

Haitian Interdiction on the High Seas: the Continuing Saga of the Rights of Aliens Outside United States Territory

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**HAITIAN INTERDICTION ON THE HIGH SEAS: THE
CONTINUING SAGA OF THE RIGHTS OF ALIENS OUTSIDE
UNITED STATES TERRITORY**

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I. INTRODUCTION

In September 1981, the U.S. Coast Guard began interdicting vessels carrying Haitian migrants on the high seas. Most of these migrants are held at the U.S. Naval Base in Guantanamo Bay, Cuba, while the U.S. government makes efforts to return them to Haiti.¹

On September 30, 1991, Haiti's democratically elected government was overthrown in a military coup.² Thereafter, reports surfaced of Haitian militiamen killing, torturing, arbitrarily and unlawfully arresting Haitian citizens and destroying their property, for political reasons.³ Since the coup, thousands of people have fled Haiti, most by way of sea, in hopes of finding refuge.⁴ As a result, Coast Guard interdictions have increased.⁵ Although the United States temporarily sus-

1. Henry J. Reske, *Courts Wrangle Over Haitians: Federal Judge Who Stopped Repatriation Overruled by Divided Appellate Panel*, 78 A.B.A. J. 30 (1992).

2. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1330 (2d Cir. 1992).

3. *Id.* The Tonton Macoutes, former Dictator Jean-Claude Duvalier's personal army, are responsible for the death and mayhem that has plagued Haiti since the overthrow of President Jean-Bertrand Aristide. 1 EUROPA PUBLICATIONS, THE EUROPA WORLD YEARBOOK 1302-03 (33d ed. 1992).

4. *McNary*, 969 F.2d at 1330.

5. *Id.* When a Haitian vessel is interdicted at sea the occupants are either taken to

pended its policy of repatriation, it was resumed in 1991.⁶

One international method designed to protect refugees is non-refoulement.⁷ This principle prohibits the return of refugees to territories where their lives or freedom would be in jeopardy.⁸ Although the United States is bound to honor non-refoulement,⁹ its adherence to the principle has been questionable. Recently, the dominant characteristic of U.S. refugee policy has been to deter refugees from seeking asylum.¹⁰

Since *Yick Wo v. Hopkins*¹¹ in 1886, the U.S. Supreme Court has considered a number of cases involving the rights of aliens seeking refuge within the United States.¹² The latest case to reach the Supreme Court is *Haitian Centers Council, Inc. v. McNary*.¹³ Before the case reached the Supreme Court, the Court of Appeals for the Second Circuit held that the protection derived from section 243 of the Immigration and Nationality Act of 1952 (INA)¹⁴ applies to all aliens no matter where they are situated, and that to forcibly repatriate Haitians violated the non-refoulement clause of section 243(h).¹⁵ On June 21, 1993, in a case captioned *Sale v. Haitian Centers Council, Inc.*,¹⁶ the

Guantanamo Bay or repatriated to Haiti. *Id.*

6. *See id.*

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176 [hereinafter Convention]. The United States was not a signatory to the Convention.

8. *See id.*

9. The United Nations Protocol Relating to the Status of Refugees, of which the United States is a signatory, mandates non-refoulement. Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223 [hereinafter Protocol]. The Protocol was completed on January 31, 1967 in New York to expand the Convention, *supra* note 7, 189 U.N.T.S. at 150, to cover persons who became refugees after 1951. However, the Protocol did not enter into force with respect to the United States until November 1, 1968, because of its long congressional legislative process.

10. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1986, 76.

11. 119 U.S. 359 (1886) (Fourteenth Amendment guarantees equal protection to all persons within the territorial jurisdiction of the United States).

12. Ellen B. Gwynn, *Immigration Law—Race and National Origin Discrimination and the Haitian Detainees—Jean v. Nelson*, 105 S. Ct. 2992 (1985), 14 FLA. ST. U. L. REV. 333 (1986).

13. 113 S. Ct. 52 (1992).

14. Pub. L. No. 82-44, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1988)). For a discussion of the INA, see *infra* notes 20-25 and accompanying text.

15. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1357 (2d Cir. 1992).

16. 113 S. Ct. 2549 (1993). The *Sale* case is the *McNary* case with the change in title reflecting the personnel changes made by the new administration. At the time of the litigation, Charles Sale was the acting commissioner for the Immigration and Nat-

Supreme Court reversed the holding in *McNary*. In the *Sale* case, the Court held that neither section 243(h) of the INA nor article 33 of the United Nations Convention Relating to the Status of Refugees limits the President's power to repatriate aliens seeking entry into the United States.¹⁷

Each day, even as this Comment goes to press, there are significant political events taking place in or affecting Haiti. The legal and humanitarian issues discussed in this Comment are relevant to U.S. policy, because the political instability in Haiti will likely lead to an increase in, or at least a continuation of, the influx of Haitians to the United States. This Comment recounts the historical basis of the United States' interdiction program as it pertains to Haitian immigrants. It examines this program and gives an overview of the cases involved in the saga of rights for those seeking refuge in the United States. This Comment concludes that because the interdiction program is inadequate to determine refugee status, the United States is neglecting its non-refoulement obligations under the Protocol and has wholly incorporated an inappropriate ideological approach to immigration policy.

II. HISTORY OF UNITED STATES IMMIGRATION POLICY

A. Refugee Law

Prior to the Refugee Act of 1980,¹⁸ U.S. law contained no general definition of a refugee.¹⁹ Instead, refugee determinations were made under the INA and certain amendments thereto.²⁰ Section 243(h) of the INA provided "the Attorney General [the discretion] to withhold deportation of an otherwise deportable alien if the alien would be subject to persecution upon deportation."²¹ An alien was thus required to demonstrate a "clear probability of persecution," or that persecution was likely to occur, in order to be eligible under section 243(h) of the INA.²² This relief was available to any alien who was already within

uralization Service.

17. *Sale*, 113 S. Ct. at 2549.

18. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of Title 8 of the U.S. Code).

19. J. Michael Cavosie, *Defending the Golden Door: the Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 420 (1992).

20. *Id.* (citing INA, 8 U.S.C. §§ 1101-1503).

21. *INS v. Stevic*, 467 U.S. 407, 414 (1984); 8 U.S.C. § 1253(h).

