

## Reflections on *Refoulement* and *Haitian Centers Council*

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In June 1993, over Justice Blackmun's dissent, the United States Supreme Court upheld the Government's policy of deliberate *refoulement*: the summary, forcible return of fleeing Haitian refugees to their persecutors. In retrospect, the Court's ruling in *Sale v. Haitian Centers Council*<sup>1</sup> came as no surprise. The Court had tipped its hand in February 1992, when it denied certiorari by an identical eight-to-one vote to an earlier challenge to the Bush Administration's policy of screening Haitian refugees.<sup>2</sup> During the previous two years, the Supreme Court had also twice denied stay requests from Haitian refugee groups<sup>3</sup> and three times intervened to stay lower court rulings favoring the Haitians.<sup>4</sup> Indeed, only three days after the Second Circuit struck down the Bush Administration's summary return policy, the Supreme Court voted seven-to-two to stay that ruling, effectively ensuring that the policy would continue for at least eleven months before final Supreme Court judgment.<sup>5</sup> Having thus made itself a *de facto* party to the forced-return policy, the Court could not so easily turn around and declare it illegal.

Nevertheless, *Haitian Centers Council* represents a profound disappointment for both human rights advocates and international lawyers. Justice Stevens's strangely apologetic opinion for the Court condoned

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1. 113 S. Ct. 2549 (1993).

2. *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992) (Blackmun, J., dissenting from denial of certiorari).

3. *See Haitian Refugee Ctr. v. Baker*, 112 S. Ct. 1073 (1992); 112 S. Ct. 1245 (1992).

4. *See Haitian Refugee Ctr. v. Baker*, 112 S. Ct. 1072 (1992); *Haitian Centers Council v. McNary*, 112 S. Ct. 1714 (1992); 113 S. Ct. 3 (1992).

5. *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir.), *stay granted*, 113 S. Ct. 3 (1992) (Blackmun & Stevens, JJ., dissenting).

the Clinton Administration's continuation of the Bush Administration's unprecedented, brutal, and unnecessary violation of human rights, an abuse which Bill Clinton as a presidential candidate had repeatedly assailed as illegal.<sup>6</sup> Equally troubling, the Court's opinion continued the Rehnquist Court's disturbing pattern of reflexive deference to presidential power in foreign affairs and hostility toward both aliens and international law.<sup>7</sup>

How should the Court have decided *Haitian Centers Council*? Justice Blackmun's powerful dissent provides one view, joining Justice White's famous dissent in *Banco Nacional de Cuba v. Sabbatino* as the most compelling recent judicial statement on the appropriate role of United States courts in interpreting international law.<sup>8</sup> The Brief for Respondents in *Haitian Centers Council*, excerpted in pages following this commentary, provides another view. How did that brief arise, what did it seek to accomplish, and what, in the end, is its legacy?

## I. THE HAITIAN CENTERS COUNCIL LITIGATION

### A. The Gideon Phase

I first heard the word "*nonrefoulement*" in 1984 while working as an Attorney-Adviser at the Office of Legal Counsel (OLC) of the United States Department of Justice. Several Sikh refugees had hijacked a plane in India and appeared to be flying toward the United States. A pressing question confronted OLC: could our Government intercept

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6. "The Bush Administration is wrong to deny Haitian refugees the right to make their case for political asylum. We respect the right of refugees from other parts of the world to apply for political asylum, and Haitians should not be treated differently." *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, July 29, 1992, available in LEXIS, Nexis Library, Currnt File. Only three days after the summary return process commenced, Governor Clinton declared:

*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. It was bad enough when there were failures to offer them due process in making such a claim. Now they are offered no process at all before being returned.*

*This policy must not stand.* It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world. This most recent policy shift is another sad example of the [A]dministration's callous response to a terrible human tragedy . . . .

As I have said before, if I were President, I would—in the absence of clear and compelling evidence that they weren't political refugees—give them temporary asylum until we restored the elected government of Haiti.

*Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, May 27, 1992, available in LEXIS, Nexis Library, Currnt File (emphasis added). See also *infra* notes 38–39.

7. See cases cited *infra* notes 71–81.

8. Compare *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2567 (1993) (Blackmun, J., dissenting) with *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (White, J., dissenting). For a discussion of Justice White's *Sabbatino* dissent, see Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2362–64 & n.89 (1991).

those refugees before they reached American airspace and return them to India? The office's immigration expert pointed out that our treaty obligations under article 33 of the 1951 United Nations Refugee Convention 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."<sup>9</sup> To return the refugees, she said, would violate our international obligation of "*nonrefoulement*," or non-return, as clarified in the 1981 OLC opinion, Proposed Interdiction of Haitian Flag Vessels.<sup>10</sup> There, OLC had concluded that our treaty obligations under article 33 applied, even outside the United States, to Haitian refugees stopped by United States Coast Guard cutters on the high seas. Even outside United States territory, OLC reasoned, article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted . . . be given an opportunity to substantiate their claims."<sup>11</sup>

I recalled that opinion seven years later when I read the Government's Eleventh Circuit brief in *Haitian Refugee Center v. Baker*.<sup>12</sup> Along with Michael Ratner of the Center for Constitutional Rights, I had started teaching the Lowenstein International Human Rights Clinic at Yale Law School. One of our first cases, a tort suit against former Haitian dictator Prosper Avril, had brought us into contact with the newly elected government of Jean-Bertrande Aristide. When a military coup toppled the Aristide government in September 1991, our clinic followed with deep concern the fate of the ousted government and the refugees.

To our amazement, the Bush Administration chose to treat the boatloads of fleeing Haitians as the problem, not the symptom. Initially, following the Reagan interdiction program established a decade earlier, the Bush Administration stopped and "screened," (i.e., interviewed) all refugees, bringing to the United States all "screened-in" Haitians who demonstrated a "credible fear" of political persecution. As more boats came, however, the Government began taking all screened-in Haitians to the United States Naval Base in Guantanamo,

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9. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6275, 189 U.N.T.S. 150, 176. The United States became a party to the Refugee Convention when it acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

10. Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981).

