\textsuperscript{131} See supra note 125 and accompanying text.
manifest an intent to include "aliens beyond the borders of the United States." In essence, by specifically differentiating between two groups of "aliens" and by never rejecting the use of the term "alien" to describe the interdicted Haitians, the Baker court acknowledged the extraterritorial scope of the definition.

The dissent in Haitian Centers Council is also troubled by the fact that the word "alien" can have a different meaning depending on whether it is modified by the word "deport" or by the word "return." However, since the term "deport" by its very nature implies an alien within a port of the United States, any limitations on the term "any alien" come from the verb "deport." An all-encompassing definition of the term "alien" is not to be altered by the fact that section 243(h) is located in Part V (dealing with deportation and adjustment of status) of the INA or by the wording of the serious nonpolitical crime exception of section 243(h)(2)(C).

In Baker, the Eleventh Circuit relied almost exclusively on the placement of section 243(h) in Part V of the INA to conclude that it did not apply to the Haitian aliens. This emphasis is flawed, however, because the Supreme Court has recognized that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." The statute's location in Part V of the INA reflects the statute's placement prior to the 1980 amendments when, indeed, section 243(h) was limited to deportable aliens. The Second Circuit also points out that it is irrelevant that section 243(h)(2)(C) applies only to aliens who have reached United States territory. If this section is read to limit section 243(h)(1) only to aliens within the United States, then the court would be re-

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133 HCC II, 969 F.2d at 1374 (Walker, J., dissenting). Deportation proceedings can only take place if an alien is within the United States.
134 Id. at 1359. Judge Pratt further notes that U.S. immigration laws make it plain that "any alien . . . in the United States" may be deported if certain conditions are met. See generally 8 U.S.C. § 1251(a) (Supp. 1992).
135 Baker, 953 F.2d at 1510.
137 HCC II, 969 F.2d at 1360. Moreover, given that other portions of Part V are limited to aliens "in" or "within" the United States, this indicates Congress' ability to restrict the statute's application to aliens within United States territory when it so chooses.
138 This section provides that section 243(h)(1) shall not apply where "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. § 1253(h)(2)(C) (Supp. 1992).
139 HCC II, 969 F.2d at 1359.
writng the statute to include what Congress expressly deleted.\textsuperscript{140} "The canon of statutory construction requir[es] a change in language to be read, if possible, to have some effect."\textsuperscript{141}

Having determined that Congress intended to define the term "alien" without regard to geographic limitation, the next critical amendment to consider is Congress' insertion of the word "return." Although the INA does not provide a definition of this term, the Second Circuit correctly concluded that Congress has prohibited expressly the Government from interdicting and forcibly returning Haitian refugees to Haiti.

"With regard to . . . statutory schemes, [the courts] have considered [themselves] bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'"\textsuperscript{142} As previously discussed, the definition of the word is: "to bring, send, or put (a person or thing) back to or in a former position."\textsuperscript{143} This definition places emphasis on the condition a person is returned "to." Similarly, in section 243(h), Congress forbade an alien from being returned to a country where he would face persecution.\textsuperscript{144} Moreover, President Bush's Executive Order also stresses the place an alien is to be returned to and directs the Coast Guard to "return the vessel and its passengers to the country from which it came . . . ."\textsuperscript{145}

The dissent in \textit{Haitian Centers Council} reasons that while Congress did expand the scope of section 243(h), it meant to extend protection to excludable aliens.\textsuperscript{146} Not only does this construction ignore the fact that Congress knew how to make statutes apply to excludable aliens,\textsuperscript{147} but it also ignores the United States' international non-refoulement obligation.\textsuperscript{148}

The United Nations Protocol Relating to the Status of Refugees is part of the Supreme Law of the Land,\textsuperscript{149} and it affects the municipal law of the United States both because it is self-executing\textsuperscript{150} and

\begin{footnotes}
\footnote{140} Id.
\footnote{143} Webster's Third New International Dictionary 1941 (1976).
\footnote{144} \textit{HCC II}, 969 F.2d at 1360.
\footnote{145} Kennebunkport Order, \textit{supra} note 2 at § 2(3) (emphasis added). It should be noted that "the government does not offer a contrary view of the term 'return.'" \textit{HCC II}, 969 F.2d at 1361.
\footnote{146} \textit{HCC II}, 969 F.2d at 1375-76 (Walker, J., dissenting). Excludable aliens, like deportable aliens, must be within the United States to be classified as such. \textit{Id}.
\footnote{147} See, e.g., 8 U.S.C. § 1362 (1988) (section applies to "the person concerned" in "any exclusion or deportation proceeding") (emphasis added).
\footnote{148} See Protocol, \textit{supra} note 5.
\footnote{149} See U.S. Const. art. IV (making treaties of the United States supreme law of the land); United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) (analysis of treaties' status as supreme law).
\footnote{150} Although the \textit{Baker} court recently held that the Protocol is not self-executing, Hai-}


because it has been given effect by the congressional enactment of the Refugee Act.151 "If one thing is clear from the legislative history of the . . . 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968."152

To mirror the Protocol's definition of a refugee, Congress drafted section 101(a)(42)(A) of the INA to provide that the term "refugee" includes:

any 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.

