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# The Story of *Sale v. Haitian Centers Council*: Guantánamo and *Refoulement*

**Harold Hongju Koh & Michael J. Wishnie***

Nearly two decades before September 11, 2001, thousands of foreign nationals were detained without due process at the U.S. Naval Base at Guantánamo Bay, Cuba. More than 300 refugees were held in the world's first offshore HIV-positive detention camp. Despite the mandate of the 1951 U.N. Refugee Convention, the United States—a land founded by refugees—returned bona fide refugees to territory where their lives and freedom would be threatened on account of their political opinion. A new model of human rights litigation and important innovations in clinical legal education emerged. And it all happened in a single lawsuit: *Sale v. Haitian Centers Council* ("the *HCC* case").[1]

When a 1991 military coup in Haiti overthrew the nation's first democratically-elected president, tens of thousands of Haitians fled the ensuing reign of terror on small boats pointed toward Florida. The United States responded by dispatching Coast Guard ships to interdict the fleeing Haitians and to destroy their boats. Initially, the United States conducted brief interviews with the Haitians, first on board the

* The authors were members of the Yale Law School litigation team that represented Haitian refugees in the *Haitian Centers Council* case. We are grateful to our courageous clients; to Yale Law students Brittan Heller, Kate Desormeau, Garth Schofield, and Michael Tan and Georgetown Law student Devon Chaffee for excellent research assistance; to Wanda Martinson, Sarah Cleveland, Brandt Goldstein and Gerry Neuman for their abiding friendship and support. We also thank Eric Schwartz for his historical recollections and our co-counsel in the case: Michael Ratner, Lucas Guttentag, Joseph Tringali, Robert Rubin, Susan Sawyer, Jennifer Klein, Ignatius Bau and the Yale law student litigators whose stories are told and whose names are listed in BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON 313 (2005) and Victoria Clawson, Elizabeth Detweiler, & Laura Ho, *Litigating as Law Students: An Inside Look at* Haitian Centers Council, 103 YALE L.J. 2337, 2337 (1994) [hereinafter *Litigating as Law Students*]. We dedicate this story to Mary–Christy Fisher and Cathy Edwards, for living these cases, and our careers, with us.

1. 509 U.S. 155 (1993).

Coast Guard ships and later at Guantánamo, in a cursory effort to determine which Haitians had a credible fear of political persecution in Haiti and which could be treated as economic migrants. The government forcibly returned to Haiti the vast majority of Haitians it had "screened out" as lacking a credible fear of political persecution.[2] The government "screened in" a second group of Haitians whom it deemed to have a credible fear of persecution, subjected them to medical testing, and if no issue arose, allowed them to enter the United States to apply for political asylum.[3] In fact, however, many of these "screened-in" Haitians were held on Guantánamo for months, and some were returned despite their credible claims to refugee status. A third group of Haitian interdictees comprised screened-in Haitians who were found to have medical conditions, such as HIV, that rendered them excludable under the immigration statutes. The government chose to detain these "HIV-positive screened-out" detainees at Guantánamo indefinitely.[4]

In spring 1992, more than six months after the coup in Haiti, the first Bush Administration abandoned its program of interdicting and screening all fleeing Haitians to determine who had a credible fear of persecution. Instead, the Administration began simply interdicting all Haitians and summarily returning them to Haiti, without any individualized inquiry into each person's potential refugee status.

The *HCC* case, brought in March 1992, lasted sixteen months and bifurcated around two core human rights issues. What we call here "*HCC–I*" or "the Guantánamo case" was the first federal lawsuit by non-citizen detainees raising a constitutional challenge to their indefinite detention on Guantánamo, an issue that arose again repeatedly after September 11, 2001. In *HCC–I*, all Haitians who had been or would be "screened in"—i.e., found by the U.S. government to possess a credible fear of persecution—brought a class action against their denial of access to counsel and their illegal detention at Guantánamo. In time, that half of the case went to a federal trial that freed about 300 HIV-positive, screened-in Haitians being held on Guantánamo, based on a finding that,

**2.** As discussed below, lawyers in Florida sued on behalf of the "screened out" Haitians, seeking to enjoin their forcible return to Haiti without fuller hearings, access to counsel, and other procedural protections. This suit was ultimately unsuccessful. *See* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992).

**3.** To secure asylum, an applicant is required to make a higher evidentiary showing, establishing that one has not only a "credible" fear of persecution, but a "well-founded" fear. 8 U.S.C. §§ 1158(b)(1), 1101(a)(42)(A).

**4.** Eventually, the government forced the screened-in HIV-positive refugees to undergo a second interview to prove not only a "credible," but also a "well-founded" fear of persecution. *See supra* note 2. The government forcibly returned to Haiti those screened-in Haitians who refused to submit to a second interview, or whom the government determined lacked a well-founded fear of persecution.



even on Guantánamo, these detainees should be accorded due process rights.

What we call "*HCC–II*" or "the Direct Return case" was a challenge brought within the same lawsuit by Haitians who should have been screened in but were instead summarily and forcibly returned to Haiti. In *HCC–II*, these Haitians argued all the way to the U.S. Supreme Court that two U.S. administrations had violated the international human rights proscription against *refoulement*, the direct return of refugees to their persecutors.[5]

Remarkably, after months of intensive litigation, both halves of the case were resolved on the same day. In *HCC–I*, the Eastern District's Judge Sterling Johnson, Jr. ruled, *inter alia*, that the government had violated the HIV-positive, screened-in Haitians' due process rights by denying them the procedures available to asylum applicants in the United States, by showing deliberate indifference to their medical needs, and by subjecting them to informal disciplinary procedures and indefinite detention.[6] On June 21, 1993, in *HCC–I*,[7] the Clinton Administration brought to the United States the last of the approximately 300 HIV-positive Haitians and their family members being held in Guantánamo, pursuant to a permanent injunction issued by the U.S. District Court for the Eastern District of New York. Yet even as the airplane carrying the Haitians approached New York, in *HCC–II*, the U.S. Supreme Court held, over Justice Harry Blackmun's sole dissent, that neither Article 33 of the U.N. Refugee Convention nor Section 243(h) of the Immigration and Nationality Act (INA) applied to refugees apprehended on the high seas.[8]

This complex story raises three questions: How did the *Haitian Centers Council* case evolve?[9] What was its aftermath? And what is its human rights legacy?

**5.** The rule against *refoulement* holds that no nation may return a foreign national directly to her persecutors, whether she has fled as a refugee or otherwise. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85.

**6.** Haitian Ctrs. Council, Inc. v. Sale, 823 F.Supp. 1028, 1041–45 (E.D.N.Y. 1993) [hereinafter *HCC–I*].

**7.** *Id.* at 1041–45.

**8.** Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177, 187 (1993) [hereinafter *HCC–II*].

**9.** The legal history of these cases is recounted in many places, including BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON (2005); and Victoria Clawson, Elizabeth Detweiler & Laura Ho, *Litigating as Law Students: An Inside Look at* Haitian Centers Council, 103 YALE L.J. 2337 (1994). For a documentary history collecting litigation documents in the case, which has been designed for use in first-year Procedure courses, *see* BRANDT GOLDSTEIN, RODGER CITRON, & MOLLY

### *The Evolution of the Haitian Refugee Litigation*

The *HCC* story began in September 1981, when the governments of the United States and Haiti entered a unique bilateral agreement "for the establishment of a cooperative program of interdiction and *selective return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti."[10] Pursuant to that agreement and its implementing executive order, the U.S. Coast Guard began "interdicting" fleeing Haitians on the high seas and "screening" (i.e. summarily interviewing) them, bringing to the United States only those few "screened-in" Haitians found to have "credible fears" of political persecution.

To the extent that the interdiction program tolerated the return of de facto political refugees, it appeared to violate the *nonrefoulement* requirement of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees.[11] That provision mandated that "[n]o Contracting State shall expel or return (*'refouler'*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his ... political opinion" (emphasis added). Although an early judicial challenge to the interdiction program foundered for lack of standing,[12] various contemporaneous government documents and instruments implementing the interdiction program seemed to confirm that this obligation of non-return applied even to refugees taken on the high seas.[13]

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BEUTZ, STORMING THE COURT: A DOCUMENTARY COMPANION (forthcoming 2009). For law journal accounts by the authors, from which much of the story that follows is drawn, *see, e.g.*, Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994); The Lowenstein International Human Rights Clinic (including Koh & Wishnie), *Aliens and the Duty of* Nonrefoulement: Haitian Centers Council v. McNary, 6 HARV. HUM. RTS. J. 1 (1993); Harold Hongju Koh, *Reflections on* Refoulement *and* Haitian Centers Council, 35 HARV. INT'L L.J. 1 (1994) [hereinafter *Reflections*]; Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483 (1993).

**10.** Agreement Effected by Exchange of Notes, U.S.–Haiti, Sept. 23, 1981, 33 U.S.T. 3559 [hereinafter 1981 U.S.–Haiti Agreement] (emphasis added). The Agreement was implemented by Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

**11.** July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 [hereinafter Refugee Convention] (emphasis added). The United States became party to the Refugee Convention when it acceded to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

**12.** Haitian Refugee Ctr., Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

**13.** For a critique of the Haitian interdiction program, *see* Stephen H. Legomsky, *The Haitian Interdiction Programme, Human Rights and the Role of Judicial Protection*, 2 INT'L J. REFUGEE L. (SPECIAL ISSUE) 181 (1990). For discussion of the numerous judicial rulings against Haitians, *see, e.g.*, Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993).

President Reagan effectively acknowledged that the *nonrefoulement* obligations of Article 33 applied to interdicted Haitians when he issued Exec. Order No. 12,324, 46 Fed. Reg. 48,109, 48,109 (Sept. 29, 1981) (guaranteeing "that no person who is a refugee will be returned without his consent"); *see also* IMMIGRATION & NATURALIZATION SERVICE, INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA (Oct. 6, 1981) (directing that INS personnel "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 Convention and Protocol"), quoted in Haitian Refugee Ctr., Inc., 953 F.2d at 1502; Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981) (reasoning that interdicted Haitians "who claim that they will be persecuted ... must be given an opportunity to substantiate their claims"); Memorandum from Larry L. Simms, Deputy Assistant Att'y Gen., Off. Legal Counsel, to the Assoc. Att'y Gen. (Aug. 5, 1981) ("Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33]."), quoted in Joint Appendix at 222, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92-344).



In a 1990 United Nations-monitored election, more than sixty-seven percent of the voters elected Jean–Bertrand Aristide as president of the first freely elected democratic government of Haiti. After a brief and troubled presidency, Aristide was overthrown by military coup in September 1991 and fled to the United States. Pursuant to the Santiago Commitment to Democracy, and with the support of officials of the George H.W. Bush Administration, the Organization of American States (OAS) adopted sanctions programs and issued resolutions urging the restoration of the constitutional government in Haiti. But as boatloads of refugees began fleeing Haiti, the Bush Administration directed the Coast Guard to bring screened-in Haitians not to the United States, but rather, to the U.S. Naval Base in Guantánamo Bay, Cuba, where they were detained behind razor-barbed wire in makeshift military camps without due process rights. This policy soon triggered litigation by Haitian refugee advocates before two circuits.

### *The Eleventh Circuit Litigation: Haitian Refugee Center v. Baker*

In November 1991, the Haitian Refugee Center (HRC) sued Secretary of State James Baker and other government officials in the Southern District of Florida, challenging, *inter alia*, the practice of returning screened-out Haitians without sufficient process. HRC won several initial victories in the Southern District of Florida, but on expedited appeal, the Eleventh Circuit twice reversed, bringing the Haitian refugee crisis before the U.S. Supreme Court for the first time around Christmastime 1991.

As the Florida lawsuit volleyed rapidly between the District Court in Miami and the U.S. Court of Appeals for the Eleventh Circuit in Atlanta,

Circuit Justice Anthony Kennedy circulated an unusual memorandum to the Supreme Court on December 20, 1991: unusual, because as Justice Kennedy himself observed, "no papers have been filed here yet."[14] Nevertheless, Justice Kennedy set out to introduce the lower court litigation to his colleagues in anticipation of an imminent filing.

Justice Kennedy's initial framing of the matter placed unusual emphasis on the interests of the U.S. government, as opposed to the individual human rights claims of the refugees. This framing both shaped and foreshadowed the Court's approach to the multiple applications and petitions arising from the refugee crisis that it would face over the next eighteen months. "This case involves the efforts by the United States Coast Guard," began the Justice, "to repatriate individuals who fled Haiti in small vessels in the last several weeks."[15] In effect, Justice Kennedy advised his fellow justices, *HRC v. Baker* was not so much a human rights story as it was a case about the challenges facing the Coast Guard. Although the refugees and their counsel could not know it at the time, this framing of the case, soon widely accepted among the Justices, ultimately doomed all human rights arguments on behalf of the Haitians that would eventually come to the Court.

When the U.S. Supreme Court first ruled on an application from the Florida litigation, in early 1992, it stayed the District Court's injunction, with Justices Blackmun, Stevens, and Thomas dissenting.[16] But the HRC

**14.** Memorandum from Justice Anthony M. Kennedy, Supreme Court of the United States, to the Conference 1 (Dec. 20, 1991) [hereinafter 1991 Kennedy Memo] (on file with authors). For the inside story of how the Justices decided the Haitian refugee cases, we examined the extensive case files in Box 623 of the collected papers of the late Justice Harry Blackmun, in the Library of Congress. For a description of how those papers were bequeathed to the Library of Congress, *see* Harold Hongju Koh, *Unveiling Justice Blackmun*, 72 BROOK. L. REV. 9, 16–23 (2006).

**15.** 1991 Kennedy Memo, *supra* note 14, at 1. The memo concluded with Justice Kennedy's statement that if the Eleventh Circuit were to deny relief to the refugees, and if the Florida plaintiffs were to seek emergency relief from the Supreme Court, "my present inclination is to grant a stay for the sole purpose of referring the matter to the conference." *Id.* at 3. Later that same day, Justice Stevens seized on the suggestion to grant a stay, writing "I think there is a real danger that the majority in the Eleventh Circuit has acted with undue haste. I strongly support your proposed grant of a stay. . . ." Memorandum from Justice John Paul Stevens, Supreme Court of the United States, to Justice Anthony M. Kennedy and the Conference, (Dec. 20, 1991) (on file with authors).