22. 8 U.S.C. § 1253(h).

the United States.²³ Aliens who were at the U.S. border seeking refuge from persecution could not avail themselves of the relief authorized under section 243(h).²⁴ Furthermore, sections 203(a)(7) and 212(d)(5) of the Act, gave the Attorney General the discretion to "parole" aliens into the country on a temporary basis for emergency reasons.²⁵

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees.²⁶ Following accession to the Protocol, Congress began considering legislation that would be consistent with the Protocol's definition of a "refugee."²⁷ The Protocol defined a refugee as an individual who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.²⁸

In 1980, comprehensive refugee legislation was enacted by Congress as the Refugee Act of 1980.²⁹ Section 101(a)(42)(A) of the Act defines a refugee as

any person who is outside any country of such person's nationality . . . 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 *well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁰

The Refugee Act of 1980 altered the treatment accorded refugees

23. *Stevic*, 467 U.S. at 415.

24. *Id.*

25. *Id.*

26. Protocol, *supra* note 9, 19 U.S.T. at 6223.

27. *Stevic*, 467 U.S. at 416-17.

28. Protocol, *supra* note 9, art. 1.2, 19 U.S.T. at 6225 (defining "refugee").

29. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION PRIMER* 196 (1985).

30. Refugee Act of 1980, § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A)) (emphasis added).

under the earlier version of the INA.³¹ The Act made the discretionary withholding of deportation provision of the INA a mandatory provision.³² As amended, section 243(h) 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."³³ Section 208(a) of the Act codified for the first time procedures for granting asylum.³⁴ Under this section, an alien who qualifies for refugee status within the meaning of section 101(a)(42)(A)³⁵ may be granted asylum at the discretion of the Attorney General.³⁶

Since the passage of the Refugee Act of 1980, two evidentiary standards have emerged for determining eligibility for the withholding of deportation and for granting asylum within the United States: "clear probability" and "well-founded fear" of persecution.³⁷ These different evidentiary standards have resulted from administrative and judicial divergence on the withholding of deportation and asylum status.³⁸ To be eligible for withholding under section 243(h), the Immigration and Naturalization Service (INS) requires applicants to adduce a "clear probability of persecution."³⁹ To be eligible for asylum under section 208(a), the INS requires applicants to have a "well-founded fear" of persecution.⁴⁰

B. Immigration Policy Toward Haiti

Haiti is a poor Caribbean nation that has a long history of political instability. This instability was heightened in 1986 when three decades of rule by father-and-son dictators ended.⁴¹ For years, Haitians have fled by boat to the United States in order to escape their country's political unrest.⁴² A substantial influx of Haitian refugees came to the

31. Cavosie, *supra* note 19, at 425.

32. *Id.*

33. 8 U.S.C. § 1253(h).

34. Cavosie, *supra* note 19, at 425 (referencing INA § 208(a), 8 U.S.C. § 1158(a)).

35. *See supra* text accompanying notes 18, 30.

36. Cavosie, *supra* note 19, at 427.

37. *Id.* at 429.

38. *Id.*

39. *INS v. Stevic*, 467 U.S. 407, 411 (1984).

40. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

41. ELIZABETH ABBOTT, *HAITI: THE DUVALIERS AND THEIR LEGACY* 321-30 (1988).

42. Holly Idelson, *Administration Holds to Policy of Haitian Repatriation*,

United States in the early 1960s in response to the mass violence and economic deprivation caused by then-Haitian president Francois Duvalier ("Papa Doc").⁴³ Initially, the United States granted parole to these Haitians and allowed them to apply for asylum.⁴⁴ Most asylum claims, however, were denied; Haitians were given refugee status instead of the permanent resident status that the United States granted to Cubans during the Mariel Boatlift.⁴⁵

Jean-Claude ("Baby Doc") Duvalier's ascent to power led to the second major influx of Haitians to the United States.⁴⁶ Between 1972 and 1980, approximately 50,000 Haitians sought asylum in the United States; as few as twenty-five succeeded.⁴⁷ As the number of Haitians seeking asylum rose, the United States began to deport refugees awaiting asylum while preventing other Haitians from entering the country.⁴⁸ The United States has used three methods to deny Haitian nationals asylum: deportation, detention, and interdiction on the high seas.

1. Deportation & Detention

The U.S. government engaged in an accelerated deportation policy known as the "Haitian Program."⁴⁹ According to evidence presented in *Haitian Refugee Center v. Smith*,⁵⁰ the INS knowingly allowed the accumulation of as many as 7,000 Haitian deportation claims between 1970 and 1978.⁵¹ In order to accelerate the processing of these cases,

CONG. Q., Feb. 27, 1993, at 462.

43. About 80% of Haiti's doctors, attorneys, technicians, professors, and professionals fled to foreign countries. ROBERT I. ROTHBERG, *HAITI: THE POLITICS OF SQUALOR* 243 (1971).

44. *Louis v. Nelson*, 544 F. Supp. 973, 978-79 (S.D. Fla. 1982), *aff'd in part, rev'd in part sub nom. Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *on reh'g vacated as moot in part, rev'd in part*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

45. Approximately 125,000 Cubans were brought into the United States by the "Freedom Flotilla" in the early 1980s. *U.S. Judges Clear Seaman of Boatlift Charges*, N.Y. TIMES, Dec. 20, 1980, at 8.

46. GILBERT LOESCHER & JOHN SCONLAN, *HUMAN RIGHTS, POWER POLITICS, AND THE INTERNATIONAL REFUGEE REGIME: THE CASE OF U.S. TREATMENT OF CARIBBEAN BASIN REFUGEES* 12 (1985).

47. *Id.*

48. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1030 (5th Cir. 1982). Prior to this policy change, a request for asylum had the effect of suspending deportation hearings until disposition of the asylum request. *Id.* at 1028.

49. *Id.* at 1029.

50. 676 F.2d 1023 (5th Cir. 1982).

51. *Id.* at 1029.

the INS implemented measures which effectively denied due process to refugees.⁵² For example, the INS instructed immigration judges to increase their case loads from as little as one scheduled deportation hearing a day to fifty-five hearings per day.⁵³ Asylum interviews were shortened from ninety minutes to only fifteen minutes of substantive dialogue.⁵⁴ Furthermore, the INS gave immigration attorneys impossible schedules that often required them to litigate three different matters in the same hour and in three different places.⁵⁵ Consequently, the *Smith* court held that the INS had effectively denied Haitian detainees their right to petition for political asylum by rendering the hearings meaningless and ineffective.⁵⁶ The majority noted, "[t]he results of the accelerated program adopted by INS are revealing. None of the over 4,000 Haitians processed during this program were granted asylum."⁵⁷

The Attorney General is authorized to parole a refugee into the United States pending a decision on the asylum application,⁵⁸ a process that can take years. The Attorney General has unfettered discretion to grant parole to refugees,⁵⁹ but in 1981, the Attorney General decided that Haitians were no longer eligible for parole.⁶⁰ The United States instituted a detention program in its place.⁶¹ The INS created a pro-

52. *Id.*

53. *Id.* at 1031.