11. *Id.* A subsequent OLC memorandum written the same year affirmed this point. See Memorandum from Larry L. Simms, Deputy Assistant Att'y Gen., Off. of 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 Centers Council*, 113 S. Ct. 2549 (1993).

12. Brief for the Appellants, *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992).

Cuba. There the Government sought to establish a "rights-free" zone, where *de facto* political refugees were detained in military camps behind razor-barbed wire with no due process rights of any kind.<sup>13</sup>

In November 1991, the Haitian Refugee Center brought suit in the Southern District of Florida challenging the practice of returning screened-out Haitians as a violation, *inter alia*, of article 33's duty of *nonrefoulement*.<sup>14</sup> The district court issued several injunctions against the Government's conduct, which the Eleventh Circuit reversed in two separate rulings. In its appeal to the Eleventh Circuit, the Government argued that article 33 did not apply on the high seas. It 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.<sup>15</sup> The Government's reading of "*refouler*" as "to expel" not only reversed OLC's 1981 understanding of that term,<sup>16</sup> it effectively rewrote article 33, creating a pointless redundancy: "[n]o Contracting State shall expel *or* expel a refugee" to conditions of persecution. The Government's effort to equate "expel" and "return" relied on a subsidiary definition of "*refouler*" listed in Cassell's, a nonauthoritative French dictionary, not the definitions "to repulse . . . drive back . . . repel" provided in the authoritative French dictionary, *Dictionnaire Larousse*.<sup>17</sup>

Nor, as a matter of international human rights law, did the Government's reading make any sense. The Refugee Convention's drafters had unequivocally barred "Contracting States from . . . return[ing] ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened," nowhere suggesting permissible locales *from* which a refugee could be returned. Common sense dictates that a person in flight becomes a refugee protected by the Convention upon escaping his homeland, not upon reaching another country. Moreover, if the most absolute, universal prohibition of the Refugee Convention—its bar against returning refugees to their

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13. Lynne Duke, *U.S. Camp for Haitians Described as Prison-Like*, WASH. POST, Sept. 19, 1992, at A1.

14. *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991), *injunction dissolved, remanded by* 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

15. Brief for the Appellants at 10–11, *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992).

16. For more on recent OLC reversals of position, see Harold H. Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993).

17. Dictionnaire LAROUSSE 631 (1981) (Français, Anglais). Yale's noted French scholar Pierre Capretz confirmed my skepticism about the government's reading. As our Supreme Court brief later noted, 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 *infra* at notes 21 & 23.

persecutors—did not apply on the high seas, could not the same be said about comparable *jus cogens* norms against torture or genocide?

Finally, the Government's argument flew in the face of history. From my OLC research on *nonrefoulement*, I recalled that the Refugee Convention had been drafted to prevent a replay of the return of Jewish refugees to their Nazi persecutors during World War II. If the Government's reading were correct, then even after ratifying the Refugee Convention, the United States government could have deliberately taken to the high seas to seize fleeing Jews and return them to Nazi gas chambers, a flagrantly implausible result.

When the Government finally beat off the Haitian Refugee Center's challenge to the Bush interdiction program in February 1992, some three thousand Haitian refugees were being held on Guantanamo.<sup>18</sup> Many were screened-in, having already established credible fears of political persecution. Absent judicial oversight, however, the Government now planned to subject these refugees to full-fledged asylum interviews without the benefit of counsel and to return those who failed to possible death or persecution in Haiti. As reports mounted, we decided that we could not leave those refugees defenseless. As spring break approached, our clinic researched and prepared a class action on behalf of all screened-in Haitians on Guantanamo and the Haitian service organizations seeking to represent them. We filed our suit before Judge Sterling Johnson in the Eastern District of New York on March 17, 1992.

The suit began as *Gideon v. Wainwright*<sup>19</sup> redux: clients simply claimed constitutional rights to speak to lawyers before being returned to possible death or persecution. Yet, after we filed for a temporary restraining order (TRO), the Government sought Rule 11 sanctions against us for filing a "frivolous" lawsuit and demanded a \$10 million bond on the TRO, by tenfold the largest bond of its kind ever requested in the history of the New York federal courts.<sup>20</sup>

We realized we had little choice but to win. We scrambled to assemble a team of marvelously talented volunteer lawyers and law students to staff the case. From the Simpson Thacher and Bartlett law firm in New York, we enlisted Joseph Tringali, Jennifer Klein and Susan Sawyer. For immigration and refugee expertise, we turned to Lucas Guttentag and Judy Rabinovitz of the ACLU Immigrants' Rights Project and Robert Rubin and Ignatius Bau of the San Francisco

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18. Helen Dewar, et al., *Moot Plan to Aid Haitians Approved*, WASH. POST, Feb. 28, 1992, at A14.

19. 372 U.S. 335 (1963) (requiring right to counsel in criminal cases).

20. In the case concluding with the largest civil settlement in history, *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 262 (S.D.N.Y. 1986), the court required only a \$1 million TRO bond.

Lawyers' Committee for Civil Rights. In short order, we formed the students into four litigation teams.<sup>21</sup> Simultaneously, we set up seven substantive legal squads—one for each count of the complaint—captained by the third-year students who had done the original research. Within weeks, more than seventy lawyers and law students were working on the case.