**16.** *See* Baker v. Haitian Refugee Ctr., Inc., 502 U.S. 1083 (1992) (ordering stay of District Court order pending disposition of appeal by Eleventh Circuit); *Id.* (Blackmun, Stevens, and Thomas, JJ., dissenting from entry of stay). Justice Thomas later explained, in a draft portion of his subsequent statement respecting denial of *certiorari* in *HRC* that he did not publish, that "I voted to deny the government's application . . . because, in my view, the petitioners deserved the additional twenty-four hours they had requested for the purpose of taking depositions and filing a response." Draft Statement of Justice Clarence Thomas Respecting Denial of Certiorari, Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1122 (1992) (No. 91–1292) (on file with authors); *but see* 502 U.S. 1122, 1122 (1992) (Thomas, J., statement respecting denial of *certiorari*) (omitting explanation).



suit ended suddenly in February 1992, when the Supreme Court denied HRC's petition for *certiorari*, over Justice Blackmun's sole dissent.[17] In his memorandum to the Conference recommending denial of *certiorari*, Justice Kennedy expressed a view that would carry the day more than a year later in *Haitian Centers Council*: that "the INA [Immigration and Nationality Act] does not have extraterritorial application."[18] By contrast, throughout the various *HRC v. Baker* applications, Justices Blackmun and Stevens previewed their later positions in *HCC*, consistently displaying a respect for the legal claims and humanitarian concerns of the refugees not shared by the rest of the Court.[19] As Justice Blackmun wrote in dissent from denial of *certiorari*,

> A quick glance at this Court's docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today. If indeed the Haitians are to be returned to an uncertain future in their strife-torn homeland, that ruling should come from this Court, after full and careful consideration of the merits of their claims.[20]

By contrast, Justice Kennedy's memorandum to the Conference reflected the government's view that "to grant the writ and a stay only later to deny relief . . . would encourage numerous additional Haitians to flee in the interim. And if returned Haitians do indeed face greater risks than those who have not fled, our action could result in more persecution rather than less."[21] Justice Kennedy's arguments seem to have persuaded Justice Thomas, who had initially voted to deny the government's stay application. A journalistic account of the Court's deliberations (based on confidential interviews) later suggested that Justice Thomas, as the only African-American member of the Court, experienced deep inner turmoil over the Haitians' plight. But in time, Justice Thomas came to view the issue as a political, not a legal, question and

**17.** Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991); Haitian Refugee Ctr., Inc., 953 F.2d 1498, *cert. denied*, 502 U.S. 1122 (1992) (denying application for stay of mandate and petition for *certiorari*).

**18.** Memorandum from Justice Anthony M. Kennedy, Supreme Court of the United States, to the Conference 1 (Feb. 10, 1992) (on file with authors) [hereinafter 1992 Kennedy Memo].

**19.** *See* Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1122, 1122 (1992) (Stevens, J., statement respecting denial of *certiorari*) ("It is important to emphasize that the denial of the petition for writ of *certiorari* is not a ruling on any of the unsettled and important questions of law presented in the petition.").

**20.** *Id.* (Blackmun, J., dissenting from denial of *certiorari*).

**21.** 1992 Kennedy Memo, *supra* note 18, at 2.

for the rest of the refugee crisis, never again cast a vote in the Haitians' favor.[22]

### *The Second Circuit Litigation: Haitian Centers Council v. Sale (HCC)*

When the Supreme Court finally denied *certiorari* in *HRC*, ending that litigation, the U.S. government held some 3,000 Haitians incommunicado at Guantánamo, virtually all of whom the government had already found to have credible fears of political persecution. In March 1992, notwithstanding prior contrary representations to the Supreme Court, the Immigration and Naturalization Service (INS) determined to re-interview the Haitians held at Guantánamo without lawyers present and to send those who failed the test of political asylum back to Haiti to face possible persecution and death.[23]

Galvanized by this news, Yale Law School's Allard K. Lowenstein International Human Rights Clinic sued an array of U.S. government officials in Brooklyn federal court, asserting that lawyers and clients have a right to communicate with one another before the clients are returned to political persecution.[24] The suit invoked statutes, treaties,

**22.** *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 16 (2007):

> [T]he new justice was . . . anguished. He sympathized with the Haitians. He called Rehnquist for advice, and the chief referred Thomas to a favorite poem by Arthur Hugh Clough. "Say not the struggle naught availeth," the poem begins, urging fortitude in the face of battle. It then ends on a hopeful note: "Westward look, the land is bright." Thomas made a copy of the poem and slid it under the glass top of his desk, where he's kept it. He joined seven other justices and declined to intervene in the plight of the Haitian boat people. "I am deeply concerned about these allegations" of mistreatment in Haiti, Thomas wrote in a separate opinion explaining why the Court would not step in. "However, this matter must be addressed by the political branches, for our role is limited to questions of law."

**23.** Urging denial of *certiorari* in *HRC*, the Solicitor General had represented to the Supreme Court that the INS would bring all screened-in Haitians to the United States. But an internal INS memorandum by the General Counsel for the INS, written only five days after the Court denied cert. indicated that, in fact, HIV-positive screened-in refugees would be interviewed at Guantánamo without attorneys present, in interviews that were supposedly "identical in form and substance, or as nearly so as possible" to asylum interviews in the United States. Memorandum from Grover J. Rees, General Counsel, INS, to John Cummings, Acting Assistant Commissioner for Refugees, Asylum, and Parole, INS (Feb. 29, 1992) (on file with authors).

**24.** The internal clinic deliberations that led to the filing of the *HCC* case complaint are recounted in GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON *supra*, note 9, at 36–43, 45–59, and Clawson et al., *supra*, note 9, at 2350–54. The Allard K. Lowenstein International Human Rights Clinic was founded in 1991 as a clinical course at Yale Law School by Professor Harold Hongju Koh, Attorney Michael Ratner of the Center for Constitutional Rights, and a group of Yale law students.



and constitutional norms on behalf of a plaintiff class of screened-in Haitian refugees and several service organizations who sought to give the refugees legal advice: Haitian Centers Council, Inc., a Brooklyn Haitian service organization; New York's National Coalition for Haitian Refugees (now the National Coalition for Haitian Rights); and the Immigration Clinic of the Jerome N. Frank Legal Services Organization of the Yale Law School, all public service organizations that asserted First Amendment rights of access to the Guantánamo Haitians in order to give them legal counsel.

Remarkably, in the next fifteen months, the case went to the Second Circuit five times and the Supreme Court eight times. The suit evolved through three distinct phases: what we will call (1) an "access to counsel" phase of the Guantánamo case (*HCC–I*), which focused primarily on the clients' claimed constitutional right to speak to their lawyers before being returned to possible death or persecution; (2) a "*refoulement*" phase (the Direct Return case, *HCC–II*), where the refugees protested their direct return to their persecutors in the face of the proscriptions of the 1951 Refugee Convention; and (3) an "illegal detention" phase, also a part of *HCC–I*, the Guantánamo case, in which the refugees directly challenged on constitutional grounds their prolonged confinement in America's first HIV-concentration camp.

#### *The Access to Counsel Phase (HCC–I)*

In the first phase of the Guantánamo case, in March–April 1992, the plaintiffs won a temporary restraining order (TRO) and preliminary injunction before the district court, requiring that the Haitians detained at Guantánamo be afforded counsel before repatriation to Haiti. The Second Circuit denied the government's requests to stay these prelimi-

Its founding goal was to provide students with training in human rights lawyering by engaging in "transnational public law litigation," which seeks to challenge human rights abuses by securing the interpretation and enforcement of internationally recognized human rights standards in U.S. courts. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). The Clinic originated, by student request, as an arm of the Allard K. Lowenstein International Human Rights Project, a student-run organization founded at Yale Law School in 1981 to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights. Both the Clinic and Project took their name from Allard Lowenstein, the political activist and Yale Law graduate who had served as U.S. Ambassador to the U.N. Human Rights Commission in the Carter Administration. *See generally* WILLIAM H. CHAFE, NEVER STOP RUNNING: ALLARD LOWENSTEIN AND THE STRUGGLE TO SAVE AMERICAN LIBERALISM (1993). For an early account of the Clinic's work, *see* Thomas Scheffey, *Yale Project: Making Sure Torture Doesn't Pay*, CONN. L. TRIB., Mar. 11, 1991, at 1. The Lowenstein Clinic pioneered the growth of international human rights clinics around the country. *See generally* Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003).

nary rulings and ultimately upheld them on appeal on the merits.[25] But the government was unwilling to abide by either the District Court's preliminary injunction, or the Second Circuit's refusal to stay it. Instead, claiming that the injunction represented extreme interference with a military operation outside United States territory, Justice Department lawyers took the extraordinary step of petitioning directly to the Supreme Court for an emergency stay of Judge Johnson's ruling.

Justice Thomas, as Circuit Justice for the Second Circuit, referred the government's application to stay the preliminary injunction to the full Court. The Court swiftly entered a stay, by a 5–4 vote. Justices Blackmun, Stevens, O'Connor, and Souter dissented,[26] but the Haitian refugees never again came so close to prevailing in any part of the case.

### *The* Refoulement *Phase (HCC–II)*

#### Lower Court Proceedings

Even while the *HCC–I* appeal was pending before the Second Circuit, on Memorial Day of 1992, President Bush abruptly changed course and issued an executive order from his Kennebunkport vacation home, authorizing the Coast Guard to return all fleeing Haitians to Haiti without any process whatsoever.[27] Bush's "Kennebunkport Order" appeared to be a textbook case of *refoulement,* for it effectively erected a "floating Berlin Wall" around Haiti that prevented Haitians from fleeing anywhere, not just to the United States. The *HCC* plaintiffs invoked several counts in their existing complaint to return to Judge Johnson for a new TRO, now challenging the Kennebunkport Order as violating three inter-connected legal prohibitions: Article 33 of the Refugee Convention; Article 33's domestic statutory analogue, 8 U.S.C. § 1253(h) of the Immigration and Nationality Act (INA);[28] and the 1981 executive agreement between the United States and Haiti. These laws, the plaintiffs argued, imposed upon the U.S. government a unified mandate of *nonrefoulement:* executive officials shall not return political refugees with colorable asylum claims forcibly and summarily to a country where they will face political persecution.

Judge Johnson denied the plaintiffs' request for a TRO on the ground that Article 33 was not self-executing. But in an unusually

**25.** Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993).

**26.** McNary v. Haitian Ctrs. Council, Inc., 503 U.S. 1000 (1992) (entering stay pending disposition of government appeal to Second Circuit).

**27.** Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992).

**28.** 8 U.S.C. § 1253(h)(1) (1988) ("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 [his] . . . political opinion.").



candid statement, he added, "[i]t 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."[29] On expedited appeal, the Second Circuit adopted the Haitians' argument and declared the *refoulement* policy illegal, finding that the new Bush "direct return" policy violated the plain language of 8 U.S.C. § 1253(h)(1).[30]

In July 1992, for the third time in seven months, the government sought and won an emergency stay of a lower court order restricting its repatriation program. On July 31, 1992, just two days after the Second Circuit entered judgment enjoining the summary repatriation of refugees called for in the Kennebunkport Order, Justice Thomas advised the Court that the Solicitor General had requested an emergency stay.[31] Echoing Justice Kennedy's earlier memos in the Florida litigation, Justice Thomas framed the case from the government's perspective, emphasizing not human rights, but themes of law and order, foreign policy, and military affairs.[32] He emphasized the similarity of the New York and Florida cases and characterized the plaintiffs in *HCC–II* as "raising claims virtually identical to those raised and rejected in *HRC v. Baker.*"[33] Given the disagreement between the Second and Eleventh Circuits regarding the applicability of the INA to refugees on the high seas, Justice Thomas concluded that "[t]here can be little doubt the present case is cert-worthy." Moreover, Justice Thomas suggested, the Second Circuit had likely erred in its analysis of 8 U.S.C. § 1253 by concluding that the *HCC–II* plaintiffs had a right to judicial review and were not collaterally estopped by the *HRC* litigation. His memo ended by returning to themes of "foreign policy and other national interests;" he dismissed the balance of equities between the Haitians and the government as "probably about equal," and declared: "I expect to vote to grant the application."[34]

**29.** Haitian Ctrs. Council Inc. v. McNary, No. 92 CV 1258, 1992 WL 155853, at *12 (E.D.N.Y. 1992).

**30.** Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1360–63 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).

**31.** Memorandum from Justice Clarence Thomas, Supreme Court of the United States, to the Conference 1 (July 31, 1992) (on file with authors).

**32.** Justice Thomas began his analysis, "[p]ursuant to a proclamation and executive order issued by President Reagan in 1981, the Coast Guard has been intercepting vessels on the high seas suspected of transporting migrants for illegal entry into the United States and has repatriated such aliens to their home countries." *Id.*

**33.** *Id.* at 2.

**34.** *Id.* at 3–5.

The full Court quickly agreed with Justice Thomas, staying the Second Circuit's order by a vote of 7–2 and setting an expedited schedule for the government to file a petition for *certiorari*.[35] As in the Florida litigation, it was Justice Blackmun, joined by Justice Stevens, who viewed the case through a different lens. In his dissent from entry of the stay, Justice Blackmun questioned the government's likelihood of success on the merits, given that eight federal judges (one District Court and three Court of Appeals judges each in the Second and Eleventh Circuits) had now divided 4–4 on the applicability of § 1253 on the high seas. As a human rights matter, Justice Blackmun noted, "the plaintiffs in this case face the real and immediate prospect of persecution, terror, and possibly even death at the hands of those to whom they are being forcibly returned."[36]

The *HCC–II* plaintiffs well understood that the Court, having now granted a stay, would almost surely also grant *certiorari*. Hoping to expedite consideration, they asked the Court to treat the government's stay application as a petition for *certiorari*, to grant it, and to expedite briefing and argument on the merits. But this time, Circuit Justice Thomas circulated a memo opposing this motion and advocating "full briefing on the question of *certiorari*;" he reasoned that the plaintiffs had identified only the extraterritorial application of § 1253 as worthy of *certiorari*, whereas his prior memorandum had noted that the Court might also wish to grant review on the questions of collateral estoppel and the right to judicial review.[37] The Court agreed and deferred a vote on *certiorari* until October 1992.[38]

The parties' chief struggle in briefing the petition for *certiorari* concerned the questions for review. The government asked the Court to grant review on three additional issues: (1) whether judicial review was available to the refugees pursuant to the INA, the Administrative Procedure Act, or otherwise; (2) whether the *HCC–II* plaintiffs were collaterally estopped[39] by the Eleventh Circuit's decisions in *HRC*; and (3) whether equitable considerations, including separation of powers concerns and respect for the President's control of foreign affairs and military policy, required that the Second Circuit deny relief. Counsel for

**35.** McNary v. Haitian Centers Council, Inc., 505 U.S. 1234 (1992).

**36.** *Id.* (Blackmun, J., joined by Stevens, J., dissenting).

**37.** Memorandum from Justice Clarence Thomas, Supreme Court of the United States, to the Conference 1 (Aug. 4, 1992) (on file with authors).