54. *Id.*

55. *Id.*

56. *Id.* at 1040.

57. *Id.* at 1032.

58. Federal law states:

The Attorney General may, . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (1988).

59. *See infra* note 61.

60. *Louis v. Nelson*, 544 F. Supp. 973, 979-84 (S.D. Fla. 1982).

61. Prior to the discontinuation of the parole policy, INS entered into an agreement with the National Council of Churches providing that Haitians who arrived in South Florida by boat other than a certified carrier were to be detained only a brief period of time for medical screening and were routinely released to available sponsors and given work authorization pending the result of the asylum applications.

Id. at 978.

gram under which Haitians were detained during the asylum application process and denied legal representation.⁶²

In *Louis v. Nelson*,⁶³ the Haitian Refugee Center (HRC) successfully contested the new detention policy on the grounds that INS violated the Administrative Procedure Act⁶⁴ (APA) when the INS failed to abide by the APA's notice and comments requirement.⁶⁵ The court ruled for the HRC, recognizing the crippling impact of the new policy:

The new release criteria radically depart from the existing practice of regularly releasing Haitian aliens. It makes detention the rule, not the exception, and prescribes very narrow circumstances where parole will be allowed. Upon implementation, the new policy had an immediate and substantial impact on the Plaintiffs. The Court cannot think of any administrative action that would have a greater impact on a regulated group of people than a change in policy which results in their indefinite incarceration where, under the previous policy, they would have been free.⁶⁶

The *Louis* court stated that it would not enforce the new detention policy because the INS had not given all concerned parties notice and an opportunity to be heard.⁶⁷ In a subsequent decision, the court ordered the release of the detained Haitians until the promulgation of a new detention policy or a determination of their claims for admission.⁶⁸

2. Interdiction Program

In 1981, President Ronald Reagan determined that there was an uncontrolled number of aliens immigrating to the United States.⁶⁹ The President considered this influx a "serious national problem detrimental

62. *See id.* at 979-84.

63. 544 F. Supp. 973 (S.D. Fla. 1982).

64. Pub. L. No. 89-554, 80 Stat. 378, 383-89 (1966) (codified at 5 U.S.C. § 101 (1988)).

65. *Louis v. Nelson*, 544 F. Supp. at 1003-04.

66. *Id.* at 997.

67. *Id.* at 1003-04.

68. *Id.* at 1006. The government promptly adopted a new parole regulation. *See* Parole of Aliens into the United States, 47 Fed. Reg. 30,045 (1982), 8 C.F.R. § 212.5 (1993).

69. *See* High Seas Interdiction of Illegal Aliens, Proclamation No. 4865, 3 C.F.R. § 50 (1981), *reprinted in* 8 U.S.C. § 1182 app. at 1259 (1988) [hereinafter Proclamation] (authorizing the interception of Haitian vessels and return of passengers to Haiti).

to the interests of the United States.”⁷⁰ President Reagan then issued an Executive Order⁷¹ directing the Secretary of State to enter into cooperative arrangements with appropriate foreign governments to prevent illegal migration of aliens to the United States by way of sea.⁷² The Executive Order provided instructions for the Coast Guard to enforce “the suspension of the entry of undocumented aliens and the interdiction of any defined vessels carrying such aliens.”⁷³ The defined vessels to be interdicted by the Coast Guard were those of foreign nations that had entered into agreements with the United States authorizing it to stop and board their vessels.⁷⁴

The Coast Guard was instructed to determine the destination and status of those aboard defined vessels⁷⁵ and to return the vessels to their country of origin.⁷⁶ If the Coast Guard had reason to believe that a vessel was in violation of U.S. immigration laws,⁷⁷ it was required to take action against the vessel, but could do so only outside the territorial waters of the United States.⁷⁸ This policy was premised on the assumption that the majority of Haitians fleeing their country were fleeing economic hardships rather than political persecution.⁷⁹ As a result of leaving Haiti for economic reasons, they did not qualify for asylum.⁸⁰

Pursuant to the Executive Order, the Attorney General, the Secretary of State and the Secretary of Transportation were to implement steps to ensure the fair enforcement of immigration laws and the strict observance of U.S. international obligations concerning those who were genuinely fleeing persecution.⁸¹ As a result, on September 23, 1981,

70. *Id.*

71. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981) [hereinafter Exec. Order].

72. *Id.*

73. *Id.* § 2(a).

74. *Id.* § 2(b)(3).

75. U.S. authorities are permitted to board a vessel sailing under the Haitian flag in order to make inquiries as to the destination of the vessel. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1329 (2d Cir. 1992).

76. Exec. Order, *supra* note 71, § 2(c).

77. The agreement between the United States and Haiti provided that the United States did not intend to return any Haitian migrants who were determined by immigration authorities to qualify for refugee status. *McNary*, 969 F.2d at 1329. Aliens determined by authorities to be in violation of U.S. laws, however, can be detained or released to representatives of the Haitian government. *Id.*

78. Exec. Order, *supra* note 71, § 2(d).

79. Idelson, *supra* note 42, at 462.

80. *Id.*

81. Exec. Order, *supra* note 71, § 3.

Secretary of State James Baker entered into an agreement with Jean-Claude Duvalier (Baby Doc) to prevent the illegal migration of undocumented Haitians to the United States by sea.⁸² Under the agreement, which is still in effect, the U.S. Coast Guard may stop and board Haitian vessels.⁸³ If the Coast Guard determines that a violation of U.S. laws or the laws of Haiti has been committed, it may return the boat and its passengers to Haiti or release them to Haitian authorities.⁸⁴ The Agreement also provides that the United States will not return any Haitian migrant who qualifies, according to U.S. authorities, for refugee status.⁸⁵

Under the interdiction program, INS officers interview interdicted Haitians at sea, or when they are taken into custody, in order to determine if they qualify for refugee status.⁸⁶ Individuals who qualify are "screened in"⁸⁷ and are eligible for transfer to the United States.⁸⁸ Those found not to meet refugee status requirements are repatriated to Haiti.⁸⁹

Challenges to the interdiction program were unsuccessful. In *Haitian Refugee Center, Inc. v. Gracey*,⁹⁰ the HRC argued that the interdiction program breached the asylum provision of the Refugee Act of 1980 as well as the deportation and exclusion provisions of the Immigration and Nationality Act.⁹¹ Both Acts require the Attorney General to establish procedures for refugees to petition for admission into the United States. The *Gracey* court concluded that only aliens who actually reach American soil are entitled to these procedures, whereas

82. See *Haiti-United States: Agreement to Stop Clandestine Migration of Residents of Haiti to the United States*, Sept. 23, 1981, U.S.-Haiti, 20 I.L.M. 1198 (1981) [hereinafter Agreement].