The *Gideon* phase of the case proceeded at a frantic pace. Fortunately, the energy of "Team Haiti"—as the students began to call themselves—proved inexhaustible.<sup>22</sup> On March 27, Judge Johnson issued a TRO and gave us four days to complete all preliminary discovery and file our preliminary injunction brief. We dispatched teams of volunteer lawyers, students, translators, and court reporters to Washington, D.C., Miami, and Guantanamo for depositions, document discovery, and client interviewing, while our Yale team worked on the preliminary injunction brief and prepared congressional testimony.<sup>23</sup> After Judge Johnson granted a preliminary injunction on April 6 requiring that the Haitians be afforded counsel before repatriation to Haiti, we fought off four successive government efforts to stay those rulings.<sup>24</sup> But on April 22, the Government finally managed to win a stay of our preliminary injunction from the Supreme Court, by a vote of five-to-four.<sup>25</sup> Within weeks, some 89 of our "screened-in" clients were returned to Haiti for insisting upon having counsel present at their asylum hearings. Unbowed, we defended our preliminary injunction on appeal, and in June, the Second Circuit upheld our "frivolous" claim and dissolved the stay.<sup>26</sup>

21. One team dealt with pretrial procedural issues and stays; a second addressed document discovery, privilege, and attorney work-product; a third tackled case management, production of briefs, and computer issues; and a fourth took care of communications, press management, lobbying, and spin control.

22. I will not forget working in my office at 3:00 a.m. on the day that our first Second Circuit brief was due. Our litigation manager, a third-year law student, stuck his head in and asked if we would be cite-checking the brief before it was filed. I grunted that we could not do so without at least 10 cite-checkers. An hour later, I heard noises in the hallway and emerged to find 10 sleepy students waiting to cite-check sections of the brief. As I watched them disappear down the hall, I began to think that maybe we had a chance after all.

23. See *U.S. Human Rights Policy Toward Haiti: Hearing before the Legislation and National Security Subcomm. of the Comm. on Government Operations of the House of Representatives*, 102d Cong., 2d Sess. 97 (1992) (testimony of Harold Hongju Koh and Sarah Cleveland).

24. One of those motions I argued by telephone, standing at the *maitre-d's* station at a New York hotel, while Michael Ratner participated by mobile phone from a Mets game.

25. *McNary v. Haitian Centers Council*, 112 S. Ct. 1714 (1992) (Blackmun, O'Connor, Souter, Stevens, JJ., dissenting).

26. *Haitian Centers Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot*, *Sale v. Haitian Centers Council*, 113 S. Ct. 3028 (1993). For a fuller account of the *Gideon* phase, see The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1, 4-6 (1993).

*B. The St. Louis Phase*

On Memorial Day 1992, President Bush issued an order from his Kennebunkport vacation home authorizing the Coast Guard to return all fleeing Haitians forcibly to Haiti regardless of any colorable claims of asylum.<sup>27</sup> The "Kennebunkport Order"—as our spin control team dubbed it—effectively erected a floating Berlin Wall around Haiti preventing Haitians from fleeing not just to the United States, but to any of the scores of islands between the United States and Haiti. The order thus rendered the Coast Guard agents of the brutal Haitian dictatorship by directing them to return fleeing refugees to the hands of their persecutors. Moreover, the elimination of the preexisting policy of screening Haitian refugees ensured that even *bona fide* refugees—including President Aristide himself—could be returned to the military regime, so long as they fled by boat.

We realized we were witnessing a textbook case of *refoulement*, made all the more horrible because it had been ordered by our own President. The order evoked the infamous Voyage of the Damned—the ill-fated voyage of the *St. Louis* in 1939—when the United States rebuffed fleeing Jewish refugees who had arrived at New York and Miami harbors, forcing many back to die in Nazi gas chambers.<sup>28</sup>

In a nationwide conference call of Haitian refugee advocates, all agreed that our Yale team was best-positioned to challenge the new policy. But for our litigation team, the timing was terrible: on Memorial Day our seven lead students were graduating, and by mid-summer all would be scattered to different jobs around the country. As commencement exercises ended, we gathered in the Law School courtyard, still wearing our graduation robes, and quickly divided up the work for the next temporary restraining order.

We decided to challenge the Kennebunkport Order on three grounds: as a violation of (1) article 33 of the Refugee Convention; (2) article 33's domestic statutory analogue, section 243(h) of the Immigration and Nationality Act, which directs that "the Attorney General shall not deport or *return any alien . . .* to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of his . . . political opinion";<sup>29</sup> and (3) the 1981 executive agreement between the United States and Haiti,<sup>30</sup> which authorizes the United States to interdict Haitian flag vessels subject to the condition

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27. Exec. Order No. 12,807, 3 C.E.R. 303 (1993).

28. GORDON THOMAS & M. MORGAN WITTS, *VOYAGE OF THE DAMNED* (1974).

29. 8 U.S.C. § 1253(h)(1) (1988) (emphasis added).

30. Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter U.S.-Haiti Agreement].

imposed by the 1981 OLC opinion: that interdicted refugees be interviewed and allowed to substantiate their asylum claims *before* repatriation.<sup>31</sup> These laws, we argued, imposed on our government a single, unified mandate: that executive officials shall not forcibly and summarily return political refugees with colorable asylum claims to a country where they will face political persecution.

Within days, we were back before Judge Johnson seeking another TRO, now opposed by the Solicitor General of the United States, Kenneth Starr. Although Judge Johnson seemed sympathetic to our article 33 arguments, he was concerned about outdated Second Circuit precedent suggesting that article 33 was not self-executing.<sup>32</sup> The following week, he denied our TRO, but in frank language, virtually invited us to appeal.<sup>33</sup>

So encouraged, we took an expedited appeal to the Second Circuit. Judge Johnson's negative ruling on article 33 prompted us to shift emphasis and lead with the statutory argument under section 243(h). Plain language, we decided, was our strongest argument: both the statute and the treaty mandate in unambiguous language that the United States shall not return ("*refouler*") refugees to their persecutors. The court's role was to enforce this language as written, not to make foreign policy or decide political questions. Lower executive officials, we reasoned, were not free to choose *refoulement* as a deterrent against

31. Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981).