**38.** McNary v. Haitian Centers Council, Inc., 505 U.S. 1236 (1992).

**39.** Collateral estoppel is a legal principle holding that a party who has actually litigated a necessarily decided issue, in a judgment which is final, and on the merits, may not attempt to re-litigate the same issue by refiling his case a second time. It was the government's view that the claims of the Haitian plaintiffs in HCC–II impermissibly overlapped with the failed claims of the plaintiffs in *HRC v. Baker* and thus were collaterally estopped.



the refugees, by contrast, emphasized that only the issue regarding the interpretation of § 1253 had divided the Second and Eleventh Circuits. The cert pool memo, by a law clerk to Chief Justice Rehnquist, recommended granting the government's petition.[40]

While the Court was deciding whether to review the Haitian refugee case during the summer and early fall of 1992 opinion, the refugee crisis also emerged as a major issue in the presidential campaign between George H.W. Bush and Bill Clinton. Shortly after the Second Circuit's July 1992 opinion, candidate Bill Clinton had praised the court for making the "right decision in overturning the Bush administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing."[41] In October 1992, the Court unanimously granted the government's petition for *certiorari* and soon set an expedited briefing schedule.[42] The government filed its opening brief on November 9, 1992. Three days later, at a press conference, now President-elect Bill Clinton reiterated his campaign criticism of the summary repatriation of Haitian refugees, declaring, "I think that the blanket sending [of the Haitians] back to Haiti under the circumstances which have prevailed for the last year was an error and so I will modify that process."[43] Taking the President-elect at his word, counsel for the refugees immediately moved to suspend briefing at the Supreme Court until one month after Clinton's inauguration. They hoped to moot the case, thereby avoiding an adverse ruling, once Clinton took office and made good on his repeated promises to change the direct return policy. With Justices Blackmun and Souter dissenting, however, the Court denied the motion to suspend briefing.[44] This ruling forced the refugee advocates to finalize their own merits briefs and a dozen amicus briefs elaborating upon each element of their position.[45]

**40.** Preliminary Memorandum from Celestine Richards, Law Clerk, to the Conference (Sept. 14, 1992) (on file with authors); *see also* Supplemental Memorandum from Celestine Richards, Law Clerk, to the Conference (Sept. 19, 1992) (on file with authors).

**41.** *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. NEWSWIRE, July 29, 1992. This statement echoed remarks Governor Clinton had made only three days after the Kennebunkport Order had been issued. *See Statement by Gov. Clinton on Haitian Refugees*, U.S. NEWSWIRE, May 27, 1992 ("I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum.... This policy must not stand."). For an extensive listing of candidate Clinton's statements, *see* Clawson et al., *supra* note 9, at nn. 61–63.

**42.** McNary v. Haitian Centers Council, Inc., 506 U.S. 814 (1992).

**43.** *The Transition: Excerpts from President-Elect's News Conference in Arkansas*, N.Y. TIMES, Nov. 13, 1992, at A18.

**44.** McNary v. Haitian Centers Council, Inc., 506 U.S. 996 (1992).

**45.** Amicus briefs were filed in support of the Haitians by three former Attorney Generals, the U.N. High Commissioner for Refugees, the Congressional sponsors of the

The Court did, however, delay calendaring oral argument until March 1993, de facto granting the refugees the time they had sought. But shortly before he took office, President-elect Clinton reversed course, abandoned his repeated pledge to rescind the Kennebunkport Order, and endorsed the Bush policy.[46] As a result, the Clinton Justice Department set about defending both the summary return policy and the legality of the Guantánamo internment before the courts.

### The Supreme Court's Deliberations[47]

Shortly before the Court held argument in *Sale* on March 2, 1993, Justice Blackmun's law clerk concluded his bench memo with the words: "It is very hard to predict what the Court will do with this case. Every day a different clerk suggests that a different issue is central to his or her justice. I imagine this one will generate ten opinions."[48]

At the Court's conference that Friday, as usual, the Chief Justice spoke first, followed by each Associate Justice, speaking in order of seniority. Because the Justices had communicated many of their substantive views on the legal issues during the extensive sparring over the 1992 stay motions, there may not have been much suspense. On the other hand, the Court had not previously benefited from full briefing and argument on the merits, so the outcome could not have been entirely free of doubt. As it turned out, however, the vote was not close. At Conference, the most significant division concerned the collateral estoppel argument,[49] which remained ancillary to the case, but whose disposition proved enormously consequential to the *HCC–I* half of the litigation.

Chief Justice Rehnquist began by expressing his view that the Haitians' claims were collaterally estopped by the Eleventh Circuit's prior decision in *HRC*. Should the Court reach the merits, he believed the President's actions were fully authorized and not barred by statute. Nor was the Chief Justice persuaded by what he perceived as the Second

Refugee Act, Americas Watch, Amnesty International, the NAACP, the Association of the Bar of the City of New York, the Lawyers' Committee for Human Rights, the American Immigration Lawyers Association, the International Human Rights Law Group, the American Jewish Committee, and various Haitian service organizations. For a description of how this "pyramidal briefing structure" came to be, *see* Koh, *Reflections, supra* note 9, at 10–11.

**46.** *Clinton Warns Haitians Not to Flee to U.S.*, L.A. TIMES, January 15, 1993, at A1 (justifying the decision on the grounds that "Boat departures in the near future would result in further tragic losses of life....")

**47.** This discussion is based on Justice Blackmun's detailed notes of the oral argument and the March 5, 1993 Conference, contained in Box 623 of the Blackmun Papers.

**48.** Bench Memorandum from Andrew Schapiro, Law Clerk to Justice Harry A. Blackmun, Supreme Court of the United States 40 (Feb. 27, 1993) (on file with authors).

**49.** *See* note 39, *supra*.



Circuit's "policy" arguments, which he characterized as "extremely weak." Speaking next, the senior Associate Justice, Byron White, expressed uncertainty about the collateral estoppel argument, but agreed that the President had authority to issue the Kennebunkport Order. Next came Justice Blackmun. His notes of the Conference are silent as to his own remarks, except to record that his was the sole vote to affirm the Second Circuit.[50]

If there was any suspense at the Conference, it probably peaked during the pause after Justice Blackmun finished speaking and before Justice Stevens began. Justice Stevens, after all, was the Court's only member consistently to have voted with Blackmun on the various stay motions and prior petitions for *certiorari*. Under any scenario, the Haitians could not prevail without Justice Stevens' vote. Justice Stevens began by agreeing that the Eleventh Circuit decision did not estop the Haitians from pursuing their claims, which were indeed subject to judicial review. On the merits, however, Justice Stevens disagreed with Justice Blackmun. Foreshadowing his eventual opinion for the Court, he observed that the Kennebunkport Order addressed not only the Attorney General, who was constrained by the immigration statutes, but the Coast Guard as well. Conceding that the plain language of § 1253(h) was "strong in favor" of the Haitians, Stevens nevertheless concluded that, in light of the Executive Branch's long-standing application of the statute only within the United States, the lack of clarifying legislative history, and practical concerns about the consequence of holding that the treaty restricted the President's power, the United States possessed the power to prevent mass immigration. Expressing an uneasiness that would later pervade his majority opinion, Justice Stevens closed by voting "with difficulty" to reverse the Second Circuit on the merits.[51]

Speaking in turn, Justices O'Connor and Scalia also voted to reverse. Justice Scalia opined that the case was more easily disposed of on the merits than on estoppel grounds and, according to Blackmun's notes,

**50.** Justice Blackmun's Conference notes are blank with respect to his own remarks, but his notes composed on March 1, 1993, the day of oral argument, make plain his view that the Haitians' "case on t[he] merits is very strong. Nothing ambig[uous] [about] t[he] lang[uage] or t[he] st[andar]d forbids [the] U.S. from returning any alien to his persecutor." Notes of Justice Harry A. Blackmun on Oral Argument, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92–344) (on file with authors). Nor was he persuaded that the respondents were collaterally estopped, because the "Fl[orid]a class ... did n[ot] include t[he] 'screened-in.'" *Id.*

**51.** Justice Blackmun's notes summarizing Justice Stevens's statement at Conference are far longer than those for any other justice. *See* Notes of Justice Harry A. Blackmun on Conference, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92–344) (on file with authors). It is not possible to know whether this reflects the duration of Justice Stevens's comments, or merely the close scrutiny that Justice Blackmun paid to them.

"t[ook] a shot" at the Second Circuit.[52] Like Justice Stevens, Justice O'Connor acknowledged the force of the Haitians' plain language argument, but found it overcome by legislative history and the presumption against extraterritoriality, as well as by the government's argument that § 1253(h) restricted only the Attorney General, not the President. Justices Kennedy, Souter, and Thomas all preferred the disposition first presented by Justice Stevens: reversing the Second Circuit on the merits rather than on the government's estoppel argument, for, as Kennedy observed (in Justice Blackmun's notes), the "case is too imp[ortan]t"[53] to be ducked on procedural grounds.

Justice Stevens circulated his first draft of the *Sale* majority opinion on Friday, May 14, 1993. Although Justice Blackmun advised the Conference the following Monday, May 17, that he would be circulating a dissent, the other Justices did not wait. The very next day, May 18, the Chief Justice and Justices O'Connor, Thomas, and Kennedy all joined Justice Stevens, giving him a majority within two business days after circulation. One day later, Justice White added a sixth vote.[54]

The most extensive comments on the Stevens draft came in a detailed memorandum from Justice Scalia, who "seriously object[ed] to the District Court's extensive criticism of U.S. policy" toward the Haitian refugees, which the Stevens draft had quoted at length.[55] "We should not be seen to approve such an extravagant incursion into political matters that were none of the judge's business," continued Scalia. "I would prefer that this note be deleted . . ."[56] Stevens agreed and deleted the challenged language.[57] Justice Scalia further requested a

**52.** *Id.*

**53.** *Id.*

**54.** Justice Kennedy included two suggestions for slight revisions to the Stevens draft, the first a clarification of the discussion of the treaty and the Supremacy Clause, and the second explaining that "I am a bit uneasy about putting presidential press releases into the *U.S. Reports*, in particular as aids to understanding formal Executive Orders.... The White House gets enough ink in other places." Memorandum from Justice Anthony M. Kennedy, Supreme Court of the United States, to Justice John Paul Stevens and the Conference (May 18, 1993) (on file with authors).

**55.** Draft Opinion of Justice John Paul Stevens at 11, n. 14, Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) (No. 92–344) [hereinafter Stevens Draft] (on file with authors).

**56.** Memorandum from Justice Antonin Scalia, Supreme Court of the United States, to Justice John Paul Stevens and the Conference 1 (May 20, 1993) [hereinafter Scalia Memorandum] (on file with authors).

**57.** Letter from Justice John Paul Stevens, Supreme Court of the United States, to Justice Antonin Scalia 1 (May 20, 1993) [hereinafter Stevens Memorandum] (copies forwarded to the Conference). Justice Stevens agreed to remove the District Court's statement that "[i]t is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it.... The Government's conduct is particularly



rephrasing of the reliance on legislative history regarding the 1980 amendments and seconded Justice Kennedy's request for clarification of the discussion of the treaty and the Supremacy Clause. Finally, Justice Scalia made two suggestions that he termed "minor:" first, he expressed reservations about describing Jean–Bertrand Aristide as "the first democratically elected president" of Haiti. "Twenty years from now, when it turns out he was Fidel Castro with a Roman collar, it may look strange in our opinion."[58] Second, Justice Scalia objected to the draft's mere mention of the "moral weight" of the Haitians' claim. "For my taste, that comes too close to acknowledging that it is morally wrong to return these refugees to Haiti, which I do not believe."[59]

Justice Stevens accommodated many of Scalia's requests, but not these last two. That same day, he replied, "[e]ven if Aristide turns out to be another Castro, the statement in the opinion is nevertheless accurate and I think appropriate because of the claim that the exodus has been motivated by the political turmoil in Haiti."[60] Justice Stevens also declined to ignore the "moral weight" of the Haitians' argument. "I think it is undeniable that it has *some* moral weight and I think it would be unfortunate for us to imply that we think it may have none."[61] Justice Scalia acceded and joined the majority that day. A week later, Justice Souter joined without comment.

Justice Blackmun circulated his lengthy dissent on Thursday, June 17, 1993, but Justice Stevens neither cited the dissent, nor revised his opinion in response. The following Monday, the Court handed down its opinion in *Sale*. Even with Justice Scalia's edits, the opinion is striking for its obvious discomfort with the policy it upheld. Cautioning that "[t]he wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration,"[62] the Court held that neither the *nonrefoulement* obligations of § 1253(h) of the INA, nor Article 33 of the Refugee Convention applied to Haitians apprehended on the high seas. Justice Stevens acknowledged the "moral weight" of the refugees' argument "that the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's bor-

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...." Stevens Draft, *supra* note 55, at 11, n. 14 (quoting Haitian Ctrs. Council v. McNary, No. 92–1258, 1992 WL 155853, at *12 (E.D.N.Y. 1992)).

**58.** Scalia Memorandum, *supra* note 56, at 2.

**59.** *Id.*

**60.** Stevens Draft, *supra* note 55, at 1–2.

**61.** *Id.* at 2.

**62.** HCC–II, 509 U.S. at 165 (internal citation and quotation marks omitted).

ders."[63] The Court closed by "by find[ing] ourselves in agreement" with the view that "[t]his case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."[64]

The Supreme Court's Decision

On close examination, the Court's opinion flouts all traditional rules of legal interpretation. As Justice Blackmun's dissent cogently observed, the Court's opinion in *HCC–II* rested on three implausible assertions: (1) that "the word 'return' does not mean return . . . [(2) that] the opposite of 'within the United States' is not outside the United States, and . . . [(3) that] the official charged with controlling immigration has no role in enforcing an order to control immigration."[65]

Justice Stevens's opinion first engaged in a long exegesis of the meanings of "*refouler*" and "return" in the statute and treaty and concluded that the legal prohibition on returning non-citizens somehow did not apply to this kind of return. But the Kennebunkport Order itself expressly authorized the Coast Guard "[t]o return" Haitian vessels and their passengers to Haiti, which was precisely the act that the law forbade. Justice Stevens never explained why the plain meaning of the French word "*refouler*" did not apply to the Haitian situation, especially when French newspapers were contemporaneously reporting that "Les États–Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde côtière" ("the United States has decided to directly *return* the refugees picked up by the Coast Guard.").[66]

Justice Stevens next reasoned that in 1980, Congress had extended the Refugee Act's protection from "any alien within the United States" to "any alien" without geographical limit, with the express intent of extending statutory protection only to foreign nationals physically, but not legally, present within the United States.[67] But if Congress meant to protect only noncitizens "physically present in the United States," why

**63.** *Id.* at 178–79.

**64.** *Id.* at 188 (Edwards, J., concurring in part and dissenting in part) (quoting Haitian Refugee Ctr., Inc. v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987).).

