Intercepting Refugees At Sea: An Analysis of the United States' Legal and Moral Obligations

Suzanne Gluck

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol61/iss4/5
[W]e live in an age when asylum-seekers are no longer only border crossers, but arrive by sea and by air in increasingly large numbers in countries far away from their homelands, in Europe, in North America and elsewhere. Their very presence and the problems resulting from the dimensions of this new phenomenon are exploited by xenophobic tendencies in public opinion. I well understand the dilemma facing many host countries, but I fear that these difficulties might tempt some Governments to consider adopting restrictive practices and deterrent measures which in my view should never be resorted to in dealing with refugees.

Poul Hartling, Former United Nations High Commissioner for Refugees

INTRODUCTION

The desperate plight of refugees seeking sanctuary in the United States raises critical legal and humanitarian issues. While the United States is under no legal obligation to grant asylum, even to refugees fleeing persecution, humanitarian concerns demand protection for victims of persecution. Accordingly, the international community has granted refugees the right of non-refoulement, the most fundamental principle of refugee protection.

Formally set forth in article 33 of the 1951 Convention Relating to the

---


2. Congress has defined the term refugee as follows:

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


3. Non-refoulement is derived from the French verb refouler meaning "to drive back or to repel." The term non-refoulement describes the principle prohibiting the forced
Status of Refugees (the "1951 Convention") and incorporated by reference in the United Nations Protocol Relating to the Status of Refugees (the "U.N. Protocol"), non-refoulement prohibits the return of refugees to countries where their lives might be threatened.\(^4\) The United States affirmed its commitment to observe non-refoulement by embodying the principle in section 243(h) of the Immigration and Nationality Act ("INA").\(^5\) The United States' obligation extends to those aliens who satisfy the criteria for refugee status.\(^6\) That is, the United States is required to protect those aliens who possess individual, well-founded fears of persecution on account of their race, religion, nationality, social group, or political opinion.\(^7\) Yet the United States' current policy of interdicting and repatriating Haitian nationals on board vessels on the high seas, without screening for refugees, violates this basic tenet.

Political turmoil in Haiti has forced thousands of Haitians to flee, many out of fear of persecution.\(^8\) Seeking to avoid a mass migration similar to the Cuban exodus in the 1980s, the United States has intercepted repatriation of refugees to countries where they face persecution. See Guy S. Goodwin-Gill, The Refugee in International Law 69 (1983).


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

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.


5. See Immigration and Nationality Act § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988 & Supp. III 1991). As a signatory to the U.N. Protocol, the United States was already bound to observe non-refoulement. See supra note 4. The United States' adherence to the principle, however, had been inadequate. In 1970, for example, Kudirka, a Lithuanian sailor, boarded a United States Coast Guard cutter and requested asylum. Although there was considerable evidence that Kudirka had experienced past, and feared future, persecution, the Coast Guard returned him to his Soviet ship where he was allegedly beaten unconscious. Congress recognized that this action was inconsistent with the U.N. Protocol's "‘generous underlying humanitarian philosophy.’" See J. Michael Cavosie, Note, Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law, 67 Ind. L.J. 411, 423-24 (1992) (citation omitted). Thus, to ensure compliance with its international obligations, Congress amended section 243(h) to parallel the mandatory provisions of article 33. See id. at 424-25.

6. See supra note 2; infra note 64 and accompanying text.


Haitian boats at sea and forcibly returned the passengers to Haiti without first determining whether they are sending bona fide refugees back to repression and persecution. Amnesty International characterizes the United States' interdiction program as “an egregious violation of international law that not only places Haitians at risk of human rights violations upon return, but also directly undermines the international regime for the protection of refugees.”

Ironically, the United States continued this practice of interdiction and forced return even after criticizing Britain, in 1989, for forcibly repatriating from Hong Kong thousands of Vietnamese refugees.