83. *Id.* at 3560.

84. *Id.*

85. *Id.* at 1199. In exchange for signing the agreement, the United States increased aid to Haiti by \$11.5 million. SIMON FASS, *POLITICAL ECONOMY IN HAITI: THE DRAMA OF SURVIVAL* 14 (1988). Haiti received over \$85 million in U.S. aid. *Id.*

86. Idelson, *supra* note 42, at 462.

87. *Haitian Ctrs. Counsel, Inc. v. McNary*, 969 F.2d 1326, 1330 (2d Cir. 1992). The purpose of pre-screening individuals to determine if they might qualify as a refugee, is to determine if they have a "credible fear of persecution." Those individuals found to have such a fear of persecution are "screened in" and are eligible to pursue an asylum claim in the United States. Those found not to have a credible fear are "screened out." *Id.*

88. *Id.*

89. See *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1502-03 (11th Cir. 1992).

90. 600 F. Supp. 1396 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

91. 8 U.S.C. § 1253(h) (1988); 8 U.S.C. § 1226 (1988).

refugees at sea have no such rights.

The plaintiffs contend that "the Executive cannot free itself of its procedural obligations to provide Haitian refugees with a hearing and legal representation merely by reaching out to sea and changing the locale of its process." However, because the statutory obligations do not exist until an alien comes within the United States, plainly the Executive can avoid those obligations by interdicting the Haitians on the high seas.⁹²

Thus, the Haitian interdiction program continues. Between 1981 and 1990, 22,940 Haitians were intercepted at sea; only eleven were deemed qualified to apply for asylum.⁹³ Then in 1990, in historic elections, Catholic priest Jean-Bertrand Aristide was elected president of Haiti.⁹⁴ Aristide's agenda included programs designed to benefit Haiti's poor.⁹⁵ In September 1991, however, President Aristide was overthrown by a political coup d'état.⁹⁶ As a result, the number of Haitians fleeing to the United States surged to over 38,000.⁹⁷ Only 11,000 Haitians have been granted the right to apply for political asylum from within U.S. jurisdiction; the Coast Guard has returned the other 27,000 to Haiti.⁹⁸

On May 23, 1992, President George Bush signed an Executive Order authorizing the Coast Guard to intercept boats en route to the United States and return their passengers to their country of origin without interviewing them to determine if they might qualify for refugee status.⁹⁹ As a result of this policy President Bush was attacked as being inhumane and a racist.¹⁰⁰ Former New York Representative Stephen J. Solarz "likened it to the U.S. decision prior to World War II to turn away Jews fleeing Nazi Germany."¹⁰¹ The Congressional Black

92. *Gracey*, 600 F. Supp. at 1404.

93. HOUSE COMM. ON THE JUDICIARY, REPORT ON HAITIAN REFUGEE PROTECTION ACT OF 1992, H.R. REP. NO. 437, 102d Cong., 2d Sess., 3, 4 (1992).

94. Idelson, *supra* note 42, at 462.

95. *Id.*

96. *Id.*

97. Randall Robinson & Benjamin Hooks, *Haitians: Locked Out Because They're Black*, WASH. POST, Aug. 24, 1992, at A17.

98. *Id.*

99. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) [hereinafter *Kennebunkport Order*]. See *infra* notes 186-191 and accompanying text for a discussion of the "Kennebunkport Order."

100. Idelson, *supra* note 42, at 463.

101. *Id.*

Caucus and several lawmakers also adamantly opposed the Executive Order.¹⁰²

As a presidential candidate who was among the critics of the Bush policy, Bill Clinton promised to provide fleeing Haitians with a temporary safe haven.¹⁰³ However, "as Inauguration Day approached, that sentiment gave way to concern that thousands of Haitians were preparing to set out on boats and take advantage of a more hospitable U.S. policy."¹⁰⁴ On January 14, 1993, President-elect Clinton indicated that after further consideration he would have to continue summarily returning Haitian boat people to Haiti, effectively reneging on his campaign promise to revoke immediately President Bush's Executive Order.¹⁰⁵

III. CHALLENGES TO THE EXECUTIVE ORDERS

As a result of the Executive Orders of former Presidents Reagan¹⁰⁶ and Bush,¹⁰⁷ Haitians are being detained at the U.S. Naval base in Guantanamo Bay, Cuba.¹⁰⁸ Ultimately 30 percent have been granted refugee status and allowed to apply for asylum.¹⁰⁹ Meanwhile, detained Haitians have been denied access to legal counsel.¹¹⁰ Two lawsuits were filed to challenge the Government's action: *Haitian Refugee Center v. Baker (Baker I)*,¹¹¹ in Florida, and *Haitian Centers Council v. McNary (McNary I)*,¹¹² in New York.

A. *The Baker Litigations*

Baker I involved a class action suit on behalf of all intercepted and

102. *Id.*

103. During the campaign, Clinton pledged, "If I were President, I would—in the absence of clear and compelling evidence that they weren't political refugees—give them temporary asylum until we restored the Government of Haiti." Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES, Jan. 15, 1993, at A1.

104. Idelson, *supra* note 42, at 463.

105. *Id.*

106. See Exec. Order, *supra* note 71 and accompanying text.

107. See Kennebunkport Order, *supra* note 99 and accompanying text.

108. Reske, *supra* note 1, at 30.

109. See Robinson & Hooks, *supra* note 97, at A17.

110. See *Louis v. Nelson*, 554 F. Supp. 973, 978-84 (S.D. Fla. 1982).

111. 789 F. Supp. 1552 (S.D. Fla. 1991) (*Baker I*), *injunction dissolved and remanded*, 949 F.2d 1109 (11th Cir. 1991) (*per curiam*) (*Baker II*), *stay granted*, 950 F.2d 685 (11th Cir. 1991) (*Baker III*), *vacated and remanded*, 953 F.2d 1498 (11th Cir. 1992) (*Baker IV*), *cert. denied*, 112 S. Ct. 1245 (1992).