**65.** *Id.* at 189 (Blackmun, J., dissenting) (internal citations omitted).

**66.** *Le bourbier haïtien*, LE MONDE, May 31–June 1, 1992, *quoted in* HCC–II, 509 U.S. at 192 (Blackmun, J., dissenting) (emphasis added). *But see* Exec. Order No. 12,807, 57 Fed. Reg. 23,133, 23,133–34 (May 24, 1992) (appropriate directives will be issued "providing for the Coast Guard . . . to *return* the vessel and its passengers to the country from which it came." (emphasis added)).

**67.** Refugee Act of 1980, Pub. L. No. 96–212 § 202(e), 94 Stat. 102 (1980) (codified as amendment to 8 U.S.C. 1253(h).).



would it not use those exact words, as it did in numerous other places in the statute?[68] The fairest reading of Congress's decision to bar the return of "any alien" seemed to be that it meant to address all noncitizens, wherever they might be located—even outside U.S. territory. Invoking the so-called "presumption against extraterritoriality," however, Justice Stevens decided against the application of section 1253(h) to noncitizens stopped on the high seas.[69] But as Justice Blackmun pointed out, that presumption was designed primarily to avoid judicial interpretations of a statute that infringes upon the rights of another sovereign.[70] Logically, the presumption should have had no force or relevance on the high seas, where no possibility exists for conflicts with other jurisdictions.

Nor did it make sense to presume that Congress legislated with exclusively territorial intent when enacting a law governing a distinctively international subject matter—the transborder movement of refugees—to enforce an international human rights obligation embodied in a multilateral convention. Whether or not the Court properly applied the presumption against extraterritorial application to the statute, it should not have applied it to presume that the United States' obligations under Article 33 of the *Refugee Convention* are territorial.[71] To "presume" that parties to human rights treaties contract solely for domestic effect would have permitted the United States to commit genocide or torture on the high seas, notwithstanding the universal, peremptory prohibitions of the Genocide and Torture Conventions.

Even more bizarre, the Court chose to invoke the presumption against extraterritoriality in a case where the executive branch itself cited the statute as the basis for its very authority to act extraterritorially. If, as the Court concluded, the presumption operated to deny the Haitians extraterritorial statutory protection, *a fortiori* it should also have operated to deny the President extraterritorial authority to stop the Haitians in the first place. Indeed, just a week after applying the presumption in *HCC–II*, the Court *permitted* extraterritorial application of the Sherman Act to foreign conduct that produced a substantial anticompetitive effect in the United States, without invoking the presumption against extraterritoriality or explaining how that presumption had been overcome.[72]

**68.** *Compare* HCC–II, 509 U.S. at 175–80 *with* provisions cited in *id.* at 202–06, n. 15 (Blackmun, J., dissenting).

**69.** HCC–II, 509 U.S. at 173.

**70.** *Id.* at 205–07 (Blackmun, J., dissenting).

**71.** *See id.* at 183 ("[A] treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.").

**72.** Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993) ("Although the proposition was perhaps not always free from doubt, . . . it is well established by now that

Finally, the Court's decision triply misconstrued the Refugee Convention as a part of international human rights law. First, the Court read unambiguous treaty language to be ambiguous. Although both the statute and the treaty clearly mandated the mutually reinforcing requirement that the United States shall not return or "*refoule*" "any alien" or "refugee" to his persecutors, the Court denied that either "return" or "*refouler*" meant "return" in this context and re-construed "any alien" to mean "any alien physically present in the United States."[73]

Second, the Court declined to construe the contested language in light of the treaty's object and purpose. Justice Stevens expressly recognized that the drafters of the Refugee Convention "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; *such actions may even violate the spirit of Article 33.*"[74] Nevertheless, he construed the statute's words deliberately to offend the object and purpose of the treaty and the statute. As Justice Blackmun recalled, the

the Sherman Act applies" to certain extraterritorial conduct. (citation omitted)). Significantly, Justice Scalia's partial dissent for himself and three others who had joined the *HCC* majority invoked the canon that statutes should not be interpreted to conflict with international law. *See id.* at 814–15 (Scalia, J., dissenting). Yet if properly applied in *HCC–II,* that canon would have militated for, not against, extraterritorial application of the *nonrefoulement* provision of the INA. *See* HCC–II, 509 U.S. at 203, n. 13 (Blackmun, J., dissenting) (noting how the Court, erroneously "reasoning backwards, ... actually looks to the *American* scheme to illuminate the *treaty*" (emphasis in original)).

**73.** In arguing that Article 33 did not apply on the high seas, the Government further claimed that the term "*refouler*" meant to "expel," not to "return," and hence, barred only the forced expulsion of Haitian refugees who had already landed in the United States, not the forced return of those refugees intercepted en route. The government's reading of "*refouler*" as to "expel" created a pointless redundancy in Article 33: "no Contracting State shall expel *or expel* a refugee" to conditions of persecution. The government's interpretation also relied on a subsidiary definition of "*refouler*" in *Cassell's,* a non-authoritative French dictionary, not the definitions "to repulse ... drive back ... repel" provided in the authoritative *Dictionnaire Larousse* 631 (1981) (Francais, Anglais). When the meaning of French terms in a treaty is an issue, the Supreme Court has traditionally "relied on ... French dictionaries as a primary method for defining terms...." Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 537 (1991). The Court had used *Dictionnaire Larousse* as its authoritative French dictionary for more than a century, while never citing *Cassell's* (until its decision in *Sale v. Haitian Centers Council*). *See* Brief for Respondents at 15–16, nn. 21, 23, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92–344). Ordinary usage, as reflected in French newspapers, also confirmed that "*refouler*" accurately described the U.S. government's actions against the Haitian refugees. *See, e.g.,* Jean-Michel Caroit, *L'exode continue,* Le Monde, May 29, 1992, at 4 ("La décision du président Bush d'ordonner a la garde côtière americaine de refouler les boat-people haïtiens vers leur le pour tenter de mettre fin à un veritable exode a suscite. [President Bush's decision to order the U.S. Coast Guard to return the Haitian boat people to their island was an attempt to put an end to a genuine exodus.]" (emphasis added))

**74.** HCC–II, 509 U.S. at 183 (emphasis added).



refugee treaty's purpose was to extend international protections to those who, having fled persecution in their own country, could no longer invoke that government's legal protection.[75] He found it "extraordinary ... that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct."[76] Although the Convention was drafted to prevent a replay of the forced return of Jewish refugees to Europe, *HCC–II* would permit such a replay, so long as fleeing refugees were intercepted on the high seas.

Third, the Court not only subordinated text, but also elevated snippets of negotiating history into definitive interpretive guides. The Vienna Convention on the Law of Treaties directs that reliance on a treaty's negotiating history is the alternative of last, not first, resort.[77] Elsewhere, Justice Scalia had specifically argued that if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the parties.' "[78] Yet, in *HCC–II,* the Court reversed a decades-old interpretation of a multilateral treaty—the Refugee Convention—by relying on statements of two foreign delegates that were never commented or voted upon by the United States; that were never presented to or considered by the Senate during its ratification of the Refugee Protocol; and that were explicitly rebutted by a sworn affidavit submitted by the U.S. government official who negotiated the treaty.[79]

In short, the *HCC–II* Court ignored the plain meaning of statute and treaty to articulate an unprecedented domestic rule of "territorial *nonrefoulement.*" Remarkably, the majority assumed that Congress did not mean what it said when it ratified a mutually reinforcing statute and treaty: that the negotiating parties intended, through floor debate, to undercut the treaty's explicit object and purpose and that Congress had enacted universal human rights obligations governing trans-border activ-

**75.** *Id.* at 207 (Blackmun, J., dissenting).

**76.** *Id.* at 189 (Blackmun, J., dissenting).

**77.** Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 32 permits use of the negotiating history in treaty construction only as a last resort, and even then, only if a plain language analysis "leaves the meaning ambiguous or obscure" or leads to a "manifestly absurd or unreasonable result."

**78.** United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (quoting majority opinion, *id.* at 366).

**79.** *See* Affidavit of Louis Henkin, appended to Brief for the Respondents at 63, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92–344), *excerpts appended to* Koh, *Reflections, supra* note 9, at 44–47. Article 31 of the Vienna Convention on the Law of Treaties instructs courts to rely primarily on a treaty's language and purpose. Vienna Convention on the Law of Treaties, *supra* note 77, at 340.

ities with an exclusively territorial focus. As Justice Blackmun's law clerk wrote in his pre-argument bench memo:

> The longer I work on this case, the more convinced I become that the Gov[ernment's] statutory interpretation argument may not even pass the "straight-face" test.... There is nothing at all ambiguous about the [statutory] language: it clearly and explicitly forbids the Gov[ernmen]t from returning any alien to his persecutors. Is that what the Gov[ernmen]t is doing here? Unquestionably. That should be the end of the case, on the merits.[80]

### *Why the Haitian Boat People Lost*

If the majority's decision was so implausible, why was the vote so lopsided? In retrospect, the Supreme Court's ruling should have come as no surprise. The Court had foreshadowed its voting alignment more than a year earlier, when it denied *certiorari* to the Haitian Refugee Center's petition regarding the screened-out Haitians' due process rights, with only Justice Blackmun dissenting. The Court's internal memoranda from that period reveal that many justices appear already to have concluded that the INA did not apply beyond the territorial borders of the United States. Indeed, during the previous two years, the full Court had voted against the Haitians no less than eight times.[81] Most crucially, nearly a year before the opinion issued, by a 7–2 vote, the Court had stayed the Second Circuit's ruling blocking the Bush policy of summary return, thereby ensuring that the policy would continue for at least eleven months before plenary Supreme Court argument and decision.[82] Having tipped its hand by these acts, and effectively sanctioned *refoulement* in the interim, the Justices could now hardly turn around and declare the same policy illegal.

**80.** Bench Memorandum from Andrew Schapiro, Law Clerk to Justice Harry A. Blackmun, Supreme Court of the United States 35 (Feb. 27, 1993) (on file with authors).

**81.** The Court had thrice intervened to stay lower court rulings favoring the Haitians. *See* Baker v. Haitian Refugee Ctr., Inc., 502 U.S. 1083 (1992); McNary v. Haitian Ctrs. Council, Inc., 503 U.S. 1000 (1992); McNary v. Haitian Ctrs. Council, Inc., 505 U.S. 1234 (1992). Moreover, the Court had twice denied stay requests from Haitian refugee groups, Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1084 (1992); Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1122 (1992); had granted *certiorari* over the Haitians' opposition, McNary v. Haitian Ctrs. Council, Inc., 506 U.S. 814 (1992); and had denied their motions both to expedite briefing, McNary v. Haitian Ctrs. Council, Inc., 505 U.S. 1236 (1992), and to suspend briefing until after Inauguration Day, McNary v. Haitian Ctrs. Council, Inc., 506 U.S. 996 (1992).

**82.** McNary v. Haitian Ctrs. Council, Inc., 505 U.S. 1236 (1992). In addition, during the October 1992 Term, the Supreme Court had vacated or reversed the judgment of the Second Circuit in all but one of the eleven decisions for which it granted review. *See* Martin Flumenbaum & Brad S. Karp, *Second Circuit Review: Performance in the U.S. Supreme Court*, N.Y.L.J. at 3 (Sept. 22, 1993).



On reflection, the pivotal decision was not the Court's, but the President's. President Bush's issuance of the Kennebunkport Order was prompted at least in part by an election-year desire to avoid a replay of the Cuban Marielito boat crisis that had plagued the Carter presidency.[83] Bill Clinton's decision to maintain the Bush policy seems best ascribed to his desire, on the one hand, to avoid a replay of the "Fort Chaffee incident"—when Mariel Cubans seized an Arkansas penitentiary and doomed Clinton's first Governorship; and on the other, to avoid a refugee inflow that might distract attention from his ambitious domestic policy agenda.[84]

Once President Clinton had acted and Congress stood by, it became almost inevitable that the Supreme Court would validate the President's actions. For as soon as the Clinton Administration played the "presidential card" before the Supreme Court, adopting the Bush policy as well as its briefs, the handwriting was on the wall. After President Clinton had changed his position, Justices Kennedy, O'Connor, Souter, and Stevens—the potential swing votes—could only wonder, "[i]f two presidents can live with *refoulement* (including one who had repeatedly condemned it), why can't we?"

Thus, the *HCC–II* case is best remembered as part of a long line of Supreme Court precedents favoring presidential power in foreign affairs.[85] When *HCC–II* was decided, no president had lost a major foreign affairs case before the Court since the *Steel Seizure* case,[86] and presidents

**83.** *See, e.g.*, JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 533–34 (1982).

**84.** *See* DAVID MARANNISS, FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON 377 (1995) (The Fort Chaffee refugee uprising "was used to great advantage by [successful Arkansas] Republican [gubernatorial] challenger Frank White and his handlers, who replayed footage of the Fort Chaffee riot to associate Clinton with images of disorder and bad times."). In addition, the group that helped Clinton make the decision—a group that reportedly included the incoming Secretary of State, National Security Advisor and Deputy, and Secretary of Defense—included no one from Congress, the Justice Department, or with bureaucratic responsibility for the promotion and protection of human rights or refugees. Moreover, the incoming Clinton administration closely coordinated its Haitian policy with officials of the departing Bush administration, some of whom stayed on well into the early months of the Clinton administration specifically to handle Haiti policy. *See* Steven A. Holmes, *Bush and Clinton Aides Link Policies on Haiti*, N.Y. TIMES, Jan. 7, 1993, at A10; Thomas L. Friedman, *Clinton Rounds Out State Dept. Team*, N.Y. TIMES, Jan. 20, 1993, at A12.

**85.** *See generally* cases cited in HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 134–49 (1990). In at least one of these cases, Justice Stevens provided the President with the decisive vote on the merits. *See* Regan v. Wald, 468 U.S. 222 (1984) (upholding Reagan administration's authority to regulate travel to Cuba). Significantly, in *HCC–II* the Court refused to credit the Government's various claims of non-reviewability, thus avoiding broad future insulation of parallel executive conduct from judicial examination.