32. *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982). *Bertrand* held "under the circumstances presented here" that article 31 of the Refugee Convention was not a direct source of individual rights. *Id.* at 219. Because "[s]ome provisions of an international agreement may be self-executing and others non-self-executing," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987), *Bertrand* did not deny the self-executing nature of article 33, the most fundamental, mandatory, and non-derogable provision of the entire convention. Nor has the Second Circuit ever reexamined *Bertrand* after the Supreme Court's decisions in *INS v. Stevic*, 467 U.S. 407 (1984), and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which strongly suggested that article 33 bound U.S. officials of its own force as soon as the U.S. acceded to the Refugee Protocol in 1968. *See also* *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in part and dissenting in part) ("After 1968 . . . the Attorney General 'honored the dictates' of Article 33.1 in administering §243(h)" even without domestic implementing legislation) (citation omitted). Significantly, the Second Circuit did not rely on *Bertrand* in *Haitian Centers Council* and the Supreme Court's opinion never denied, and at points even suggested, that article 33 is self-executing. *See Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2562 & n.35 (1993).

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

*Haitian Centers Council v. McNary*, No. 92-CV-1258, 1992 U.S. Dist. LEXIS 8452, at \*5 (E.D.N.Y. June 5, 1992).

unwanted immigration any more than they could choose summary execution or drowning.

By now, support was flooding in from refugee and human rights groups around the world; we soon secured seven amicus briefs in support of our expedited appeal. In June, the Second Circuit set the case for accelerated argument, ordering our brief by Friday, June 19, the Government's response by the following Wednesday, our reply brief twenty-four hours later, and oral argument the next morning, on June 26.

In late July the Second Circuit declared the *refoulement* policy illegal.<sup>34</sup> Judge Pratt, writing for the majority, held that the Bush policy violated section 243(h)(1) of the Immigration and Nationality Act. Judge Newman's concurrence captured our point exactly:

[T]he language of section 243(h), like the language of the U[nited] N[ations] Protocol that it implements . . . forbids our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution . . . . No alien, even one who satisfies the standard of "refugee," has a right to asylum, or a right to enter the United States . . . . If denied asylum, he may not enter; he may go elsewhere, or, in an extreme case, languish at our border . . . . But the command of section 243(h) is absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors.<sup>35</sup>

But our victory in the Second Circuit was short-lived. Hours after the opinion was issued, the Government sought another Supreme Court stay of the ruling. Once again, we worked through the night to file an opposition. Students came to work at Simpson Thacher from summer associate jobs all over New York City, with one student even coming directly after completing the grueling New York bar examination. But the Court, with only Justices Blackmun and Stevens dissenting, stayed our ruling.<sup>36</sup> In early October, the Court granted certiorari over our opposition.<sup>37</sup>

Amid this frenzy, one hope surfaced. During his presidential campaign, Bill Clinton repeatedly praised the Second Circuit for making the "right decision in overturning the Bush Administration's cruel policy of returning Haitian refugees to a brutal dictatorship without

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34. *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

35. *Id.* at 1368-69 (Newman, joined by Pratt, JJ., concurring).

36. *McNary v. Haitian Centers Council*, 113 S. Ct. 3 (1992).

37. *McNary v. Haitian Centers Council*, 113 S. Ct. 52 (1992).

an asylum hearing."<sup>38</sup> Our best chance, we reckoned, lay in delaying Supreme Court review of both Second Circuit victories until after the election. If Clinton were to win, he would need time to abandon both of the Bush Administration's Haitian policies and to withdraw the government's petition for certiorari.

### C. *The Merits Brief and Its Amici*

On election day, Team Haiti celebrated Clinton's victory and anticipated a new policy regarding Haitian refugees. At a press conference the week after election day, the President-elect stated:

[W]ith regard to the Haitians, *I think my position on that has been pretty clear all along*. I believe that there is a legitimate distinction between political and economic refugees. But I think that we should have a process in which these Haitians get a chance to make their case. I think that the blanket sending them back to Haiti under the circumstances which have prevailed for the last year was an error *and so I will modify that process*.<sup>39</sup>

We viewed these words not as campaign statements of a presidential aspirant but as authoritative pronouncements of the President-elect. Accordingly, we moved to suspend further briefing in the Supreme Court case until after the inauguration. The Court denied our motion, setting a pre-Christmas deadline for the filing of our brief and supporting amicus briefs.<sup>40</sup>

By mid-November our merits brief work shifted into high gear. Permitted only sixty-five pages to address the merits as well as threshold issues of collateral estoppel, reviewability, and the availability of injunctive relief under the Administrative Procedure Act, we adopted a pyramidal briefing structure. We addressed every issue somewhere in our brief, but left detailed elaboration of each issue to an accompanying

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38. *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, *supra* note 6. While the Government's petition for certiorari was pending, Governor Clinton issued a statement "re-affirm[ing] [his] opposition to the Bush Administration's cruel policy of returning Haitian refugees to their oppressors in Haiti without a fair hearing for political asylum." *Gov. Clinton Reaffirms Opposition to Administration Policy on Haiti*, U.S. Newswire, Sept. 9, 1992, available in LEXIS, Nexis Library, Currnt File. Finally, the most comprehensive public statement of the Clinton-Gore Administration's immigration agenda stated the incoming Administration's intent to "stop the forced repatriation of Haitian refugees—reverse Bush Administration policy, and oppose repatriation." BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 119 (1992).

39. 'I Intend to Look Beyond Partisanship . . . to Help Guide Our Nation', WASH. POST, Nov. 13, 1992, at A10 (emphasis added).