In an unexpected turn of events, President Clinton announced his intention to continue, at least temporarily, the forced repatriations despite his campaign statements sharply criticizing the Bush Administration’s interdiction program. During his campaign, Clinton had described the policy as “‘another sad example of the Administration’s callous response to a terrible human tragedy.’” Defending his new position, Clinton asserted that his decision was motivated by concerns for those Haitians drowning at sea in their attempt to flee Haiti. As a practical matter, a mass exodus from Haiti was expected after Clinton’s inauguration and this policy decision was seen as the only way to prevent the onslaught. Nevertheless, the United States’ obligation to observe non-refoulement prohibits the return of those Haitians who face persecution in Haiti. Accordingly, at a minimum, non-refoulement mandates that the United States screen the Haitians aboard the intercepted boats to ensure that they will not be returning bona fide refugees to persecution in Haiti.

---


11. See David B. Ottaway, Britain Faulted on Viet Repatriation; Expulsion From Hong Kong 'Unacceptable,' Administration Says, Wash. Post, Nov. 28, 1989, at A17.


15. See supra note 4; infra note 64.

When challenged in court by groups representing the refugees, the United States government defended its policy by stating that the laws that prohibit refoulement do not extend to the high seas. This defense has in turn generated the current controversy over whether section 243(h) of the INA—the section that prohibits refoulement—applies to aliens interdicted in international waters. On March 2, 1993, the Supreme Court heard oral arguments in order to resolve a split in the circuits on this issue.

This Note contends that the humanitarian backdrop of section 243(h), particularly its conformance to article 33 of the 1951 Convention, presupposes an extraterritorial application. The forced repatriation of Haitian refugees therefore violates both domestic and international law. Part I reviews the United States' interdiction program, its effect on Haitian emigres, and the subsequent litigation challenging its legality. Part II examines the statutory language and the legislative history of both section 243(h) and article 33 to determine the extent of the United States' non-refoulement obligation as imposed by both the Refugee Act and international law. Part III analyzes the United States' legal and moral obligations towards the interdicted Haitians. Finally, this Note concludes that either the Supreme Court or Congress should provide an authoritative definition of section 243(h) that explicitly states its extraterritorial application to ensure future compliance with this fundamental principle.

I. BACKGROUND

A. The Interdiction Program

In 1981, President Reagan determined that the continuous flow of illegal aliens into this country was detrimental to United States interests. Instead the United States must provide the intercepted Haitians with individual hearings to determine refugee status to ensure that bona fide refugees are not returned to their persecutors.

17. See infra notes 43-60, 72-166 and accompanying text.

The government asserts that the Supreme Court can reverse the Second Circuit's decision without reaching the merits under alternate theories: 1) the Immigration and Nationality Act precludes judicial review, 2) the Haitian class is barred by collateral estoppel, and 3) equitable principles prevent injunctive relief against a President's order in the area of foreign affairs. See Brief for Petitioners at 10-13, McNary v. Haitian Ctrs. Council, Inc. (U.S. 1992) (No. 92-344) [hereinafter Brief for Petitioners].

Therefore, he issued an executive order authorizing the Secretary of State to enter into "cooperative arrangements" with foreign governments to prevent illegal migration into the United States by sea. Significantly, the order mandated "strict observance of [the United States'] international obligations concerning those who genuinely flee persecution in their homeland"—that is, strict adherence to the principle of non-refoulement.

The United States subsequently entered into one such cooperative agreement with Haiti. Under the agreement, the United States Coast Guard was authorized to stop and board Haitian boats suspected of carrying illegal immigrants and to return them to Haiti. The agreement provided, however, that the United States would not return any Haitian

---


Interestingly, the previous year President Reagan had stated:

[Cites text from Reagan's speech accepting the Republicans' Nomination on July 18, 1980.]