**86.** Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

had won many by asserting assorted justiciability defenses. Still, *HCC–II* added a new and surprising gloss to existing presidential power precedents. The Court docilely accepted the government's claim, newly minted for oral argument, that the case "concern[ed] the scope of the *President's* emergency powers to adopt measures that he deems to be necessary to prevent a mass migration of aliens across the high seas."[87] Yet the plaintiffs never challenged the President's constitutional authority to direct foreign and military policy. Neither President Bush nor President Clinton issued a new proclamation nor declared a national emergency to deal with the refugee problem. President George H.W. Bush's Executive Order did not even mandate that the Attorney General or Coast Guard return interdicted Haitians to Haiti. Instead, the President ordered only that "appropriate instructions" be issued, "provided ... that the [A]ttorney [G]eneral, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."[88] The plaintiffs argued that the President's Order could not grant the Attorney General such unreviewable discretion to return possible refugees, because the statute, treaty, and executive agreement had all *removed* that discretion from the President. Even on the high seas, they argued, the President's word is not the only law. Just as the Taft–Hartley Act had removed the Commerce Secretary's discretion to seize Youngstown's steel mills during the Korean War, section 1253(h) of the INA, Article 33 of the Refugee Convention, and the 1981 U.S.–Haiti Accord together removed the Attorney General's discretion to return fleeing refugees in far less emergent circumstances. Thus, properly understood, *HCC* fell within Category III of Justice Jackson's famous concurrence in *Youngstown,* in which the executive's "power is at its lowest ebb." Here, executive officials arguably acted in a manner "incompatible with the express or implied will of Congress,"[89] expressed in the statutory and treaty mandates that "[v]ulnerable refugees shall not be returned" to their persecutors.[90]

Curiously, the Court concluded that the statute's directive to the "Attorney General" did not intend to limit the president and the Coast Guard. This argument recalled the Reagan Administration's claim during the Iran–Contra Affair that the Boland Amendments' restriction upon United States agencies "involved in intelligence activities" somehow did not bind the National Security Council, even when it engaged in intelligence activities.[91] Yet here, Congress had carefully exercised its plenary power over immigration and directed that "the Attorney General ... shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens."[92] By mandating in 1980 that the Attorney General "shall not ... return any alien" to conditions of persecution, Congress had carefully removed the discretion of the Attorney General *and any of her agents*—including the Coast Guard—to respond to perceived crises with summary return of refugees.

In dictum, the Court also cited the infamous *Curtiss–Wright* case to suggest that the statutory presumption against extraterritoriality has "special" force when courts construe "statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."[93] But as Justice Blackmun correctly noted, "[t]he presumption that Congress did not intend to legislate extraterritorially has *less* force—perhaps, indeed, no force at all—when a statute on its face relates to foreign affairs."[94] In such circumstances, the presumption should have, in fact, run the other way, i.e., to favor extraterritorial application of United States law unless Congress otherwise indicated.

By overemphasizing the President's struggle to deal with the modest Haitian refugee outflow, the Court necessarily undervalued the human plight of the refugees themselves. Only Justice Blackmun, long a guardian of human rights, international law, and noncitizens, heard the Haitians' "modest plea, vindicated by the treaty and the statute," that

**87.** Transcript of Oral Argument (Deputy Solicitor General Maureen Mahoney) at 1 (emphasis added), Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92-344); *cf.* HCC–II, 509 U.S. at 187 ("[W]e are not persuaded that either [treaty or statute] places any limit on the president's authority to repatriate aliens interdicted beyond the territorial seas of the United States.").

**88.** Exec. Order 12,807, 57 Fed. Reg. 23,133, 23,134 (May 24, 1992).

**89.** Youngstown, 343 U.S. at 637 (Jackson, J., concurring). Indeed, *HCC* arguably presented an even less compelling case than *Youngstown,* inasmuch as the Taft–Hartley Act, unlike 8 U.S.C. 1253(h), did not expressly remove the lower executive official's discretion to perform the challenged act.

**90.** HCC–II, 509 U.S. at 190 (Blackmun, J., dissenting).

**91.** *Compare* HCC–II, 509 U.S. at 171–73 *with* Harold Hongju Koh, *Boland Amendments, in* 1 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 111 (Leonard Levy & Louis Fisher eds., 1994).

**92.** *See* 8 U.S.C. § 1103(a) (1988), *cited in* HCC–II, 509 U.S. at 201 (Blackmun, J., dissenting); *see also* HCC–II, 509 U.S. at 201 (Blackmun, J., dissenting) ("Even the challenged Executive Order places the Attorney General 'on the boat' with the Coast Guard."). As the statute notes, "The officers of the Coast Guard insofar as they are engaged ... in enforcing any law of the United States shall ... be deemed to be acting as agents of the particular executive department ... charged with the administration of the particular law ... and ... be subject to all the rules and regulations promulgated by such department ... with respect to the enforcement of that law." 14 U.S.C. § 89(b) (2007).

**93.** *See* HCC–II, 509 U.S. at 188 (*citing* United States v. Curtiss–Wright Export Corp., 299 U.S. 304 (1936)); *see also* KOH, *supra* note 85, at 94 ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the 'Curtiss–Wright, so I'm right' cite....").

**94.** HCC–II, 509 U.S. at 206–07.

"the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death."[95]

*The Illegal Detention Phase:* HCC–I

Even while the Supreme Court litigation raged in the Direct Return portion of the case, about 300 Haitian men, women, and children remained interned at Guantánamo. All had credible claims of political persecution, and many had already established full-fledged claims of political asylum. Nevertheless, they were barred from entering the United States, because most had the HIV virus.[96] When the Guantánamo phase of the case returned to Brooklyn federal court for consideration of permanent relief, the plaintiffs amended the complaint to challenge directly the legality of their confinement in America's first HIV concentration camp.

Following a two-week bench trial, Judge Johnson ordered the Guantánamo Haitians immediately released.[97] "If the Due Process Clause does not apply to the detainees at Guantánamo," Judge Johnson wrote, the government "would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin."[98] The court also held that the U.S. Government had violated American lawyers' First Amendment rights by denying them access to the Haitians for the purpose of counseling, advocacy, and representation and that the defendants had abused their statutory authority under the Administrative Procedure Act by conducting unauthorized asylum interviews at Guantánamo and denying parole to the screened-in Haitians.[99]

The Clinton Administration chose not to seek a stay of that order, and after filing a notice of appeal, settled the case.[100] The plaintiffs ultimately agreed that Judge Johnson's orders (but not his opinions) could be vacated on the ground that defendants had fully complied with those orders, in exchange for the defendants' agreement to dismiss their appeal and to pay an award of fees and costs totaling $634,100. Just thirteen days after Judge Johnson issued his post-trial decision granting permanent injunctive relief to the Haitian refugees still on Guantánamo,

**95.** *Id.* at 208 (Blackmun, J., dissenting).

**96.** *See* 8 U.S.C. § 1182(a)(1)(A)(i) (1993) (excluding from admission into the United States persons "determined . . . to have a communicable disease of public health significance").

**97.** HCC–I, 823 F.Supp. 1028.

**98.** *Id.* at 1042.

**99.** *Id.* at 1040–41, 1045–49.

**100.** *See* Stipulated Order Approving Class Action Settlement Agreement, Haitian Ctrs. Council, Inc. v. McNary, No. 92–1258 (E.D.N.Y. Feb. 22, 1994).



the government defendants finally released the last of the Guantánamo Haitians into the United States.

Although the Guantánamo portion of the case had been moving toward trial for months in the district court, it was very nearly derailed by the Supreme Court's actions in *HCC–II*. When the Justices met in Conference on March 5, 1993 to cast votes on *HCC–II*, Justice Blackmun's notes do not indicate that any Justice spoke to the potential impact that an estoppel ruling in *HCC–II* might have on the impending trial in *HCC–I*.[101] One cannot know how the Court would have ruled had it reached the estoppel issue, but Justice Blackmun's notes from Conference suggest the vote would certainly have been close.[102] The strong sentiment to reach the merits in *HCC–II*, however, and Justice Stevens's decision not to address the estoppel argument in his majority opinion, likely had momentous consequences for *HCC–I*. For had the Court agreed with the government that the issues and plaintiffs in *HCC–II* impermissibly overlapped with those in the Eleventh Circuit litigation, *HRC v. Baker*, (as Chief Justice Rehnquist began the Conference by suggesting), this decision would have precluded the district court from granting relief to the Haitians still at Guantánamo in *HCC–I* and denied the Clinton Administration the political option of accepting a trial defeat to allow the Guantánamo refugees to enter the United States.[103]

The Supreme Court's last brush with *HCC–I* came on June 21, 1993, the same day that the Court handed down its opinion in *HCC–II*. Justice Stevens circulated a "hold memo" to the Conference regarding the government's petition for *certiorari* to review the Second Circuit decision in *HCC–I*, which had affirmed a preliminary injunction in favor of the Haitians at Guantánamo. In light of the government's decision to comply with the district court's June 8 decision entering a *permanent* injunction in *HCC–I*, both sides advised the Court that the petition for *certiorari* to

**101.** *See* HCC–I, 823 F.Supp. at 1034 (noting that trial began March 8, 1993).

**102.** Justice Blackmun's notes indicate that Chief Justice Rehnquist argued most directly that the Haitians' claims were estopped, with Justices Scalia and Thomas agreeing the estoppel arguments were difficult. Justices Blackmun and Stevens stated their view that the claims were not estopped, with, apparently, both Justices Souter and Kennedy expressing sympathy for this position. Justice White was uncertain, and Justice Blackmun's notes on Justice O'Connor's view are unclear. *See* Notes of Justice Harry A. Blackmun on Conference, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92–344) (on file with authors).

**103.** President Clinton's then-Deputy National Security Adviser, Sandy Berger, later recalled, "A lot of people [in the Clinton Administration] were happy when we lost. The President was glad. I was glad." Eric Schwartz, a National Security Council staffer, explained, after the District Court's ruling, "We didn't have to take any affirmative action anymore. . . . In a political world it's very different to make an affirmative decision than to say you're complying with a court order." GOLDSTEIN, HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON, *supra* note 9, at 290.

review the *HCC I preliminary* injunction was now moot. In a memorandum to the Conference, Justice Stevens agreed and recommended that the Court grant the *HCC–I* petition for *certiorari* and vacate the Second Circuit decision as moot. He noted that Judge Johnson had held the Haitians' claims were not collaterally estopped, "an issue presented but left undecided in [*HCC–II*]."[104] Without amendment or dissent, on June 28 the Court entered the order that Justice Stevens proposed.[105]

But the end of the *HCC* litigation marked only a pause in the broader Haitian political crisis. As the Clinton Administration maintained its policy of direct return, domestic political pressure began to build. After months of silence, exiled President Aristide finally condemned the summary repatriation policy and announced that he would terminate the 1981 U.S.–Haiti Agreement as of October 1994.[106] The African–American community began drawing attention to the gross inconsistency of the Haiti policy with the U.S.'s international obligations and the discriminatory treatment of Haitians vis-à-vis Cubans and other immigrant groups. TransAfrica leader Randall Robinson undertook a hunger strike to publicize the Haitians' plight, personalizing the issue and becoming a focal point for media attention. The African–American community magnified its voice through the increasingly powerful forty-member Congressional Black Caucus (CBC), which in March 1994 sent President Clinton a letter announcing that "the United States' Haiti policy must be scrapped."[107]

In May 1994, President Clinton finally agreed. He appointed former Congressman William H. Gray, an African–American and former CBC member, as his new special envoy to Haiti, apparently acceding to Gray's demands that the Administration abandon its direct return policy. Finally, the U.S. encouraged the United Nations Security Council to adopt a "Desert Storm"-type resolution, authorizing member-states "to form a multinational force under unified command and control and, in this framework, to use all necessary means [including a military invasion] to facilitate the departure from Haiti of the military leadership" and to restore Aristide's government.[108] Four days later, American soldiers began landing in Haiti and, within days, numbered in the tens of thousands. Within a month, amid continuing street violence, the Haitian

**104.** Memorandum from Justice John Paul Stevens, Supreme Court of the United States, to the Conference 1 (June 21, 1993).

**105.** Sale v. Haitian Centers Council, Inc., 509 U.S. 918 (1993).

**106.** *See Aristide Ends Refugee Pact*, INT'L HERALD TRIB., Apr. 8, 1994.

**107.** Peter J. Boyer, *The Rise of Kweisi Mfume*, NEW YORKER, Aug. 1, 1994, at 34.

**108.** *U.N. Resolution for Invasion of Haiti*, N.Y. TIMES, Aug. 1, 1994, at A6; Richard D. Lyons, *U.N. Authorizes Invasion of Haiti To Be Led by U.S.*, N.Y. TIMES, Aug. 1, 1994, at A1.



Parliament had granted a limited amnesty, the coup leaders had resigned, and President Aristide had returned to Haiti in triumph.[109]

### *Why the Guantánamo Haitians Won*

Why did the Guantánamo Haitians win, while the Haitian boat people lost? On balance, the *HCC* litigation demonstrates the human rights impact of what one of us has called "transnational public law litigation."[110] As the case unfolded, *HCC* developed a sprawling transnational party structure. In addition to the U.S. government officials, Haitian refugees, and humanitarian service organizations who comprised the original party set, the amici curiae supporting the plaintiffs came to embrace a broad array of intergovernmental organizations, international human rights nongovernmental organizations (NGOs), domestic civil rights groups, "rule of law" proponents, refugee advocates, and members of Congress. The elaborate transnational claim structure intertwined statutory claims, constitutional claims, and claims based on both bilateral and multilateral agreements. These claims not only interlocked but also evolved, the "lead claim" shifting as the case moved from forum to forum.

Like all transnational public law litigation, the suit's focus was never backward-looking, but always prospective, evolving, and expanding. The plaintiffs began with a relatively modest aim: securing the right to counsel for Haitians being subjected to de facto asylum interviews on Guantánamo. But over time, the narrow right-to-counsel case *(HCC–I)* expanded into a broad legal challenge against most aspects of the U.S. government's policy toward Haitian refugees, ranging from the extraterritorial *refoulement* of Haitians fleeing Haiti *(HCC–II)* to the sustained offshore detention of HIV-positive Haitians on Guantánamo.

**109.** *See* Larry Rohter, *Haitian Bill Doesn't Exempt Military from Prosecution*, N.Y. TIMES, Oct. 8, 1994, at A4. In the years that followed, Aristide went on to complete a troubled presidency, marked by continued controversy, and Haiti remains a deeply troubled country today.