40. *McNary v. Haitian Centers Council*, 113 S. Ct. 593 (1992) (Blackmun & Souter, JJ., dissenting).

amicus filing.<sup>41</sup> Amicus briefs by Americas Watch and Amnesty International challenged the Government's factual claims about the absence of political violence in Haiti and the adequacy of in-country refugee processing as a substitute for asylum processing on United States soil. The amicus briefs of the NAACP, the Association of the Bar of the City of New York and the Lawyers' Committee for Human Rights addressed the three alternative grounds for affirmance: equal protection, the United States-Haiti Agreement, and the self-executing nature of article 33. A brief by Professor Gerald Neuman of Columbia University for the American Immigration Lawyers' Association answered challenges to standing and reviewability under the Administrative Procedure Act.<sup>42</sup> On the merits, the International Human Rights Law Group answered the Government's arguments regarding the presumption against extraterritoriality; the United Nations High Commissioner on Refugees challenged the Government's reading of the negotiating history of the Refugee Convention; and Professor Deborah Anker of the Harvard Immigration Clinic and some of her former students submitted a brief on behalf of members of Congress analyzing the legislative history of section 243(h) and the Refugee Act of 1980.

Four additional amicus briefs were designed to provide context and a sense of the universal condemnation of the Government's position: (1) the "rule of law" brief, by Professor Michael McConnell of the University of Chicago and attorneys at Mayer, Brown and Platt on behalf of former Attorneys General Nicholas Katzenbach, Benjamin Civiletti, and Griffin Bell, argued for straightforward enforcement of the plain and unambiguous meaning of the governing statute; (2) a "Brandeis brief" authored by Professors David Martin of the University of Virginia and Norman and Naomi Flink Zucker of the University of Rhode Island for the American Jewish Committee and Anti-Defamation League offered historical perspective on how the United States had, since World War II, responded more generously to much larger mass migrations from Communist Europe, Cuba, Southeast Asia, and Central America; (3) the amicus brief of the Association of the Bar of the City of New York, based on research from a dozen Harvard law students, recounted the universality of both the duty of *nonrefoulement* and the condemnation of *refoulement*; and (4) a submission by twenty-seven Haitian service organizations, immigration groups, and refugee advocates recorded the widespread opposition to the forced-return policy.

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41. Copies of all amicus briefs are on file at the *Harvard International Law Journal*.

42. Professor Neuman had previously authored a brilliant Second Circuit amicus brief in the right-to-counsel phase of the case on behalf of the International Human Rights Law Group concerning the legal status of Guantanamo and the rights of aliens detained there.

One question remained: how best to structure our own merits brief. We decided that only “double plain meaning”—the mutually reinforcing language and structure of section 243(h) and article 33—might persuade the strict constructionists on the Court. Former Secretary of State Cyrus Vance agreed to sign our brief, as did eight of my steadfast colleagues at Yale Law School.<sup>43</sup> A new group of Clinic students, calling itself “Team Haiti, the Next Generation,”<sup>44</sup> began researching memo after memo, relentlessly attacking footnotes in the Government’s filings.

Perhaps our most controversial decision came in response to the Government’s selective treatment of article 33’s negotiating history. Citing new research, the Government sought to downplay its bald reversal of the 1981 OLC opinion by quoting two statements by foreign delegates in the *travaux préparatoires* suggesting that article 33 was not intended to apply to extraterritorial interceptions. Assuming *arguendo* that the plain language of the treaty and statute at issue did not entirely foreclose resort to such secondary materials, we felt that the Court should construe the quoted remarks in light of the Refugee Convention’s broad object and purpose. Accordingly, we secured a sworn affidavit from Louis Henkin, Columbia University’s renowned international law professor, who had served as the United States delegate to the United Nations *Ad Hoc* Committee on Statelessness and Related Problems that had drafted article 33.<sup>45</sup>

We suspected that the Government would object if we appended such an affidavit to our Supreme Court brief, although the Court’s own rules plainly allowed such submissions. But our concern was assuaged when the Government’s opening brief hypothesized that “[t]he failure of the OLC opinion to examine the premise that article 33 applied on the high seas may perhaps have been due to the fact (which has just come to our attention) that the same premise was also assumed by

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43. That group included our Dean, Guido Calabresi, himself a refugee; Drew S. Days III, who would soon be named Solicitor General in the Clinton Administration; Akhil Amar; Geoffrey Hazard, who advised us on the collateral estoppel issues in the case; Paul Kahn, who had advised throughout on First Amendment issues; Tony Kronman; Peter Schuck, our in-house immigration adviser; and Myres McDougal, whose role in the *Sabbatino* case I have recounted in Koh, *supra* note 8, at n.89. Burke Marshall signed our Second Circuit briefs but recused himself from our Supreme Court brief because of his work for the Clinton transition team.

44. Our Supreme Court team included Yale J.D. candidates Ethan Balogh, Tory Clawson, Wade Chow, Lisa Dugaard, Liz Derweiler, Eric Falkenstein, Adam Gutride, Laura Ho, Serge Leary, Christy Lopez, Christine Martin-Nicholson, Feisal Naqvi, Song Richardson, Steve Roos, Veronique Sanchez, Jessica Weisel, and Mike Wishnie. Our Supreme Court brief also drew heavily on earlier work by Michael Barr, Graham Boyd, Ray Brescia, Chris Coons, Sarah Cleveland, and Paul Sonn, who graduated in May 1992 but had worked tirelessly on the initial TRO.

45. See Affidavit of Louis Henkin, *infra* at 44–47.

some State Department personnel at the time . . . ."<sup>46</sup> If the Government could rely upon unsworn statements about what unnamed State Department personnel "assumed" about article 33, then certainly, we were entitled to rebut with sworn statements from the particular State Department official who was actually present at the negotiations.

The last days before Christmas remain a blur: our team worked on the brief around the clock for several days before filing, editing the final version with Michael Ratner, Joe Tringali, Lucas Guttentag and Susan Sawyer in a massive all-night session at Simpson Thacher before mailing the finished product to Washington. Bleary-eyed, we joked that the brief would have only academic value once Clinton took office, and that we would have to publish it somewhere as a law review article after his administration had terminated the forced-return policy and the Supreme Court case.