The Protocol's definition of the word "refugee" explicitly rejected the temporal and geographic limitations imposed by the United Nations Convention's definition154 and reflects, in part, the drafters' intent to apply the word "refugee" expansively.

The most fundamental right protected by both the United Nations Convention and the Protocol is the refugee's right not to be returned to a country where he or she faces persecution. This non-refoulement obligation is set forth in Article 33.1 of the Convention which provides:

No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.155

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151 INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987); see also Stevic, 467 U.S. at 416 (stating that the "language of Refugee Act of 1980 conforms to Protocol"); Baker, 789 F. Supp. at 1567 (acknowledging that there has been at least partial congressional enactment of Protocol).

152 Cardoza-Fonseca, 480 U.S. at 436-37


154 Protocol, supra note 5, at 6225.

155 Convention, supra note 89, 189 U.N.T.S. at 176.
Although the scope of this non-refoulement obligation has not been uniformly interpreted to apply extraterritorially, the plain language of this Article cannot reasonably lead to the denial of protection to Haitian refugees fleeing a brutal military regime on the grounds that those fleeing have not yet reached the territory of the United States.

"The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " Article 33 clearly prohibits the "return (refouler) of a refugee . . . in any manner whatsoever to . . . territories" where he faces persecution. Given the Convention's object and purpose "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms," this plain language cannot be read to protect refugees once they reach a contracting state's territory, yet afford them no protection while they are in transit.

Furthermore, even if it is conceded that the meaning of the word "refouler" is ambiguous, any uncertainty is dispelled by the practice of the contracting states. The United States has recognized implicitly and protected explicitly the Haitian refugees' right against non-refoulement. The Reagan Executive Order and accompanying guidelines expressly apply only to persons interdicted on international waters and require the "strict observance of [the United States'] international obligations concerning those who genuinely flee persecution in their homeland." Instructions forbidding the

156 See, e.g., Note, The Rights of Asylum Under United States Law, 80 COLUM. L. REV. 1125, 1126-27 (1980) (stating that Article 33 extends protection only to those within a contracting country's territory); Note, supra note 150, at 794 (Article 33 does extend to refugees outside a contracting country's territory).


158 Haitian Centers Council v. McNary, 969 F.2d 1350, 1363 (2d Cir. 1992) (quoting to the Preamble to the United Nations Convention, supra note 89), cert. granted, 61 U.S.L.W. 3082 (U.S. Oct. 5, 1992) (HCC II). Such an interpretation would be anomalous with the Refugee Act which would then be interpreted to protect refugees in the United States and also within their home country (section 101(a)(42)(A) allows the President, in special circumstances to specify that a person may be considered a refugee even if he has not yet left the country of persecution), yet deny these same refugees any protection while they are in transit, See 8 U.S.C. § 1101 (a)(42)(a) (1988).

159 Although the dissent contends that the word "refouler" is ambiguous, it is not clear that any ambiguity does exist. Compare HCC II, 969 F.2d at 1377 (Walker, J., dissenting), with id. at 1363.

160 The Supreme Court has stated that "the practice of treaty signatories counts as evidence of the treaties' proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." Stuart, 489 U.S. at 369.

161 Reagan Exec. Order, supra note 40, §§ 2(d), 3. In discussing the possible implementation of an interdiction program, participants in hearings before the Subcommittee on Immigration and Refugee Policy made it clear that any such program would have to comply with the United States' non-refoulement obligation. United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate
return of a refugee were clear, and the INS officers involved in the interdiction program were to be "constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Protocol."\(^{162}\)

The United States again recognized its non-refoulement obligation in its agreement with Haiti. While the Haitian government, at the time, agreed to allow U.S. Coast Guard Cut'ers to board Haitian vessels and to return the passengers to Haiti, it was understood that "under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."\(^{163}\)

These interpretations are consistent with the construction of the United Nations High Commission for Refugees (UNHCR).\(^{164}\) According to the UNHCR, a person becomes a refugee as soon as he fulfills the criteria contained in the definition and "this would necessarily occur prior to the time at which his refugee status is formally determined."\(^{165}\) Moreover, the UNHCR has taken the position that the non-refoulement obligation applies extraterritorially.\(^{166}\) These determinations of the UNHCR are not to be considered unimportant, especially in light of the fact that "in a number of countries, including Canada and Australia, the Office of the High Commissioner participates directly in procedures established for the determination of refugee status."\(^{167}\)