**110.** Transnational public lawsuits exhibit five distinctive features:

> a *transnational party structure,* in which states and nonstate entities equally participate; (2) a *transnational claim structure,* in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus,* fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.

Koh, *supra* note 24, at 2371.

From the start, the plaintiffs and their counsel recognized that the chances of ultimate success before the Supreme Court were slim. For that reason, their governing strategy was to provoke the articulation of norms by sympathetic judicial fora—the Eastern District of New York and the Second Circuit—and then to transport those norms to other fora for use in political bargaining. Once won, the lower court victories were used to focus press attention, to score points in Congress,[111] to influence the Clinton campaign and transition teams, and ultimately to bargain for the clients' interests in negotiations with the Justice Department.

In the early phases of the suit, the goal of plaintiffs and their counsel was simply to keep the refugee issue politically alive until Bill Clinton could be elected President and undo the Bush Administration's Haitian policies. As in memorable domestic public law cases involving such thorny public issues as prison reform[112] and school busing,[113] the judicial decisions in *HCC* set the bounds and allocated bargaining chips for a process of institutional dialogue among a number of fora and players concerned with different dimensions of the larger Haitian problem. Like other institutional reform litigants, upon winning injunctive relief from the district court, the plaintiffs in *HCC* pursued a strategy of "complex enforcement" in which court orders formed a relatively minor part of the overall remedy.[114] Most notably, the plaintiffs became de facto partners with the district judge and government in the running of the Guantánamo camp. Although the government consistently denied plaintiffs' right-to-counsel claim, arguing that the presence of counsel would disrupt the operation of the naval base, during the last nine months of the case the defendants acquiesced in the nearly continuous presence at Guantánamo of plaintiffs' lawyers, who frequently helped to mediate disputes between the military and the refugees.[115] Over time, it became apparent that defendants' right-to-counsel violations stood at the tip of

**111.** *See, e.g., U.S. Human Rights Policy Toward Haiti: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong. 98–99 (1992) [hereinafter *Hearing on U.S. Human Rights Policy Toward Haiti*] (statement of Harold Hongju Koh) (urging House Committee to investigate abuses on Guantánamo by citing district court preliminary injunction opinion); *U.S. Policy Toward Haitian Refugees: Joint Hearing and Markup on H.R. 5360 Before the Subcomm. on Int'l Operations and the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 102d Cong. (1992) [hereinafter *Hearing on U.S. Policy Toward Haitian Refugees*].

**112.** *See, e.g.*, Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

**113.** *See, e.g.*, Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

**114.** Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981) (describing judicial intervention in systemic enforcement of the Eighth Amendment).

**115.** *See* Clawson et al., *supra* note 9, at 2375–76.



the iceberg, as "[t]he desire to bring ongoing violation[s] to an immediate halt propel[led the] court inexorably to search for and eliminate their causes."[116] Bargaining in the shadow of the district court's injunctive orders, the plaintiffs, the INS, Justice Department officials, and various refugee resettlement groups engaged in an ongoing dialogue that led to the piecemeal parole of scores of refugees into the United States for health and humanitarian reasons, before final class-wide relief was judicially granted. In the endgame, the plaintiffs bartered *vacatur* of the district court's trial orders for the freedom of the Haitians held at Guantánamo, a governmental decision not to pursue one final appeal, and a compensatory award of fees and costs.[117]

In retrospect, the *HCC* suit won lower court declarations of illegality regarding both the policy of interdiction and prolonged detention and, during the year that appeals were pending, restored pressure on the executive branch to deal with the underlying political crisis. During the presidential campaign, candidate Bill Clinton used the court decisions as part of a broader attack on Bush's foreign policy. After Clinton took office and reversed course, the plight of the Haitian refugees became a grassroots political issue on which ordinary citizens began to take a stand, which by 1994 meant widespread dissatisfaction with the Administration's Haitian policy. Had the case simply died in the courts in February 1992, there would have been no similar focal point around which such political pressure could coalesce. Furthermore, the public outcry against the Supreme Court's decision arguably hastened the ultimate political decision to restore Aristide by military intervention.

In terms of precedent and human impact, the Guantánamo phase of the case alone vindicated the decision to bring the transnational lawsuit. On the precedential ledger, the plaintiffs won judicial enunciation of due process norms: both a ruling by a court of appeals (*HCC–I*) and a permanent injunction from the district court declaring that "aliens"—even those held outside the United States—have due process rights. These rights include decent medical care, freedom from arbitrary discipline, humane living conditions, and assistance of counsel in asylum hearings, which were violated by indefinite incommunicado detention in an HIV-internment camp.[118] Most concretely, the suit won the release

**116.** Note, *supra* note 114, at 630 (citation omitted); *see also id.* ("As the causes identified reveal deeper systemic deficiencies, they too must be addressed through increasingly expansive remedies.").

**117.** *See* Stipulated Order Approving Class Action Settlement Agreement, *supra* note 100.

**118.** HCC–I, 823 F.Supp. 1028. The Haitians also won a preliminary injunction to the same effect, later affirmed by the Second Circuit, which was vacated by the Supreme Court on other grounds. *See* Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot*, 509 U.S. 918 (1993).

and parole of some 310 Haitians held on Guantánamo, who began new lives in America.

### *Reflecting on Human Rights Practice and Pedagogy: The Lessons of HCC*

As time has passed, the Haitian refugee litigation has emerged as an important landmark for the law of detention at Guantánamo, for refugee law, and for human rights litigation and clinical legal education.

### *HCC and the Law of Detention on Guantánamo*

The Haitian crisis helped to publicize Guantánamo, which has today become a household word. When the crisis began in the 1990s, few Americans had ever heard of Guantánamo, apart from those who knew the song "Guantanamera"[119] or had seen the movie "A Few Good Men."[120] Since 1902, the United States has occupied the forty-seven-square-mile U.S. Naval Base in Guantánamo Bay under a unique, perpetual lease agreement entered between the United States and Cuba, which provides that "the United States shall exercise complete jurisdiction and control over and within such areas."[121] Thirty-one square miles of that base are on land, an area larger than Manhattan and nearly half the size of the District of Columbia.[122] The Haitian litigation joined a line of historical precedent strongly suggesting that fundamental constitutional rights and limitations on governmental authority apply to all persons detained at Guantánamo.[123] *HCC–I* then triggered years of intense litigation about the scope of the constitutional rights of foreign nationals detained there.

**119.** The 1929 tune "Guantanamera" ("girl from Guantánamo"), with lyrics attributed to Jose Marti and music by Jose Fernandez Diaz, popularized by American singer Pete Seeger, ranks among Cuba's best known patriotic songs. *See* La guantanamera: historia ¿conclusa?, http://www.juventudrebelde.cu/2004/julio-septiembre/sep-7/laguantanamera.html.

**120.** The 1992 Academy Award-nominated Rob Reiner film featured Jack Nicholson and Tom Cruise in a movie about a court-martial for acts at U.S. Naval Base Guantánamo Bay. *See* A FEW GOOD MEN (Castle Rock Entertainment 1992)

**121.** Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.–Cuba, T.S. No. 418.

**122.** *See* Navy Office of Information, Statistical Information, U.S. Naval Base, Guantánamo Bay, Cuba (1985); Wayne S. Smith, *The Base from the U.S. Perspective*, in SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 97, 98 (Wayne S. Smith & Esteban Morales Dominguez, eds. 1988).

**123.** For a definitive account of these historical precedents, *see* Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 15–32 (2004). We thank Professor Neuman for his scholarship and advocacy, which provided many of the examples given in this section.



As the Haitian crisis was winding down, in July 1994, about seventy Cuban refugees unsuccessfully sought to escape Castro's regime aboard the tugboat *13 de Marzo*. The survivors were forced to return to Cuba, where they were imprisoned by the Castro regime, triggering widespread protests there. In response, Fidel Castro temporarily allowed persons seeking exodus to leave Cuba, which led to more than 30,000 refugees fleeing toward Florida on makeshift rafts, relying on longstanding U.S. refugee policy granting asylum (and eventually permanent residence and citizenship) to fleeing Cubans under the Cuban Adjustment Act of 1966.[124] President Clinton "ordered that illegal refugees from Cuba will not be allowed to enter the United States [and instead] will be taken to the naval base at Guantánamo. . . ."[125] On September 9, 1994, the U.S. and Cuban governments signed an unprecedented agreement "recogniz[ing] their common interest" in preventing Cubans from leaving by sea, confirm[ing] that the Cubans "will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States" for indefinite detention, and agreeing to "arrange . . . the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994."[126]

A group of prominent Cuban–American attorneys, again assisted by Yale's Lowenstein International Human Rights Clinic, sued the Clinton Administration in federal court in Miami, seeking to enjoin the U.S. government from involuntarily repatriating Guantánamo detainees back to Cuba.[127] At the hearing on the TRO, a U.S. government lawyer asserted that "[t]he Cubans who are in safe haven at Guantánamo are without rights under our Constitution" or any other U.S. laws.[128] Judge Clyde Atkins, who had been the trial judge in the *HRC* case, rejected the government's claims. But on expedited appeal, in *Cuban–American Bar Ass'n (CABA) v. Christopher,* the Eleventh Circuit reversed, holding that "these [Cuban and Haitian] migrants are without legal rights that are cognizable in the courts of the United States. . . ."[129] The Eleventh

**124.** Pub. L. No. 89–732, 80 Stat. 1161 (Nov. 2, 1966).

**125.** The President's News Conference, 30 WEEKLY COMP. PRES. DOC. 1682 (Aug. 19, 1994).

**126.** U.S. Dep't of State, *U.S.–Cuba joint communiqué on migration*, DISPATCH, Sept. 12, 1994, at 5(37) [hereinafter Clinton–Castro Communiqué].

**127.** One of this Chapter's co-authors (Koh) was counsel of record for the Cuban detainees in the *CABA* case.

**128.** Transcript of Hearing at R5:27–73, Cuban American Bar Ass'n v. Christopher, No. 94–2183 (S.D. Fla. Oct. 26, 1994).

**129.** Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995). The Eleventh Circuit expressly disagreed with Judge Johnson's view in *HCC–II*, affirmed

Circuit further held that American lawyers have no First Amendment rights to communicate with or associate with their clients on Guantánamo because the clients themselves lack underlying rights.

The Guantánamo litigation of the 1990s thus generated pointed disagreement between the Second and Eleventh Circuits regarding a novel issue that resurged into public consciousness a dozen years later: the legal rights of non-citizens detained at Guantánamo.[130] Although the Second Circuit's decision in *HCC–I* was vacated as moot, and Judge Johnson's permanent injunction ruling was vacated by settlement, those courts' position in *HCC* remains the far better-reasoned "law of Guantánamo." For read literally, the Eleventh Circuit's ruling that "the First Amendment does not apply to the migrants or to the lawyers at Guantánamo Bay" would permit the United States government to bar American citizens at Guantánamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, and would free U.S. officials to punish Americans at Guantánamo for writing open letters, criticizing the President, or even engaging in religious worship.[131] Similarly, the panel's holding that Cuban refugees on Guantánamo "are without legal rights that are cognizable in the courts of the United States" would theoretically free American officials to terrorize or torture those refugees deliberately, to starve them, to subject them to forced abortions and sterilizations, or to discriminate against them based on the color of their skin.

The *HCC–I* rulings, by contrast, acknowledged that, although Guantánamo Bay Naval Base lies outside the formal borders of the United States, in all other senses, it "feels" like America.[132] The United States provides the only law and is accountable there only to itself. Of all the U.S. overseas military bases, only Guantánamo lacks a Status of Forces Agreement that defines the allocation of civil and criminal jurisdiction

by the Second Circuit, that Guantánamo is subject to U.S. law, by virtue of being under exclusive U.S. jurisdiction and control.

**130.** *Compare* Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (affirming preliminary injunction because plaintiffs were likely to succeed on their constitutional claims), *vacated as moot sub nom.* Sale v. Haitian Centers Council, Inc., 509 U.S. 918 (1993), *with* Cuban–American Bar Ass'n, 43 F.3d 1412 (denying that rights exist).

**131.** Cuban American Bar Ass'n, 43 F.3d at 1429. These examples are not merely hypothetical. In March 1995, for example, U.S. authorities at Guantánamo apparently excluded paintings by Cuban refugees from a Guantánamo art show because they were critical of U.S. policy. Pamela S. Falk, *Trapped in Cuba*, N.Y. TIMES, April 15, 1995, at 19.

**132.** *See* Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel*, ORLANDO SENTINEL, Dec. 22, 2003, at A1. Wayne S. Smith, *The Base from the U.S. Perspective*, *in* SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 97, 98 (Wayne S. Smith & Esteban Morales Dominguez, eds. 1988). In 2003, the base commander described it as "small-town America," Carol Rosenberg, *New chief brings Guantánamo up to date*, MIAMI HERALD, Oct. 25, 2003, at A15.



over military and other personnel. Over the years, thousands of foreign nationals have been employed as laborers at Guantánamo—including Cubans, Jamaicans and Filipinos—whom the Eleventh Circuit's ruling would leave without legal recourse.[133] Historically, the parallel judicial treatment of the Panama Canal Zone and the Trust Territory of the Pacific Islands—both non-sovereign territories under the complete jurisdiction and control of the United States—also recognized the application of fundamental constitutional rights to foreign nationals within those territories.[134] Finally, given that all manner of federal law applies at Guantánamo—from environmental regulation of iguanas to the federal Anti–Slot Machine Act[135]—it would be bizarre indeed if the Bill of Rights did not apply to human beings held against their will by the U.S. government in the same place.

The Eleventh Circuit's ruling in the Cuban case effectively invited the U.S. government to establish an offshore "rights-free zone" on Guantánamo. Although American detention camps were not new, especially for refugees, the *CABA* case enhanced the possibility that Guantánamo could be used as a long-term offshore detention facility.[136] Accordingly, during the 1990s, the U.S. Government repeatedly used Guantánamo as a holding center for thousands of asylum seekers captured at sea from Haiti, Cuba, and even China.[137] During the Kosovo Crisis of spring 1999, the Clinton Administration briefly considered, but ultimately withdrew, a plan to bring 20,000 Kosovar refugees to Guan-

**133.** *See* Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans*, COMMERCIAL APPEAL (Memphis, TN), Feb. 1, 2002, at A7 (noting presence of 1000 foreign workers), *available at* 2002 WLNR 7300249; *Filipino residents register to vote*, 63(34) GUANTÁNAMO BAY GAZETTE 4 (Aug. 25, 2006), *available at* https://www.cnic.navy.mil/navycni/groups/public/@pub/@southe/@guantanamobay/documents/document/cnic_048662.pdf (700 Philippine nationals on Guantánamo registered to vote in home country).