#### *D. The Clinton Reversal and the Korematsu Phase*

In January the unthinkable happened. One week before taking office, President-elect Clinton reneged on his promise and announced that he would maintain the Bush policy of *refoulement* indefinitely. It soon became clear that the Clinton Administration would defend both the summary return policy and the legality of the Guantanamo internment in court, adopting the Bush rationale that the Haitians had no legal rights outside the United States.

During this time, the government continued to hold about 310 Haitian men, women, and children with credible claims of political persecution in the Guantanamo internment camp. Almost all of these screened-in Haitians were not allowed to enter the United States and apply for political asylum because they had tested positive for the HIV virus. As the months passed, the Haitians held at Guantanamo grew increasingly desperate; they began a lengthy hunger strike, and several attempted suicide. Their mental and physical condition deteriorated, and many endured intense pain.<sup>47</sup> The military responded by confining recalcitrant Haitians in the Navy brig for days on end, without even a fig leaf of due process.<sup>48</sup> After the disastrous mass suicide at Waco, Texas, some of the Guantanamo Haitians threatened similar acts.

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46. Brief for the Petitioners at 50 n.40, *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

47. Duke, *U.S. Camp for Haitians Described as Prison-Like*, *supra* note 13; Mike Clary, *Haitians in Camp May Die, Doctors Warn; Guantanamo Bay: Pair Call Facility A 'Public Health Outrage.'* *They Urge Clinton to Act to End a Hunger Strike Among HIV-Positive Refugees*, L.A. TIMES, Feb. 11, 1993, at 30.

48. *Id.*

We publicized the crisis through grass-roots political organization. Yale law students started a hunger strike that was passed to dozens of other campuses across the country.<sup>49</sup> Reverend Jesse Jackson and other civil rights leaders staged press conferences and mass arrests in cities across the country, joined by singer Harry Belafonte, film director Jonathan Demme, and actress Susan Sarandon.<sup>50</sup>

I argued the *refoulement* case before the Supreme Court in early March. A week later, the Guantanamo phase of the case returned to Brooklyn federal court for consideration of permanent relief. Our trial team, led by Joe Tringali and Lucas Guttentag, realized that it was no longer enough to secure lawyers for our desperate clients; we needed to challenge the legality of our clients' confinement in America's first HIV concentration camp. On the eve of trial we amended our complaint to include such a challenge. We realized grimly that in the space of a year, the same lawsuit had evolved from replays of *Gideon* to *The St. Louis* to *Korematsu v. United States*,<sup>51</sup> as our government had worked a succession of human rights abuses upon poor, black, sick Haitians: by anyone's definition, a discrete and insular minority.

At the close of trial, Judge Johnson ordered the immediate release of the sickest Guantanamo Haitians, and in early June he ordered the remainder freed. "If the Due Process Clause does not apply to the detainees at Guantanamo," he noted, 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."<sup>52</sup> The Clinton Administration chose not to seek a stay of that order, and on June 21, allowed the last of the Guantanamo Haitians into the United States.<sup>53</sup>

## II. THE REFOULEMENT DECISION

Victory for the Guantanamo Haitians soon blended into defeat for the Haitians fleeing Haiti. On the day the last Haitians left Guantanamo, the Supreme Court sustained the legality of the *refoulement* policy in *Sale v. Haitian Centers Council*.<sup>54</sup> While taking pains to specify

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49. Nadine Brozan, *Chronicle*, N.Y. TIMES, Mar. 12, 1993 at B6.

50. Sarandon and actor Tim Robbins even made a plea for the Haitians detained at Guantanamo before a worldwide television audience during the Academy Awards ceremony.

51. 323 U.S. 214 (1944) (allowing confinement of Japanese-American citizens in World War II internment camps because emergency wartime circumstances "required" it).

52. *Haitian Centers Council v. Sale*, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993).

53. Two months later, however, the Government appealed Judge Johnson's ruling, but at this writing, the appeal appears likely to be settled.

54. 113 S. Ct. 2549 (1993).

that the Court was not passing on the policy's morality,<sup>55</sup> Justice Stevens, writing for the majority, accepted the Government's position that neither section 243(h) nor article 33 applied to Haitians apprehended on the high seas.

Litigants rarely make dispassionate critics. Yet even on its own terms, the Court's opinion is deeply unconvincing. As Justice Blackmun's dissent pointed out, the Court's opinion rests on the implausible assertions that "the word 'return' does not mean return . . . [that] the opposite of 'within the United States' is not outside the United States, and [that] the official charged with controlling immigration has no role in enforcing an order to control immigration."<sup>56</sup>

In his opinion, Justice Stevens first engaged in a long exegesis of the meanings of "*refouler*" and "return" in the statute and treaty to conclude that the legal prohibition on returning aliens somehow did not apply to this kind of return.<sup>57</sup> What he ignored, however, is that the Kennebunkport Order itself authorized the Coast Guard "[t]o return" Haitian vessels and their passengers to Haiti,<sup>58</sup> which is precisely the act that the law forbids.

Justice Stevens next argued that Congress in 1980 extended the Refugee Act's protection from "any alien within the United States" to "any alien" with the intent of extending statutory protection only to aliens physically, but not legally, present within the United States.<sup>59</sup> But if Congress meant to protect only aliens "physically present in the United States," why would it not use those exact words, as it did in numerous other places in the statute?<sup>60</sup> The fairest reading of Congress's decision to bar the return of "any alien" is that it meant to address all aliens, wherever located.

To argue against the application of section 243(h) to aliens stopped on the high seas, Justice Stevens invoked the so-called "presumption against extraterritoriality."<sup>61</sup> But as Justice Blackmun pointed out, that presumption was designed primarily to avoid judicial interpretations of a statute that infringe upon the rights of another sovereign.<sup>62</sup> The

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55. See 113 S. Ct. at 2556 ("The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration."); *id.* at 2563 ("In spite of the moral weight of [respondents'] argument, both the text and negotiating history of Article 33 indicate that it was not intended to have extraterritorial effect.").