Given the plain language of the Article and the practice of treaty

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\[^{162}\text{Reagan Exec. Order, supra note 40, § 3.}\]

\[^{163}\text{U.S.-Haiti Agreement, supra note 47, at 3560.}\]

\[^{164}\text{In 1979, the UNHCR published a handbook interpreting the United Nations Convention and the Protocol. This document describes and interprets the United Nations Convention section by section. While this handbook is not a treaty and has no binding force as international law, the handbook has been used as guidance by some U.S. courts. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 ("the Handbook provides significant guidance in construing the Protocol, to which Congress ought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."). Furthermore, under Article II of the Protocol, the United States agreed to "co-operate with the Office of the United Nations High Commissioner for Refugees . . . and shall in particular facilitate [the UNHCR's] duty of supervising the application of the provisions of the present Protocol. Protocol, supra note 5, 19 U.S.T. at 6226.}\]

\[^{165}\text{UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS § 28 (1979).}\]

\[^{166}\text{Id.}\]

signatories, the clear import of the treaty is established, and any reliance on the negotiating history of the Convention is not only unnecessary, but is disallowed. Article 32 of the Protocol "requires an interpreting body to conclude that an ordinary meaning of the text is either obscure or unreasonable before it can look to 'supplementary means' [and] reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (Travaux Pr6paratoires) as a guide to interpretation of the agreement." The dissent's reliance on the negotiating history of the Convention is therefore not only misplaced, but the conclusion reached contravenes a basic tenet articulated by the Supreme Court: "treaties are to be construed in a broad and liberal spirit[,] and when two constructions are possible, one restrictive of rights which may be claimed under it, and the other favorable to them, the latter is preferred." 169

B. Review of Presidential Authority to Issue the Kennebunkport Order

The Second Circuit notes that "there is an undercurrent in the government's brief to the effect that this case presents a 'political question' which is beyond the scope of judicial decision making." 170 A cause of action is nonjusticiable if it is "unsuited to judicial inquiry or adjustment" because it presents a "political question" by involving the "relationship between the judiciary and the coordinate branches of the Federal Government" in such a way as to implicate the doctrine of separation of powers. 171 However, phrasing the issue to assert that the courts cannot "intrude into a delicate area of the nation's foreign policy," 172 will not render the Presidential action unreviewable.

While it is recognized that the executive branch has power to control the foreign affairs of the nation, 173 the fact that a controversy affects immigration or foreign policy does not of itself render the controversy nonjusticiable. 174 There exists no "lack of judicially discoverable and manageable standards" to apply, 175 and the Supreme Court has expressly allowed narrow judicial review of decisions made

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175 Id. at 1566. See Baker v. Carr, 369 U.S. 186, 217 (1962). It should also be noted that the dissent in HCC II implicitly agrees that this case involves a justiciable issue. See Haitian Centers Council v. McNary, 969 F.2d 1350, 1379-80 (2d Cir. 1992), cert. granted, 61 U.S.L.W. 3082 (U.S. Oct. 5, 1992) (HCC II).
by Congress or the President in the area of immigration and naturalization. 176

*Haitian Centers Council* involves "a determination of whether the current interdiction program itself (a creature of an executive order, and thus, of law), is consistent with a federal statute." 177 "The federal courts may review a case... to insure that the 'executive departments abide by the legislatively mandated procedures.'" 178 Moreover, while Congress allows the President to "suspend the entry of all aliens or any class of aliens," Congress has also explicitly forbidden the violation of the United States' non-refoulement obligation embodied in section 243(h)(1). The President's authority to regulate the "entry" of aliens is thus limited by the INA's explicit adoption of the 1967 Protocol Relating to the Status of Refugees. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter." 179

V. Reaction to President Bush's Repatriation Program

Just three days after President Bush announced the creation of his interdiction program, Congressman Conyers noted the irony that "today, May 27, is exactly 53 years [since] the Hamburg American Lines Cruiser, the St. Louis, arrived in the Caribbean. On board were 903 passengers who had red "J" stamped on their passports identifying them as Jewish refugees fleeing Hitler's Germany. With embarrassment and the only other time that has happened, the Jews on the St. Louis could find no sanctuary in the United States." 180 What is the difference between this incomprehensible act and the forcible repatriation of Haitian refugees to their persecutors? Another Congressman noted that "when George Bush ordered that persecuted Haitians fleeing a brutal military dictatorship be forced back to Haiti, it was one of the most cruel, hypocritical, and cynical acts of a heartless administration." 181 The United Nations High Commissioner for Refugees added her voice of criticism to President Bush's decision to turn back Haitian boat people without giving them a chance to apply for asylum. 182