**134.** *See generally* Neuman, *supra* note 123.

**135.** *Installation of Slot Machs. on U.S. Naval Base, Guantánamo Bay*, 6 Op. Off. Legal Counsel 236, 237, 242 (1982); Transcript of Oral Argument at 43, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03–334 & 03–343) (Justice Souter noting that "[w]e even protect the Cuban iguana"), *available at* 2004 WL 943637.

**136.** Such camps include those holding more than 110,000 Japanese–Americans during World War II, *see, e.g.*, PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); MANZANAR (J. Armor & P. Wright, eds., 1988); the several military bases within the United States processing thousands of refugees fleeing Vietnam in the mid–1970s; the facilities that held the 125,000 Cubans of the 1980 Mariel "Freedom Flotilla," some still lingering in detention, *see* Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Federal Crisis Management*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1983); and the thousands of Central American refugees detained in tent-shelters and various federal facilities in Arizona, California, South Texas, Louisiana and Florida, *see generally* Koh, *America's Offshore Refugee Camps*, *supra* note 9.

**137.** *See, e.g.*, United States v. Li, 206 F.3d 56, 69 n. 1 (1st Cir. 2000) (Torruella, C.J., dissenting) (noting government's use of Guantánamo as an interim detention center for interdicted Chinese in 1996).

tánamo, based in part on opposition from those familiar with the Haitian refugee debacle.[138]

Nevertheless, shortly after the terrorist attacks of September 11, 2001, President George W. Bush chose to bring more than 700 alleged Al Qaeda detainees—most apprehended in Afghanistan, but including individuals picked up in Pakistan, the United Arab Emirates, Bosnia, and the Gambia, among other countries—to Guantánamo, with no apparent exit strategy. In short order, Guantánamo became a center of intense international controversy over America's commitment to human rights.[139] Before the first 9/11 detainees were brought to Guantánamo, the Bush Justice Department's Office of Legal Counsel concluded, after a review of existing case law, that "a detainee could make a non-frivolous argument that [habeas] jurisdiction does exist over aliens detained at [Guantánamo Bay, Cuba], and we have found no decisions that clearly foreclose the existence of habeas jurisdiction there."[140] Nevertheless, in three plenary cases that went to the U.S. Supreme Court, the Bush Administration unsuccessfully argued that non-citizen detainees lacked meaningful legal rights on Guantánamo.

In *Rasul v. Bush*, the Court held that non-citizen detainees on Guantánamo have a statutory right to file petitions for a writ of habeas corpus to challenge their detention.[141] Justice Stevens, writing for the *Rasul* Court, noted that "the United States exercises exclusive jurisdiction and control" at Guantánamo.[142] Justice Kennedy agreed in concurrence that "Guantánamo Bay is in every practical respect a United

**138.** *See* Philip Shenon, *U.S. Chooses Guantánamo Bay Base in Cuba for Refugee Site*, N.Y. TIMES, April 7, 1999.

**139.** For critical accounts of the U.S. detention policy there, *see, e.g.*, MICHAEL RATNER & ELLEN RAY, GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW (2004); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006), and DAVID ROSE, GUANTÁNAMO: THE WAR ON HUMAN RIGHTS (2004).

**140.** *See* Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'y Gens., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba* (Dec. 28, 2001), *available at* http://www.pegc.us/archive/DOJ/20011228_philbinmemo.pdf.

**141.** 542 U.S. 466 (2004). Each author of this Chapter served as counsel on an amicus brief filed in support of the detainees in *Rasul*.

**142.** *Id.* at 476. Although the Court's ultimate holding in *Rasul v. Bush* was statutory and jurisdictional, in a key footnote, the Court suggested that detainees at Guantánamo do have valid claims to constitutional protection, stating that "allegations that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing, *unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'* " *Id.* at 483, n. 15 (2004) (emphasis added) (quoting 28 U.S.C. § 2241(c)(3)); *see also* In re



States territory."[143] In contrast to his approach in *HCC–II*, Justice Stevens held in *Rasul v. Bush* that the presumption against extraterritoriality of U.S. law had no application at Guantánamo, because petitioners were being "detained within 'the territorial jurisdiction' of the United States."[144]

Two years later, in *Hamdan v. Rumsfeld*, the Court again ruled in favor of an alleged "enemy combatant" held at Guantánamo, both on jurisdictional grounds and on the merits.[145] Justice Stevens, now writing for a 5–3 Court, found the President's Nov. 2001 Military Commissions Order unauthorized by either his constitutional Commander-in-Chief Power or the September 2001 Authorization of Use of Military Force Resolution (AUMF) passed by Congress. The Court further ruled that the Order violated the Uniform Code of Military Justice (UCMJ), which calls for military commissions to be as much like statutory courts-martial as "practicable," and Common Article 3 of the Geneva Conventions of 1949, which set minimum universal standards for treatment of detainees, including trials before "regularly constituted courts." Calling President Bush's military commissions an "extraordinary measure raising important questions about the balance of powers in our constitutional structure,"[146] the Court roundly rejected the Administration's extreme constitutional theory of executive power and invalidated a military proceeding against a non-citizen detainee on Guantánamo as unauthorized by law.[147] The *Hamdan* Court followed its earlier insistence in *Rasul*[148] that Guantánamo be treated as a land subject to law by rejecting the Administration's attempt to depict Hamdan as a person outside the law. Even while acknowledging that Hamdan might have committed serious crimes, the Court nevertheless proclaimed that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[149] By so saying, the Court rejected the Government's premise that 9/11 had created a new "crisis paradigm" that somehow required that ordinary legal rules be jettisoned in Hamdan's case.[150]

Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 462 (D.D.C. 2005), *rev'd sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

**143.** *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

**144.** *Id.* at 480 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

**145.** 548 U.S. 557 (2006).

**146.** *Id.* at 567.

**147.** *See generally* Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006).

**148.** 542 U.S. 466 (2004).

**149.** *Hamdan*, 548 U.S. at 635.

**150.** As Justice Kennedy put it, "a case that may be of extraordinary importance is resolved by ordinary rules ... those pertaining to the authority of Congress and the

After *Hamdan*, Congress quickly passed the Military Commissions Act of 2006 (MCA), which authorized the President to try "alien unlawful combatants," including those held on Guantánamo, before military commissions.[151] In *Boumediene v. Bush*, the Bush Administration argued that Congress had constitutionally abolished Guantánamo detainees' constitutional right to a writ of habeas corpus by enacting the MCA. The D.C. Circuit agreed, reasoning that the MCA abridged no rights protected by the Suspension Clause, because "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government."[152] But in June 2008, the Supreme Court reversed that ruling, holding that "aliens designated as enemy combatants" and detained at Guantánamo "have the constitutional privilege of habeas corpus" to challenge the legality of their detentions in federal court.[153]

Justice Kennedy's majority opinion for five justices emphasized that habeas corpus is "a vital instrument to secure" the fundamental "freedom from unlawful restraint," and "an essential mechanism in the separation-of-powers scheme" that undergirds the American democratic system; accordingly, he found the attempt in the Military Commissions Act to restrict that right a violation of the Suspension Clause of the Constitution.[154] In so holding, the majority specifically rejected the government's twin claims that the detainees' status as designated enemy combatants and physical location outside the territorial United States stripped them of their constitutional right to petition for the writ. Significantly, the Court rejected the Government's proposed "sovereignty" test, under which noncitizens would have a constitutional right to habeas only on the sovereign territory of the U.S., as effectively granting

interpretation of its enactments." Rather than embracing ad hoc, crisis solutions, he argued, "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring in part).

**151.** Pub. L. No. 109–366, 120 Stat. 2600 (Oct. 17, 2006). The MCA states "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *Id.* § 7(a), as amended by Pub. L. 110–181, Div. A, § 1063(f) (codified at 28 U.S.C. § 2241(e)).

**152.** Boumediene v. Bush, 476 F.3d 981 at 991 (D.C. Cir. 2007). With respect to Guantánamo, the D.C. Circuit essentially reasserted its own prior analysis in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), which had been previously rejected by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004).

**153.** Boumediene v. Bush, 128 S.Ct. 2229, 2240 (2008).

**154.** *Id.* (citing U.S. CONST. art. I, § 9, cl.2).



the political branches "the power to switch the Constitution on or off at will."[155]

Choosing instead a "functional approach," Justice Kennedy emphasized that "practical concerns, not formalism," are paramount when determining whether noncitizens detained by the U.S. have a constitutional right to challenge their detentions via habeas. The detainee's citizenship, the sovereignty of the detention site, the "status" of the detainees, "the adequacy of the process" for determining enemy combatant status, "the nature of the sites where apprehension and then detention took place," and "the practical obstacles inherent in resolving the prisoner's entitlement to the writ" all made it appropriate to extend Suspension Clause protections to Guantánamo.[156] Finally, the majority found that the Combatant Status Review Tribunal process created by the Executive Branch to determine prisoners' status fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[157]

By the time *Boumediene* was decided, the costs of using Guantánamo as an offshore detention facility had become glaring. The number of detainees on the base had shrunk to 300, with only a dozen or so considered "high-value." High-security facilities had been built at a cost of $54 million and the base had an annual operating cost of $100 million. Yet for all the expenditure of time and reputation, in six years, the U.S. Guantánamo policy had yielded only one guilty plea, four suicides (out of forty-one attempts), and widespread public conviction that the offshore Guantánamo prison camp should be closed as a human rights disaster.[158]

*HCC–II* yielded another important legacy. Many of the lawyers involved in the 9/11 Guantánamo litigation first grappled with these issues in the original Haitian cases.[159] And when the Supreme Court finally ruled that noncitizens held on Guantánamo have a constitutional right to a writ of habeas corpus, ironically, the Justices who arrived at that conclusion—Stevens and Kennedy—were the intellectual authors of the approach that had led to the Haitians' loss in *HCC–II*. Thus, sixteen

**155.** *Id.* at 2259.

**156.** *Id.*

**157.** *Id.* at 2260.

**158.** David Bowker & David Kaye, *Guantánamo by the numbers*, N.Y. TIMES, Nov. 10, 2007, at A15. Those making public statements suggesting that the Guantánamo camps be closed included the Secretary of Defense, the Attorney General, eight Democratic and two Republican presidential candidates, several of America's closest allies—France, Germany, and the United Kingdom—and even President Bush himself.

**159.** This group includes the authors, Michael Ratner, Lucas Guttentag of the ACLU, Professors Sarah Cleveland of Columbia, Gerald Neuman of Harvard, Neal Katyal of Georgetown (who argued the *Hamdan* case), the current incarnation of Yale Law School's Lowenstein International Human Rights clinic, and many others.

years after *HCC* began, the Supreme Court finally established, once and for all, that Guantánamo is not a law-free zone.

### *HCC and Refugee Law*

Although the Supreme Court made bad law in *HCC–II*, the limited precedential weight of the Court's ruling has minimized its impact on the development of refugee law. The Haitian interdiction program was almost uniquely discriminatory, in which the Coast Guard stopped Haitian boats on the high seas pursuant to the 1981 United States–Haiti Accord, a rare agreement that provided no general authority for the Coast Guard to intercept and return refugees from other countries for whom no such accord exists.

Nor did the Supreme Court's decision in *HCC* resolve the legality of the interdiction policy under international, as opposed to U.S. domestic, law. Other human rights groups pressed arguments similar to those urged by the *HCC* plaintiffs against the U.S. government's direct return policy before the Inter–American Commission on Human Rights, which declared "... The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its amicus curiae brief before the Supreme Court, that Article 33 had no geographical limitations."[160] Immediately after *HCC–II* came down, the United Nations High Commissioner for Refugees declared that it considered the Court's decision a "setback to modern international refugee law," because the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. More recently, in an advisory opinion issued in January 2007, the UNHCR stated that

> the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.... Thus, an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party ... would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position ... that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.[161]

In stating this conclusion, the High Commissioner expressly rejected the Supreme Court's argument in *HCC–II*, stating: "UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention.[162] Instead, the High Commissioner followed the reading of the text and negotiating history of the Refugee Convention in Justice Blackmun's dissent. Significantly, in the past the Supreme Court has held that the UNHCR's interpretation of its own treaty should " 'provid[e] significant guidance in construing the [1951 Refugee] Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.' "[163]

What these international rulings show is that adverse U.S. Supreme Court decisions are no longer final stops, but way stations, in the process of complex enforcement triggered by transnational public law litigation. However unfamiliar this argument may be to American lawyers, European human rights litigants have long understood that adverse national court decisions may be "appealed" to and even "reversed" by the European Court of Human Rights. As one of us has argued, a *transnational legal process* pressures nations who flout international law rules back into compliance with those rules.[164] Law-abiding states tend to incorporate international law into their domestic legal and political structures. Thus, when such a state violates international law, that violation creates frictions and contradictions that affect its ongoing participation in the transnational legal process. Indeed, transnational public law litigation of the "institutional reform" type aims precisely to provoke judicial action that will create such frictions, thereby helping

**160.** *See* The Haitian Centre for Human Rights et al. v. United States, Case 10,675, Inter–Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, Doc. 7 rev. at 550 (1997); *see also* discussion of Case No. 10,675 in *Petitioners Release Resolution of the Inter–American Commission on Human Rights Concerning U.S. Program of Haitian Refugee Interdiction*, 32 I.L.M. 1215 (1993).

**161.** *See* United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non–Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, at ¶¶ 24 & 43 (January 26, 2007), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=45f17a1a4.

**162.** Id. at ¶ 24, n. 54.

**163.** INS v. Cardoza–Fonseca, 480 U.S. 421, 439 & n. 22 (1987) (discussing the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status).

**164.** *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

shape the normative direction of governmental policies. Even resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in transnational legal interactions. Through a complex process of rational self-interest and norm internalization—at times spurred by transnational litigation—international legal norms seep into and become entrenched in domestic legal and political processes. In this way, international law helps drive how national governments conduct their international relations.