56. *Id.* at 2568 (Blackmun, J., dissenting) (citations omitted).

57. *Id.* at 2563-64 ("['R]eturn' has a legal meaning narrower than its common meaning").

58. See Exec. Order No. 12,807, § 2(c)(3), 57 Fed. Reg. 23,133 (1992) (emphasis added) (stating that appropriate directives will be issued "providing for the Coast Guard . . . [t]o return the vessel and its passengers to the country from which [they] came").

59. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2561-62 (1993).

60. See, e.g., provisions cited in 113 S. Ct. at 2575-76 n.15 (Blackmun, J., dissenting).

61. 113 S. Ct. at 2560.

62. *Id.* at 2576-77 (Blackmun, J., dissenting).

presumption should have no force or relevance on the high seas, where no possibility exists for conflicts with other jurisdictions. Nor does it make sense to presume that Congress legislated with exclusively territorial intent when enacting a law governing a distinctively international subject matter—the trans-border movement of refugees—to enforce an international human rights obligation embodied in a multilateral convention. 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 own extraterritorial authority to act. If, as the Court concluded, the presumption operated to deny the Haitians extraterritorial statutory protection, *a fortiori* it should also operate to deny the President extraterritorial authority to stop the Haitians in the first place.<sup>63</sup>

The Court further concluded that the statute's directive to the "Attorney General" did not intend to limit the President and the Coast Guard.<sup>64</sup> The argument is reminiscent of 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.<sup>65</sup> In this case, 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."<sup>66</sup> 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 her agents*—including the Coast Guard—to respond to perceived crises with summary return of refugees.<sup>67</sup>

Most troubling, the Court recognized that the drafters of the 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*

63. See Brief for Respondents *infra* at text accompanying note 62.

64. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2559–60 (1993).

65. See Harold Hongju Koh, *Boland Amendments*, in 1 *ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 112 (Leonard Levy & Louis Fisher eds., 1994).

66. See 8 U.S.C. § 1103(a) (1988), *cited in* 113 S. Ct. at 2574 (Blackmun, J., dissenting); *see also id.* ("Even the challenged Executive Order places the Attorney General 'on the boat' with the Coast Guard.").

67.

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) (1993).

33.”<sup>68</sup> Yet instead of reading the statute’s words in that spirit, Justice Stevens construed them in a manner that deliberately *offended* the spirit of the treaty the statute was meant to embody.

Such a construction is inexplicable as a matter of international law. Article 31 of the Vienna Convention on the Law of Treaties states the fundamental principle that treaties should first be construed according to both their ordinary meaning and their object and purpose.<sup>69</sup> As Justice Blackmun recalled, the 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.<sup>70</sup> The Henkin affidavit confirms that the Convention was drafted to prevent a replay of the forced return of Jewish refugees to Europe. Yet the Court’s opinion would permit such a replay, so long as refugees were hunted down and taken on the high seas.

### III. IS THE SUPREME COURT READY FOR THE NEW WORLD ORDER?

Ironically, just one Term earlier, in *United States v. Alvarez-Machain*, Justice Stevens had vigorously dissented from a construction of an extradition treaty permitting governmental kidnapping of criminal suspects, which was precisely what that treaty was drafted to forbid.<sup>71</sup> *Haitian Centers Council* now takes its place in a line of recent Supreme Court precedent misconstruing international treaties. In the past few years, the Court has sanctioned the emasculation of a range of treaties governing international service of process,<sup>72</sup> the taking of evidence,<sup>73</sup> bilateral extradition,<sup>74</sup> and now *nonrefoulement*. In each case, its technique has been identical: to read unambiguous language as ambiguous, to ignore object and purpose, to elevate snippets of negotiating history into definitive interpretive guides, and finally to sanction precisely the result that the specific treaty was drafted to prevent.

*Haitian Centers Council* also extends recent Supreme Court precedent favoring presidential power,<sup>75</sup> disfavoring aliens and human rights, and

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68. 113 S. Ct. at 2565 (emphasis added).

69. Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, T.S. No. 58, 1155 U.N.T.S. 331.

70. 113 S. Ct. at 2577 (Blackmun, J., dissenting).

71. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2201–02 (1992) (Stevens, J., dissenting).

72. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

73. *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

74. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

75. The President has not lost a major foreign affairs case before the Court since the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In at least one foreign affairs case, Justice Stevens provided the President with the decisive vote. *See Regan v. Wald*, 468

exalting the presumption against extraterritoriality. This past Term, the Court upheld the INS policy of arresting and detaining unaccompanied minors<sup>76</sup> and, in addition, vacated lower court orders directing the INS to accept legalization applications beyond the statutory deadline.<sup>77</sup> In the past two Terms, the Court has immunized a foreign sovereign for using police to commit torture within an employment relationship,<sup>78</sup> and refused to apply United States law extraterritorially to protect victims of employment discrimination,<sup>79</sup> environmental harm,<sup>80</sup> and federal torts.<sup>81</sup>

In the end, *Haitian Centers Council* will be remembered as a narrow, apologetic opinion that validated a uniquely discriminatory interdiction program. Although the Coast Guard can stop Haitian boats pursuant to the United States-Haiti accord—a unique agreement the United States has yet to extract from any other state—nothing in the Court's decision provides general authority for the Coast Guard to intercept and return refugees from other nations for whom no such accord, and no Kennebunkport Order, exists.<sup>82</sup>

Nevertheless, the decision is a sad one for anyone whose ancestors first came here by boat. Nowhere in the Court's account of the President's struggle to deal with the modest Haitian refugee outflow is there any mention of the human plight of the refugees themselves. As only Justice Blackmun recognized, the Haitians claimed neither a right of entry nor even a right not to be intercepted; "[t]hey demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse and death."<sup>83</sup> How soon

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U.S. 222 (1984) (upholding President Reagan's authority to regulate travel to Cuba). *See generally* HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 134–49 (1990). Moreover, Justice Stevens added new gloss to presidential power in *Haitian Centers Council* by suggesting 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." *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2567 (1993). As Justice Blackmun correctly noted, "the majority's dictum . . . is completely wrong. The 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." *Id.* at 2577 (Blackmun, J., dissenting).