112. 789 F. Supp. 541 (E.D.N.Y. 1992) (*McNary I*).

detained Haitians, most of whom had been "screened-out," meaning the INS found no credible fear of persecution, leaving the Haitians to await repatriation.¹¹³ On November 19, 1991, the HRC filed a complaint in district court against Secretary of State Baker.¹¹⁴ The complaint asserted claims allegedly arising under the Executive Order issued by President Reagan,¹¹⁵ international law,¹¹⁶ the United Nations Protocol Relating to the Status of Refugees,¹¹⁷ U.S. immigration statutes¹¹⁸ and the Fifth Amendment.¹¹⁹ More specifically, HRC maintained that the INS had failed to comply with its own guidelines, promulgated pursuant to the Executive Order, for the identification of those with potentially valid asylum claims.¹²⁰ For example, INS officials were making refugee determinations based on five minute interviews on Coast Guard cutters, conducting the interviews in public and at a time when the Haitians were physically and mentally exhausted and in no condition to answer questions.¹²¹

HRC then filed an amended complaint,¹²² adding claims under the First Amendment and the Administrative Procedure Act (APA). The amended complaint alleged that the government had denied HRC access to the interdicted Haitians and that such denial was violative of the First Amendment.¹²³ HRC also claimed that the INS' interviewing process was in violation of the APA.¹²⁴

113. According to the Second Circuit, an alien was included in the *Baker* class if she: 1) faced current or future detention on Coast Guard cutters or at Guantanamo Naval Base; 2) had been interdicted pursuant to the U.S. interdiction program; and 3) had been denied her First Amendment and procedural rights. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1354 (2d Cir. 1992) (*McNary III*).

114. See *Baker I*, 789 F. Supp. at 1552.

115. Exec. Order, *supra* note 71.

116. See *supra* notes 7-9 and accompanying text.

117. See Protocol *supra* note 9, 19 U.S.T. 6223. The Protocol is discussed in detail at *supra* notes 26-28 and accompanying text.

118. See *supra* part II.A.

119. *Baker I*, 789 F. Supp. at 1553.

120. *Id.*

121. *Id.* at 1557.

122. See *id.*

123. *Id.* at 1554. The Haitian Refugee Center's claim was that they had a right to associate with interdictees under the First Amendment. *Baker IV*, 953 F.2d at 1513. See discussion *infra* part III.B.1.

124. *Baker I*, 789 F. Supp. at 1554. The APA provides that "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," are entitled to judicial review. 5 U.S.C. § 702; see also *Baker IV*, 953 F.2d at 1505 (construing APA provisions allowing review of compliance with the INA). See also discussion *infra* part III.B.2.

The district court found a substantial likelihood that the interdiction program violated both the Haitians' right of non-refoulement under article 33 of the Protocol, and the HRC's First Amendment right to access interdicted Haitians in order to advise them of their legal rights.¹²⁵ The court enjoined the repatriation of Haitians pending either the implementation of new guidelines or a resolution of the plaintiffs' complaint.¹²⁶

On the first appeal (*Baker II*),¹²⁷ the Eleventh Circuit dissolved the injunction and remanded the case with instructions to dismiss the claims based on the United Nations Protocol.¹²⁸ The court found the Protocol was not "self-enforcing" and thus provided no protection to aliens outside of the United States.¹²⁹ The court further found the HRC's First Amendment claim alone could not support the injunction.¹³⁰ The HRC immediately obtained a temporary restraining order based on the APA claim.¹³¹ In *Baker III*,¹³² the Eleventh Circuit stayed the restraining order pending appeal.¹³³

Finally, in *Baker IV*,¹³⁴ the Eleventh Circuit held that the Haitian interdiction plan did not violate the Protocol,¹³⁵ and HRC had no First Amendment right of access to aliens.¹³⁶ The court reasoned that because U.S. immigration law does not extend protection to aliens who have never entered the United States, the Protocol and the APA do not apply to such aliens.¹³⁷ Moreover, it held that allowing HRC representatives "meaningful access" to the Haitians would inconvenience the government.¹³⁸ On February 24, 1992, the Supreme Court denied the HRC's petition for a writ of certiorari.¹³⁹

125. *Baker I*, 789 F. Supp. at 1554.

126. *Id.* at 1578.

127. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991) (*Baker II*).

128. *Id.* at 1111.

129. *Id.* at 1110-11.

130. *Id.*

131. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1579 (S.D. Fla. 1991).

132. *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685 (11th Cir. 1991) (*Baker III*).

133. *Id.* at 687.

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

135. *Id.* at 1510-11.

136. *Id.* at 1505-09.

137. *Id.* at 1508.

138. *Id.* at 1514.

139. *Haitian Refugee Ctr., Inc. v. Baker*, 112 S. Ct. 1245 (1992).

B. Analysis of Baker

In his dissenting opinion in *Baker IV*, Judge Hatchett criticized the majority's "outside the United States" argument as "pure legal fiction."¹⁴⁰ Hatchett argued that Haitian "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."¹⁴¹

1. First Amendment Claim

HRC claimed that the government violated its First Amendment rights by refusing to grant it access to Haitians detained at Guantanamo Bay.¹⁴² The majority conceded that there was a First Amendment right to associate for the purpose of engaging in litigation as a form of political expression.¹⁴³ However, they stated that this right is predicated on the existence of an underlying legal claim that may be asserted by the potential litigant.¹⁴⁴

This seems to contradict at least one earlier Eleventh Circuit decision. In *Jean v. Nelson*,¹⁴⁵ a case analogous to *Sale v. Haitian Centers Council, Inc.*,¹⁴⁶ the Eleventh Circuit noted that "[t]he Supreme Court has repeatedly emphasized that counsel have a First Amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration."¹⁴⁷ Furthermore, nothing in *Jean* dictates that HRC's First Amendment right rests on the rights of the Haitians.

The majority's determination that access to Haitians detained at Guantanamo Bay would impose an undue burden on the government¹⁴⁸ is similarly unsound. It is true that the Naval Base taken as a whole is a non-public forum.¹⁴⁹ In addition to time, place, and manner regulations, the government may reserve a non-public forum for its intended

140. *Baker IV*, 953 F.2d at 1515 (Hatchett, J., dissenting).

141. *Id.* at 1516 (Hatchett, J., dissenting).

142. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1116 (11th Cir. 1991)(*per curiam*) (*Baker II*).

143. *Baker IV*, 953 F.2d at 1513.

144. *Id.*

145. 727 F.2d 957 (11th Cir. 1984).

146. 113 S. Ct. 2549 (1993).

147. *Jean v. Nelson*, 727 F.2d at 983.

148. *Baker IV*, 953 F.2d at 1514.