Fittingly, Justice Harry Blackmun was the first to recognize this point, at a speech to the American Society of International Law shortly after his retirement in 1994. Criticizing *HCC–II,* Justice Blackmun said, "To allow nations to skirt their solemn treaty obligations and return vulnerable refugees to persecution simply by intercepting them in international waters is ... to turn the Refugee Convention into a 'cruel hoax.' ... We perhaps can take some comfort," Justice Blackmun said, "in the fact that although the Supreme Court is the highest court in the land, its rulings are not necessarily the final word on questions of international law."[165]

### *HCC: Beyond Litigation and Clinical Legal Education*

Finally, the story of the *HCC* litigation reveals important lessons for human rights litigation and for contemporary social justice campaigns. *HCC–I*, the more successful strand of the case, resulted in the shuttering of the world's first HIV detention camp and the lawful admission of nearly 300 refugees into the United States. This outcome actually reflected two victories, each necessary, but neither alone sufficient to liberate the Haitians. In June 1993, following trial in the Eastern District of New York, Judge Johnson entered a permanent injunction ordering that the refugees "be immediately released (to anywhere but Haiti)."[166] Because no other nation would accept the refugees, this order amounted to a directive to permit the Haitians to enter the U.S. Had the Haitians failed to prevail on the myriad factual and legal disputes at trial, there seems no possibility that the government would ever have admitted them.[167] At a time when some skeptics (and even some human rights advocates) disparaged litigation as a blunt instrument for promoting social change—a time-consuming, resource-intensive, lawyer-dominated process played out before a conservative judiciary—the *HCC–I* trial outcome offered an important counter-example. *HCC* showed that affirmative litigation still matters, and can play a crucial role in effectuating policy change as well as delivering individual justice.

**165.** Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 44, 42 (1994) (quotations omitted).

**166.** HCC–I, 823 F.Supp. at 1049.

**167.** Joseph Tringali of the firm of Simpson, Thacher & Bartlett, and Lucas Guttentag of the ACLU Immigrants' Rights Project, served as lead counsel at trial.



But all counsel involved also understood that the victory after trial, standing alone, could not secure the release of the Haitian refugees. The government had the right to appeal the permanent injunction to the Second Circuit and would likely have secured a stay pending appeal from either the Second Circuit or the Supreme Court. Even if the Second Circuit had affirmed the trial judgment, the Haitians' counsel understood the significant likelihood of another grant of *certiorari* and eventual reversal by the Supreme Court. Freedom for the refugees, thus, depended on a second struggle outside the courtroom, in the realm of politics and public opinion.[168] That victory arrived days after the trial decision, when the voice of Webb Hubbell, a close colleague of President Clinton and then the Associate Attorney General, came booming over a speakerphone in a conference room at Simpson Thacher to announce that the government had decided to let the Guantánamo Haitians in.[169] As described by one official involved in the decision to admit the Haitians—rather than to appeal and seek a stay—senior Clinton Administration officials had "no desire" to continue detaining the refugees on Guantánamo.[170] To the best of this official's recollection, there had been significant concern about the potential public and congressional reaction to a unilateral decision to admit the refugees, but the trial opinion by Judge Johnson supplied an opportunity to "resolve the situation in a humanitarian way."[171] Consequently, the government declined to seek an immediate stay of Judge Johnson's order and the refugees were admitted to the U.S., for resettlement in New York and southern Florida.

The presence within the Administration of senior officials eager to close the Guantánamo HIV camp helped secure the release of the Haitians and confirms the importance of an "inside" advocacy strategy pursued by counsel for the refugees and their allies.[172] But benign intervention by benevolent leaders was likely not the full story, for there

**168.** Michael Ratner, *How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 217 (1998) ("Looking back, I believe that the political climate created by our organizing work around Guantánamo is the only thing that protected the court victory.").

**169.** *See* GOLDSTEIN, HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON, *supra* note 9, at 288.

**170.** Telephonic interview by Michael Wishnie with Eric Schwartz, former National Security Counsel staff (Jan. 2, 2008).

**171.** *Id.*

**172.** *See* Ratner, *How We Closed*, *supra* note 168 (discussing "inside" and "outside" advocacy strategies).

had been sympathetic officials in the first Bush Administration as well.[173] From the start of the case in early 1992, counsel had actively sought to explain their cause in the media, before Congress, to other civil society institutions, and on the street. This "outside" advocacy strategy—complementary to the plaintiffs' litigation strategy—sought allies in the media and political elites, as well as among local government officials, students, and grassroots activists. Over the eighteen months of the litigation, members of the legal team worked the telephones and traveled to Washington to lobby members of Congress and their staff, to meet and strategize with influential AIDS, civil rights, and human rights NGOs; to pitch stories to the national media;[174] and to collaborate with prominent civil rights and entertainment leaders such as the Rev. Jesse Jackson, director Jonathan Demme, and actress Susan Sarandon on high-profile public events.[175] In addition, the legal team pursued a bottom-up, grassroots strategy that included engagement with local AIDS and Haitian activists in New York City, resulting in modest local protests and outreach to regional and independent media, as well as municipal officials in New York, Boston, Seattle, and elsewhere. These constituencies came to support the resettlement of the refugees and offered the Clinton Administration the local political support necessary for release after trial.[176] As condemnation of the Guantánamo camps grew, so too

**173.** *See id.* at 205 ("For months I spoke daily with Paul Capuccio, the Assistant Attorney General ... who was in charge of the case for the Justice Department.... Although I had great ideological differences with Capuccio, he wanted to deal humanely with the refugees, and we developed a warm working relationship"); GOLDSTEIN, HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON, *supra* note 9, at 173–175, 180 (discussing Capuccio's role in securing piecemeal release of numerous refugees).

**174.** *See, e.g.*, Pamela Constable, *U.S. Camp for Haitians Described as Prison-Like*, WASH. POST, Sept. 19, 1992, at A1 (reporting on July 1992 detainee uprising and military retribution); *See* Anna Quindlen, *Set Her Free*, N.Y. TIMES, Nov. 18, 1992, at A27; Derrick Z. Jackson, *Judge, About those Haitians* ..., BOSTON GLOBE, June 13, 1993.

**175.** Ratner, *How We Closed*, *supra* note 168, at 217 (describing civil disobedience by Jackson, Demme, and Sarandon on the first day of trial, and statement by Sarandon and Tim Robbins at Academy Awards presentation).

**176.** *See generally* Clawson et al., *Litigating as Law Students*, *supra* note 9, at 2372. The grassroots strategy yielded other critical but unintended consequences. For instance, when the Bush Administration surprised the Haitians' counsel by releasing individual refugees with pressing medical concerns, many of the activists became essential humanitarian providers, helping to arrange the quiet resettlement of more than thirty Haitians. These activists were also responsible for developing and nurturing essential relationships with municipal agencies and political leaders who later publicly supported closure of the camp and resettlement of all refugees. When Judge Johnson ordered the release of all Haitians, large refugee resettlement agencies argued that they would need federal grants, and weeks or months to prepare, for the release of the remaining refugees. The grassroots activists and providers, especially Betty Williams and William Broberg in New York, insisted that all refugees could be accommodated, immediately, and without need for grants



did the independent efforts of numerous organizations and individuals, a point driven home when students at Yale Law School initiated a rolling campaign of campus hunger strikes, termed "Operation Harriet Tubman," that resulted in media coverage across the country.[177]

At times, this "do everything" approach strained resources and caused conflicts among co-counsel who questioned the propriety and efficacy of congressional visits, media advocacy, and grassroots organizing at different moments of the litigation, when litigation deadlines for briefs or discovery loomed.[178] But a second lesson from *HCC* is that litigation does not occur in a vacuum and that courtroom victories are rarely sufficient, standing alone, to achieve lasting change. The time-consuming, often frustrating work of engaging the public debate and attempting to make the case against the Guantánamo HIV camp from the halls of Congress to the streets of Brooklyn was what transformed the courtroom victory into meaningful relief for the refugees.

*HCC–I* taught a third lesson: that there remains a vital role for generalist legal practice, in human rights advocacy and otherwise, across the litigation/non-litigation divide. Many law students and young attorneys are advised to identify a practice niche, master relatively narrow areas of substantive law, procedure, and forum details, and then to excel in that specialized field. Counsel for the refugees in *HCC–I* rejected this preference for specialization, instead engaging directly and intensively in both litigation and non-litigation strategies. The legal team included experienced litigators and benefited greatly from the generous counsel of lawyers far more seasoned in legislative or agency campaigns. But in the end, the plaintiffs won because their lawyers chose not to limit themselves to courtroom work, but rather, to pursue a broad range of media, political, and grassroots efforts.

Similar practical lessons for human rights litigation emerged from *HCC–II*, the ostensibly unsuccessful effort to halt the summary repatriation of Haitian refugees. The case showed that litigation matters, although often, it is not enough to have the better legal arguments. That point emerges painfully from the numerous comments by the Supreme Court Justices at conference in *HCC–II*, which both acknowledged the force of the Haitians' plain language arguments, yet strained that language to evade an outcome perceived as politically undesirable.

for the administrative expenses of resettlement—an offer that resulted in the swift release of the remaining Haitians.

**177.** Ratner, *How We Closed*, *supra* note 168, at 215. The question whether students on the *HCC* legal team should join their classmates' hunger strike, even though such participation would diminish their ability to work on the suit at a crucial time, further divided counsel. *See* Clawson et al., *Litigating as Law Students*, *supra* note 9, at 2378.

**178.** *See, e.g.*, Ratner, *How We Closed*, *supra* note 168, at 208 (discussing disagreements about publicizing refugee hunger strike in early 1993).

In time, engaging the public and political debate proved vital to winning this human rights struggle as well. In 1992–93, advocates for the fleeing refugees suceeded in persuading neither the elites within the Clinton Administration and Congress, nor the wider population at a grassroots level, of the "moral weight" and practical advisability of providing sanctuary to those fleeing persecution. But by 1994, the "inside/outside advocacy" game had finally helped turn the political tide in the refugees' favor, which made a different political solution possible. This same general lesson has increasingly emerged in the post-September 11 Guantánamo advocacy, which over several years has deployed a blend of litigation, political initiatives, and public commentary to turn public opinion decisively in favor of closing the Guantánamo detention camps.[179]

Finally, the *HCC* litigation offers important lessons to clinical legal education, especially as conducted by the rapidly growing number of human rights clinics.[180] Yale's Lowenstein Clinic deliberately eschewed the "small case" approach generally favored by some contemporary clinicians, in which students take on discrete matters, such as an eviction defense or divorce, handling all court appearances and exercising professional judgment in consultation with the client and their supervising attorney. Nor was *HCC* a traditional project for a human rights clinic, which often tends to be a non-litigation matter such as an analytical report documenting human rights abuses. *HCC* was a clinical undertaking of a different magnitude, in which the enormity and velocity of the litigation did not allow for the usual degree of student responsibility or structured reflection ordinarily sought in clinical education.

Nevertheless, even as pedagogy, *HCC* accomplished many objectives. Despite its law reform nature, the case involved substantial student participation in and responsibility for all aspects of the litigation, from its inception to the final settlement. Students did not argue legal motions or appeals, but they routinely exercised delicate professional judgment. They interviewed and counseled clients; drafted countless pleadings, briefs, and discovery documents; took and defended depositions; identified, interviewed, and prepared witnesses for deposition and trial; participated in face-to-face and telephonic negotiations with opposing counsel; analyzed issues of professional ethics that arose throughout

**179.** One of us has called this a process of "social internalization," which is triggered by and often spurs political and legal internalization of international legal norms into domestic law. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 HOUSTON L. REV. 623 (1998).

**180.** *See* Hurwitz, *Lawyering for Justice*, *supra* note 24; Stacy Caplow, *"Deport all the Students": Lessons Learned in an X-Treme Clinic*, 13 CLINICAL L. REV. 633 (2006) (reviewing *Storming the Court* and questioning clinical pedagogy in *HCC* litigation).



the case; and examined as many witnesses at trial as any of the lawyers but for lead counsel.[181]

The intensity of the work also provided many moments for reflection and inspired many to pursue human rights careers.[182] *HCC* thus demonstrates that reflective lawyering can be achieved in complex law reform matters. Moreover, *HCC* undeniably succeeded in inspiring and nurturing student passion for law as a force for human rights and social change.[183] In many ways, *HCC* was a throwback to the early days of clinical education, which included many complex law reform suits in the service of the civil rights movement.[184] *HCC* showed that what civil rights had been to the clinical education movement of the 1960s, international human rights could become for the clinical education movement of a new global century. And in this, the Haitian refugee litigation may have helped to renew a commitment within clinical education to the goal of achieving systemic policy reform.[185]

### *Conclusion*

At the end of the day, the Haitian refugee litigation will be remembered for telling not one, but two human rights stories. The first was an intensely human story of refugees fleeing to freedom and the lawyers who tried to help them. The second, legal story told how a transnational lawsuit helped to resolve a foreign policy crisis, open discussion over the human rights of foreign nationals held on Guantánamo, reignite debate

**181.** *See* Clawson et al., *supra* note 9, at 2387–88. After internal discussions, it was agreed that any student or lawyer who wished to examine a witness at trial could examine one witness each. Ultimately, only two students elected to do so.

**182.** Many of those who worked intensively on the *HCC* case have gone on to pursue careers in human rights, international law, or public interest lawyering, including the authors, Michelle Anderson, Ethan Balogh, Michael Barr, Graham Boyd, Ray Brescia, Sarah Cleveland, Tory Clawson, Chris Coons, Lisa Daugaard, Liz Detweiler, Margareth Etienne, Carl Goldfarb, Adam Gutride, Laura Ho, Anthony K. (Van) Jones, Christy Lopez, Catherine Powell, Steve Roos, Veronique Sanchez, Paul Sonn, Cecillia Wang, and Jessica Weisel.

**183.** Clawson et al., *supra* note 9, at 2388–89.

**184.** Caplow, *"Deport all the Students," supra* note 180, at 643 ("In the 1970s, many clinics did handle large impact cases as a means for advancing civil rights and social justice."). This is not to suggest that *HCC* was unique as law reform litigation, even in a human rights clinic. *See, e.g.*, *Federal Jury Finds Detention Center Liable for Mistreatment*, INT'L HERALD TRIB., Nov. 13, 2007 (reporting on successful multiyear suit by Rutgers Constitutional Litigation Clinic to hold private detention facility accountable for abuse of detained asylum-seekers).

**185.** Foreign clinical law professors have also seized upon the potential of the *HCC* litigation in inspiring law reform litigation in a clinical setting, as well as justifying clinical legal education itself. The Committee of Chinese Clinical Legal Educators, for instance, recently secured Ford Foundation funding to translate and publish *Storming the Court*, in part to support efforts to establish clinical legal education in the People's Republic.

over the duties of states to fleeing refugees, and pioneer a new model of human rights litigation and clinical education.[186]

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**186.** The first of these stories is well told in GOLDSTEIN, HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON, supra note 9; the second is well told in Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, *supra* note 24.