76. *Reno v. Flores*, 113 S. Ct. 1439 (1993).

77. *Reno v. Catholic Social Services*, 113 S. Ct. 2485 (1993).

78. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993).

79. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

80. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (dismissed for lack of standing); *see also id.* at 2150 n.4 (Stevens, J., concurring in judgment) (relying on presumption against extraterritoriality).

81. *Smith v. United States*, 113 S. Ct. 1178 (1993) (declining to apply Federal Tort Claims Act to Antarctica).

82. As our brief pointed out, international law permits a state to board another state's vessel only with the express consent and authorization of that state, except when a ship is engaged in piracy, slave trade, or illegal broadcasting. *See* Brief for Respondents, *infra* at note 75.

83. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2577 (1993) (Blackmun, J., dissenting).

will we regret the Court's decision, as other nations invoke its rationale to repel fleeing Bosnians and Vietnamese? The Clinton Administration's recent extension of *refoulement* to hapless Chinese refugees on the high seas shows the grotesque lengths to which this executive policy may soon lead.<sup>84</sup>

Nor did the Government ever explain why the policy of *refoulement* was truly necessary. All the Haitians asked was that the Clinton Administration return to the decade-old Reagan-Bush policy of screening refugees before return. Those with credible fears of persecution did not demand asylum or even entry, only safe haven until order in Haiti was restored. Safe haven within the United States would not be nearly as burdensome as alarmists predict—during six months of unregulated out-migration, with no restoration of democracy at home in sight, fewer than 34,000 Haitians fled.<sup>85</sup> Nor would it have been unfeasible to hold refugees in a truly humanitarian refugee camp at Guantanamo. Our complaint was not with Guantanamo *per se*, but with the United States military's treatment of refugees there as prisoners of war without due process rights, access to counsel, or adequate medical or living conditions.

The government simply failed to search long and hard enough for effective, lawful alternatives to *refoulement*. With enough jawboning, the United States surely could have persuaded other nations in the region—such as Canada, Venezuela, and Mexico—to take their share of refugees while the political crisis in Haiti was being negotiated. What the government did offer—refugee processing at sites within Haiti—has provided minimal relief for Haitians genuinely fearful of political persecution.<sup>86</sup> Those rare refugees who have successfully pursued in-country processing have been arrested and held for days by the Haitian military, even over protests from the White House, before being allowed to leave the country.<sup>87</sup>

By October 30, 1993, the date of President Aristide's scheduled return to Haiti, the ironies in the *refoulement* policy had become painfully manifest. When a United States ship carrying armed American soldiers tried to dock in Port-au-Prince, supporters of the Haitian

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84. Seth Faison, *U.S. Tightens Asylum Rules for Chinese*, N.Y. TIMES, Sept. 5, 1993, at A45.

85. 113 S. Ct. at 2554. Over the past several decades, by contrast, the United States has taken in as many as 900,000 Cubans. See Brief *Amicus Curiae* of American Jewish Committee and Antidefamation League in Support of Respondents at 13, *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

86. See generally Brief of *Amicus Curiae* of Americas Watch in Support of Respondents, *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

87. A case in point is that of Williams Corascelan, a Haitian soldier who refused to obey the military regime, fled Haiti by boat, and was summarily returned pursuant to the Kennebunkport Order. When he applied for refugee status in Haiti, United States immigration authorities recognized his well-founded fears of persecution and gave his application expedited status. Yet

military regime prevented its landing and forced its return. After months of waiting, the United States government finally sent warships to enforce an economic blockade off the coast of Haiti.<sup>88</sup> The Clinton Administration announced that it was too dangerous for the armed American soldiers to land, but Coast Guard cutters patrolling alongside the warships continued to intercept and return unarmed boat people to the same Haitian military, who promptly arrested and punished them upon return.<sup>89</sup> When the Clinton Administration's top human rights official returned from Haiti and suggested that the forced return policy be rethought, he was rebuked by his superiors, who called his statement, but not the policy, "completely wrong and outrageous."<sup>90</sup>

On reflection, *Haitian Centers Council* was ultimately lost in the political arena. Once President Clinton reversed his position, the four swing Justices—Stevens, Kennedy, Souter, and O'Connor—probably concluded that if the President could live with *refoulement*, so could they. It is no surprise that when judges stretch to condone bad policy, the result makes bad law.

At the same time, *Haitian Centers Council's* curiously inward focus and dismissive attitude toward international law raises legitimate questions about the ability of the current Court to deal with the post-Cold War world. We are far from the days when our Justices, the likes of John Marshall and John Jay, were diplomats and statesmen schooled in and sensitive to the law of nations. At a time when our allies look outward and rely increasingly upon international law to facilitate international commerce, migration, and democratization, our Supreme Court continues to look inward, myopically fixated on short-term national interest. If the United States is to continue as the world's only surviving superpower, how long can its highest court persist in deciding international cases indifferent to the principles of comity, sanctity of treaty, and respect for human rights that must form the bedrock of any new world order?

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even after that application was approved, he was arrested by military officials at the airport in Haiti and held for six days, winning release only after an extraordinary direct protest from the White House. See Deborah Sontag, *Haiti Arrests Man on Way to Asylum in the U.S.*, N.Y. TIMES, Mar. 14, 1993, at A8.

88. R.W. Apple, Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993 at A1.

89. Howard W. French, *Boat People Face Persecution*, N.Y. TIMES, Oct. 30, 1993, at A5.

90. Stephen A. Holmes, *Rebuking Aide, U.S. Says That Haiti Policy Stands*, N.Y. TIMES, Dec. 16, 1993, at A6.