149. The term "non-public forum" is used to describe any facility, such as a military installation, from which the government has reserved the right to exclude the general public. *Id.* at 1517.

purposes, as long as any restrictions on speech are reasonable.¹⁵⁰ However, if part of an installation is used for non-military purposes, First Amendment rights are broader on those parts of the base used for non-military functions than they are on those parts used exclusively for military functions.¹⁵¹ Clearly, the part of the Guantanamo Naval base where the Haitians are held is used for non-military functions.¹⁵²

The district court found that the government had "opened [the base] to members of the press, representatives of the United Nations High Commission on Refugees, church officials," and a host of other civilian groups.¹⁵³ Despite allowing admission to these diverse groups, the government denied access to a few HRC lawyers who sought to advise and console detainees.¹⁵⁴

The Supreme Court in *Kleindienst v. Mandel*,¹⁵⁵ stated that even though a U.S. citizen may have First Amendment rights, he may not constrain the government's power to exclude aliens.¹⁵⁶ In the instant case, however, HRC was not seeking admission of the Haitian refugees to the United States, only access to them.¹⁵⁷

2. The Administrative Procedure Act Claim

The APA provides a cause of action to "[a] person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute."¹⁵⁸ "The APA provides for the judicial scrutiny of the actions of lower ranking government officials in order to determine if the officials are in compliance with Article 33 and the INS guidelines issued pursuant to Executive Order 12324"¹⁵⁹ Thus, the action of the officials charged with the duty of properly interviewing the refugees is subject to judicial review unless it is clear that such review is barred.¹⁶⁰

Judge Hatchett argued in his dissent that HRC and the Haitians interdicted on the sea can demand judicial review under the APA if:

150. *Id.*

151. *Id.* (citing *Flower v. U.S.*, 407 U.S. 197 (1972)).

152. *Id.* at 1516.

153. *Id.*

154. *Id.*

155. 408 U.S. 753 (1972).

156. *Baker IV*, 953 F.2d at 1518 (Hatchett, J., dissenting) (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

157. *Id.*

158. 5 U.S.C. § 702.

159. *Baker IV*, 953 F.2d at 1519 (Hatchett, J. dissenting).

160. *See* 5 U.S.C. § 704.

"[t]hey satisfy the standard set out in § 702,"¹⁶¹ the officials' actions are reviewable under § 704,¹⁶² and if the officials' actions do not come under the exclusion provisions of § 701(a)(1) and (2).¹⁶³ The majority stated that because the aliens were not within U.S. borders, the APA does not apply to them.¹⁶⁴ However, the APA does not state that a person must be within the United States.¹⁶⁵

The district court's finding of fact that the INS' low ranking officials failed to take adequate measures to ensure the enforcement of U.S. immigration laws should have been upheld.¹⁶⁶ The Haitians are suffering legal wrong because of agency action and therefore meet § 702's requirements.¹⁶⁷ As Judge Hatchett stated in his dissent, "[b]oth the Protocol and the Executive Order with its implementing INS guidelines constitute the relevant United States law relating to the interdiction of Haitians on the high seas."¹⁶⁸

Judge Hatchett concluded that the Protocol was self-executing and thus bound the United States in accordance with article VI of the Constitution.¹⁶⁹ A self-executing international agreement is one that directly accords enforceable rights to persons without the benefit of Congressional implementation.¹⁷⁰

Section 704 of the APA requires that in order for a determination to be reviewable it must constitute a final action by the agency for

161. *Baker IV*, 953 F.2d at 1519 (Hatchett, J., dissenting) (construing 5 U.S.C. § 702). See also *supra* note 158 and accompanying text.

162. *Id.* (construing 5 U.S.C. § 704).

163. *Id.* (construing 5 U.S.C. § 701(a)(1) and (2)).

164. *Id.* at 1507. The majority stated that the cases it cited support the conclusion that Congress intended to preclude judicial review of administrative determinations regarding aliens outside the territory of the United States.

165. *Id.* at 1520 (Hatchett, J., dissenting) (citing *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961) (noting that the APA "does not say 'any citizen.' It does not say 'any person physically present in the United States. . . . The emphasis is on the breadth of the coverage.'")).

166. *Id.*

167. *Id.* See also *supra* note 158 and accompanying text.

168. *Baker IV*, 953 F.2d at 1520 (Hatchett, J. dissenting).

169. *Id.* See also *Baker II*, 949 F.2d at 1109, 1113-14 (Hatchett, J. dissenting); Abigail D. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 733, 781 (1988) (stating that "[an] examination of the subject matter of the Protocol supports the argument that the non-refoulement provision is self-executing and therefore governing in the United States. Self-executing treaties typically involve extradition, consular rights, most favored nation status, and treatment of aliens.").

170. See *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part).

which there is no other adequate remedy by a court.¹⁷¹ By forcefully repatriating the Haitians despite inadequate screening procedures, the INS took final action; the Haitians have no other adequate remedy. The actions of low ranking officials are thus subject to judicial review, unless there is an exception under § 701(a) of the APA.¹⁷²

A strong presumption of reviewability attaches upon compliance with §§ 702 and 704.¹⁷³ The actions of low ranking officials are subject to judicial review unless it is clear that such review is barred.¹⁷⁴ Nothing in the laws relating to the interdiction of Haitians or the legislative history relating to the U.S. accession to the Protocol indicates that Congress intended to bar judicial review in this matter.¹⁷⁵ Thus, the government's actions do not come under the exclusion provisions of § 701(a), and therefore the APA provides HRC with a cause of action to seek judicial review of the low ranking officials' actions.

C. *The McNary Litigation*

Shortly after the *Baker* litigation, the Haitian Centers Council (HCC) filed a class action suit on behalf of "screened-in" Haitians (*McNary I*).¹⁷⁶ "Screened-in" Haitians were those aliens who were found to possess a credible fear of persecution and who were therefore supposed to be brought to the United States to apply for asylum.¹⁷⁷ HCC's complaint alleged that the government was re-screening and adjudicating the asylum claims of Haitians who were HIV-positive without allowing those refugees access to legal counsel.¹⁷⁸ The *McNary I* court issued a temporary restraining order barring the INS from re-

171. *Baker IV*, 953 F.2d at 1520 (Hatchett, J., dissenting) (construing 5 U.S.C. § 704).

172. *Id.* at 1521.

173. *Id.* Judge Hatchett cited *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). The Court in *Bowen* noted:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Id. at 671 (citing S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945)).

174. *Baker IV*, 953 F.2d at 1521 (Hatchett, J., dissenting).

175. *Id.* at 1522.

176. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992) (*McNary I*).

177. See *supra* notes 86-89 and accompanying text for a discussion about "screened-in" refugees.

178. *McNary I*, 789 F. Supp. at 546.

screening "screened-in" aliens without first offering them legal representation.¹⁷⁹

On appeal,¹⁸⁰ the government argued that the "screened-in" plaintiffs were members of the class certified in the *Baker* action and, thus, their claims were barred under the doctrine of collateral estoppel.¹⁸¹ The HCC countered that because the INS had already determined that "screened-in" Haitians possessed a credible fear of political persecution, they were "de facto asylees," entitled to due process protection.¹⁸² The Second Circuit agreed with the HCC.¹⁸³ The court found that the Guantanamo Naval Base is under U.S. jurisdiction, making the protections of the Due Process Clause applicable to aliens held there.¹⁸⁴ *McNary II* held that the government can restrict HCC counsel from Guantanamo Bay, but, if so, the government must provide Haitians with access to other attorneys.¹⁸⁵

Meanwhile, on May 24, 1992, President Bush issued the "Kennebunkport Order"¹⁸⁶ which commanded the Coast Guard to intercept Haitians on the high seas and return them to Haiti without determining whether they qualified for refugee status.¹⁸⁷ The government contended that since all Haitians flee economic chaos, not physical oppression, the policy of detaining some Haitians only encouraged others to attempt passage.¹⁸⁸ The HCC immediately requested a preliminary injunction which the district court denied, finding that the HCC was unlikely to succeed on the merits because the right to counsel does not extend to aliens outside U.S. borders.¹⁸⁹ The court's opinion, however, reflects its negative reaction to the U.S. policy towards Haitian

179. *Id.* at 548. Shortly thereafter, the district judge replaced the restraining order with a temporary injunction. On April 22, 1992, the Supreme Court stayed the order pending appeal to the Second Circuit. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992).

180. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (*McNary II*).

181. *Id.* at 1337.

182. *Id.* at 1341.

183. *Id.*

184. *Id.* at 1344.

185. *Id.* at 1347.

186. Kennebunkport Order, *supra* note 99 and accompanying text; *see also* *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d at 1352 (*McNary III*) ("On May 23, 1992, President Bush signed an executive order which has come to be known as the 'Kennebunkport Order.'").

187. Kennebunkport Order, *supra* note 99.

188. *See supra* text accompanying notes 79-80.

189. *Haitian Ctrs. Council, Inc. v. McNary*, 1992 U.S. Dist. LEXIS 8452, at *1 (E.D.N.Y. June 9, 1992).

refugees:

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 or a higher court reconsiders *Bertrand* [a Second Circuit holding that the Protocol was not self-executing¹⁹⁰]. Until that time, however, this court feels constrained by the rationale of *Bertrand* and cannot grant the Plaintiffs relief on this claim.¹⁹¹

In *McNary III*,¹⁹² the Second Circuit considered whether the Kennebunkport Order violated federal guarantees¹⁹³ that refugees who possess a credible fear of persecution will not be returned to their homeland.¹⁹⁴ *McNary III* held that *Baker* did not collaterally estop the plaintiffs from relitigating the issue because the *McNary* class consisted of Haitians who had been or would be "screened-in."¹⁹⁵ The court also found the Kennebunkport Order breached the Government's promise in *Baker* to allow "screened-in" aliens to file asylum applications in the United States.¹⁹⁶

The Second Circuit disagreed with the *Baker* court's conclusion that the mandatory withholding of deportation provision of the Refugee Act under § 243 does not apply to aliens interdicted beyond U.S. bor-

190. *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982).

191. *Haitian Ctrs. Council, Inc. v. McNary*, 1992 U.S. Dist. LEXIS 8452, at *5.

192. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (*McNary III*).

193. 8 U.S.C. § 1253(h)(1) (1988).

194. See *McNary III*, 969 F.2d at 1363 (noting that the object and purpose of the Refugee Convention is to prevent refugees from being returned to those who will persecute them).

195. *Id.* at 1355. This class included three sub-groups: 1) 150 previously "screened-in" Haitians who were nevertheless repatriated; 2) all interdicted Haitians who should have been "screened-in" because they possessed a credible fear of persecution; and 3) all unscreened Haitians at Guantanamo Bay Naval Base who would have been "screened-in" but for summary repatriation. *Id.* at 1354-55.

196. *Id.* at 1356-57.

ders.¹⁹⁷ Section 243(h)(1) 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."¹⁹⁸ The court concluded that even aliens intercepted in international waters qualify for the protection of § 243,¹⁹⁹ since Congress defines an "alien" as any person who is not a U.S. citizen.²⁰⁰ The Second Circuit found that the district court had mistakenly focused only on the plaintiffs' right-to-counsel argument in denying the plaintiffs' request for a preliminary injunction.²⁰¹ Whereas the right to counsel provision is reserved for persons within the territory of the United States, the *McNary III* court held the protection derived from § 243 applies to all aliens no matter where they are situated.²⁰² The court further held that interdicting and forcibly repatriating Haitians constituted a "return" in violation of § 243,²⁰³ and directed the district court to enter an injunction prohibiting the government from interdicting and repatriating Haitians without first determining whether they qualified for refugee status.²⁰⁴

Faced with conflicting holdings, the Supreme Court granted certiorari in *McNary*,²⁰⁵ and all preliminary injunctions were stayed pending judgment.²⁰⁶ On June 21, 1993, the Supreme Court in *Sale v. Haitian Centers Council, Inc.*²⁰⁷ reversed the court of appeals in *McNary*, holding that § 243 and article 33 do not apply to refugees outside the territory of the United States.²⁰⁸

IV. THE SUPREME COURT AND THE CONSTITUTIONAL QUESTION

A number of cases involving the immigration status of aliens, whose protection under the Constitution was unclear, have come before the Supreme Court.²⁰⁹ In *Jean v. Nelson*,²¹⁰ the Court had the opportu-

197. *Id.* at 1357.

198. 8 U.S.C. § 1253(h)(1). *See also supra* text accompanying notes 33, 39.

199. *McNary III*, 969 F.2d at 1357.

200. 8 U.S.C. § 1101(a)(3) (1988).

201. *McNary III*, 969 F.2d at 1360.

202. *See id.* (stating that § 243(h)(1) applies to a broader class of persons than the right to counsel, and that § 243(h)(1) applies irrespective of an alien's location).

203. *Id.*

204. *Id.* at 1367.

205. 113 S. Ct. 52 (1992).

206. 113 S. Ct. 3 (1992).