177 HCC II, 969 F.2d at 1367. See Acevedo v. Nassau County, 500 F.2d 1078, 1084 n.7 (2d Cir. 1974).
178 Id. (quoting Haitian Refugee Center v. Gracey, 809 F.2d 794, 838 n.116 (D.C. Cir. 1987) (Edwards, J., concurring)).
179 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
On June 15, 1992, the Bush Administration defended its repatriation order by claiming that the Haitians are fleeing "economic conditions, and that "there have been no reports of mistreatment of returnees." In actuality, the Bush Administration chose to close its eyes to the continued human rights violations being perpetrated by a military government. On Monday, May 18, 1992, unidentified planes dropped leaflets with Aristide's picture asking the population to mobilize. "Those persons who were found with these leaflets in their possession were beaten and arrested." The next day, five bodies were found on the street with bullet wounds. In St. Marc, a port town north of Port-au-Prince, there is talk of "Mr. 52", a police officer who whips anyone he arrests 52 times unless a $100 bribe is paid on the spot. Then, there is "Z" who tells the Haitian people that he reigns over all and that there is no higher authority. The list goes on and on, and under Bush's program to "safeguard human life," these human rights violations will only be accentuated. Sadly, the Clinton Administration has yet to repeal the Bush Executive Order despite the new President's campaign promises to treat Haitians more sympathetically.

Despite all the reports made available to the Bush and Carter Administrations, the government continues to maintain that Haitians can present their asylum claims at the American Embassy in Haiti. One need only look at the statistics to realize that this alternative is a sham. When the Haitians were being screened at Guantanamo Bay, under the Reagan Interdiction Program, thirty percent were found to have a credible claim of asylum. Under the "program" at the American Embassy Haiti, however, only about one percent have been approved. Even more compelling than these statistics is the story of Carl Henri Richardson. Mr. Richardson campaigned on behalf of President Aristide. On November 10, 1991, troops searched his house without a warrant. The next day, Mr. Richardson was arrested and thrown in jail for thirteen days. In June, 1992, after months of hiding, Mr. Richardson went to the U.S. consulate to apply for refugee status. After waiting outside for two hours, he was

183 McKinley Statement, supra note 62.
185 Haiti: A Human Rights Nightmare, supra note 8, at 10.
187 Id.
188 Greenhouse, supra note 172.
190 Id.
191 Id.
192 Id.
193 Id.
told that he needed more documentation to prove that he had a rea-
sonable fear of persecution. While travelling to get this additional
information, Mr. Richardson was beaten by Haitian soldiers for three
hours—he was beaten on the head until he lost consciousness. He
was then kept in jail for a week. The Bush Administration then
declared it was “very interested in speaking with” Mr. Richardson.
Unfortunately, the case of Mr. Richardson is not atypical. President
Bush’s use of the U.S. Embassy in Haiti as an “alternative” to flight
by sea thus is nothing but a cruel hoax for the thousands of Haitian
refugees forced to continue to face their persecutors.

In the face of these human rights violations, Congress has not
only applauded the recent decision in Haitian Centers Council, it has
undertaken to protect the Haitian refugees through explicit legisla-
tion. As early as February 25, 1992, the Haitian Refugee Protection
Act of 1992 was presented “to assure the protection of Haitians in
the United States or in United States custody . . . or on board United
States Government vessels, . . . or elsewhere outside the United
States . . .” These Haitians were not to be involuntarily returned
to Haiti. On May 27, 1992, another bill was introduced in part to
“terminate the migrant interdiction agreement between the United
States and Haiti, and to direct the President to establish expanded
processing facilities for Haitians seeking refuge.” Outraged by
what it considered to be the Administration’s continued violation of
international law, a bill was introduced on June 10, 1992 to “reaffirm
the obligation of the United States to refrain from the involuntary
return of refugees outside the United States.” The final status of
these bills is still pending.

Conclusion

As a self-proclaimed leader in the fight against human rights vi-
lations, the United States stained its soul with its forcible repatriation
of Haitian refugees. The Second Circuit’s decision in Haitian Centers
Council v. McNary, however, provides hope—hope to the Haitian ref-
ugees that they will be able to escape their persecutors. This deci-
sion, however, impacts on more than just the Haitian refugees. It
sends a message to the Executive Branch and to the international
community at large. When Congress has adopted explicitly the non-
refoulement obligation of the 1967 Protocol Relating to the Status of

194 Id.
195 Id.
196 Id.
197 Id.
Refugees, the courts should not and will not let the President circumvent the obligations this country has undertaken to uphold.

Christina Carole de Matteis