207. 113 S. Ct. 2549 (1993).

208. *Id.*

209. Gwynn, *supra* note 12, at 333.

210. 472 U.S. 846 (1985).

nity to clarify questions regarding the extent of the government's exclusion power and the constitutional rights of excludable aliens. However, in a six to two decision, the Court evaded the important constitutional issue by concluding that the INS regulations resolved the issue.²¹¹

The majority's analyses in *Jean*, and in *Haitian Refugee Center v. Baker*, were unclear, and the Court used legal fictions to evade the constitutional question as to the rights of aliens outside U.S. borders.²¹² Justice Marshall, in his dissent in *Jean*, articulated the deficiencies in that Court's reasoning:

Purporting to exercise restraint, the Court creates out of whole cloth non-constitutional constraints on the Attorney General's discretion to parole aliens into this country, flagrantly violating the maxim that 'amendment may not be substituted for construction'. . . . In my mind, there is no principled way to avoid reaching the constitutional question presented by the case. Turning to that question, I would hold that petitioners have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin.²¹³

Once again, the Court had the opportunity to address and clarify the rights of aliens outside the United States in the petition for certiorari in *Haitian Refugee Center, Inc. v. Baker*.²¹⁴ The Court, however, evaded the issue and denied the petition.²¹⁵ As Justice Blackmun stated in his dissent, the question "whether international or domestic law affords the Haitians a substantive right not to be returned to a country where they face possible persecution . . . is difficult and susceptible to competing interpretations."²¹⁶ Blackmun went on to state that the Court's docket was not so congested as to preclude consideration of this important issue.²¹⁷

The *McNary* litigation tried to shed some light on the rights of interdicted aliens outside U.S. territory who have been "screened in."²¹⁸ The court held that as to "screened in" aliens there were serious

211. *Id.* at 858 (Marshall, J., dissenting). See also Gwynn, *supra* note 12, at 333.

212. See *Jean*, 472 U.S. at 846.

213. *Id.* at 857 (Marshall, J., dissenting).

214. 112 S. Ct. 1245 (1992).

215. *Id.*

216. *Id.* (Blackmun, J., dissenting).

217. *Id.*

218. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1332 (2d Cir. 1992) (*McNary II*).

questions concerning their Fifth Amendment claims.²¹⁹ As noted above, however, this holding was inconsistent with the Eleventh Circuit's holding in *Baker*.²²⁰ Faced with competing interpretations of the rights of aliens seeking refuge within the United States, the Supreme Court granted certiorari.²²¹ The Court, in its June 21, 1993 decision in *Sale v. Haitian Centers Council, Inc.* made it painfully clear that aliens outside the United States can not avail themselves of protection under the Constitution or U.S. immigration law. The Court's ruling makes the United States a signatory to a worthless agreement.

V. CONCLUSION

The refugee law, at least as it presently applies to Haitian immigrants, affirms that aliens outside U.S. borders have no rights under either international law or the Constitution and that such aliens will be repatriated to their home countries. Of all migrants to the United States who have legitimate asylum claims, only Haitian migrants are prevented from reaching U.S. borders²²² and from availing themselves of constitutional protections. Essentially, the Supreme Court's ruling in *Sale v. Haitian Centers Council, Inc.* holds that it is perfectly legal for the United States to go beyond its seven mile coastal border, seize and detain migrants, and subject them to rape, torture, or any act that would otherwise normally be held criminal,²²³ so long as such migrant country's administration, whether legitimate or not, does not object.

The U.S. interdiction program clearly violates non-refoulement because the procedures under the interdiction program are inadequate to determine refugee status. Although the interdiction program is conducted outside U.S. borders, the Refugee Act and the Protocol represent the minimal procedural protections for persons seeking refugee status both within and outside U.S. borders. This is clearly the reason the United States became a signatory to the Protocol and then supplemented it by enacting the Refugee Act in 1986. By ruling that the Protocol is ineffective against the President's power to repatriate, the

219. *Id.* at 1326.

220. *See supra* notes 197-204 and accompanying text.

221. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

222. Unlike Mexican migrants who are prevented from illegally entering the United States borders, Haitians are stopped and seized not at or within the U.S. seven mile coastal border but anywhere at sea outside of U.S. territory in international waters.

223. There are no allegations of these acts. The author used them for their effect in showing that there are no limits to how poorly these detainees can *lawfully* be treated.

United States has turned its back on its international humanitarian promises and appears to have wholly adopted an ideological approach to immigration.

The ideological basis that characterized U.S. practice before the enactment of the Refugee Act has therefore not been removed. The government's practice of admitting substantial numbers of refugees from the former Soviet Union and Eastern European nations sharply contrasts with the small number of refugees admitted from "Third World" nations.²²⁴ Why the paradox? Could it be that the U.S. refugee policy is geared toward embarrassing communist countries by admitting large numbers from those countries, or does the refugee policy reflect an unacknowledged prejudice against black or Hispanic refugees in quantity? The government has continually expressed the view that the extremely low rates of refugee admission from Haiti, South Africa, and South America are not a referendum on the human rights situation in those countries, and that an individual must prove that she has been singled out for persecution.²²⁵ However, the government has defended its very liberal admission policy for those from former Eastern Bloc countries by pointing to very little but the existence of oppression in those countries.²²⁶

Thousands of refugees repatriated to Haiti stand to lose their lives at the hands of the military, while others confront hunger and starvation, conditions exacerbated by the recent economic embargo. Repatriation and interdiction should not be the U.S.' way of preventing an overwhelming influx of Haitians into the country. The United States should focus on establishing democracy in Haiti. Not only would a stable democracy reduce the number of Haitian refugees seeking asylum, but it could also lead to a positive relationship between the countries by showing that the United States still has legitimate international humanitarian concerns. Moreover, it would entice Haitian professionals to return to Haiti and strengthen its political, economic, and social infrastructure.

It is conceded that the U.S. economy may not be able to absorb more permanent aliens into this country. What is suggested, however, is that there be a presumption favoring individuals, based on the level of human rights violations in their country, and not on some ideological principle. Moreover, if asylum status cannot be granted for all those

224. See Mark Gibney, *Who is Our Favorite Refugee Today?*, 14 HUM. RTS. Q. A.B.A. SEC. INDV. RTS. & RESP., Summer 1989, 30, 32. (U.S. pattern of admissions for fiscal year 1985).

225. *Id.* at 33.

226. *Id.*

refugees who possess legitimate claims of persecution, which most Haitians do, then at the very least, all such refugees should be afforded temporary protective status until a democratic government is established in Haiti.

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