---

21. See Exec. Order No. 12,324, § 1, 3 C.F.R. 180 (1982), reprinted in 8 U.S.C. § 1182 (1988). Executive Order 12,324 instructed the Coast Guard to "enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens," id. § 2(a), as follows:

1. To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

2. To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

3. To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent.

Id. § 2(o)(1)-(3).

22. Id. § 3.


Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board. The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the
whom authorities deemed qualified for refugee status. By including this provision, the United States acknowledged the potential culpability of "actually returning refugees to a country where they may be endangered, even though such actions take place in an area wholly outside its territorial jurisdiction."\(^2\) The government delegated to Immigration and Naturalization Service ("INS") officials responsibility for determining whether any of the interdicted Haitians "had sufficiently credible claims of persecution to be 'screened-in' to the United States to pursue asylum applications."\(^2\)

The INS established guidelines for field officers to follow in making this determination.\(^2\) Under these guidelines, INS officials interviewed passengers on interdicted boats to discover whether they had a legitimate claim for asylum.\(^2\) Officials who lacked training in asylum law, however, often made these determinations based on hasty interviews on board crowded vessels.\(^2\) Haitians who demonstrated a "credible fear" of persecution were "screened-in" and brought to the United States to continue the asylum process.\(^3\) The remaining Haitians were "screened-out" United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

. . .

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

*Id.* at 3559-60. This agreement was necessary because international law prohibits a nation from intercepting another country's vessel on the high seas without an agreement between the two parties. *See* Louis B. Sohn, *Interdiction of Vessels on the High Seas*, 18 Int'l Law. 411, 418 (1984).


28. *See id.* These interviews were required only "[t]o the extent that it . . . [was], within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable." *Id.* at 1502.

29. *See Beck, supra* note 26, at 56.

30. *See id.* In order to qualify for asylum under § 208(a) of the Immigration and Nationality Act, an alien must demonstrate refugee status as defined in § 101(a)(42), which requires a "well-founded fear of persecution." *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987); *infra* note 63 and accompanying text. This is a higher standard than the preliminary "credible fear" test the INS officials employed. To qualify for protection against *refoulement* under § 243(h), an alien must meet an even higher standard and establish a "clear probability of persecution." INS v. Stevic, 467 U.S. 407, 413 (1984); *see infra* note 64 and accompanying text.
and were immediately repatriated to Haiti. On September 20, 1991, a military coup ousted Jean Bertrand Aristide, Haiti's first democratically elected president in 200 years. Americas Watch, the National Coalition for Haitian Refugees, and Physicians for Human Rights, described the grim climate of political turmoil and persecution that followed:

In the period immediately following the coup, massacre and widespread killings were the order of the day. Since then, techniques have become more refined but similarly brutal. Selected assassinations, disappearances, severe beatings and political unrests continue. Entire neighborhoods, particularly in the poor and populous shantytowns of Port-au-Prince and across the countryside that voted for Aristide almost unanimously, have been targeted for particularly brutal and concentrated attacks. Common people are arrested merely for having photographs of President Aristide in their home or for the possession of pro-Aristide literature.

As conditions in Haiti worsened, migration to the United States increased. In response, the United States government temporarily suspended the interdiction and repatriation program, but resumed the practice on November 18, 1991. The INS continued to screen for refugees, now at the United States Naval Base at Guantánamo Bay, Cuba. Under new leadership, INS officials implemented improved screening procedures and began reaching an average "screen-in" rate of thirty percent. Believing that this rate was too high, President Bush issued Executive Order 12,807, authorizing the United States Coast Guard to intercept boatloads of Haitian refugees at sea and to return them immediately to Haiti without consideration of their claims for political asylum.

32. See id.
34. See Baker, 953 F.2d at 1502.
35. See id.
36. See infra notes 46-48 and accompanying text.
37. See Beck, supra note 26, at 55. Between 1981 and 1990 the average screen-in rate had been less than one percent. See id.
39. See id. The executive order provided, in part, as follows:

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States

Sec. 2. (a) . . . [T]he Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

Id. (citation omitted). The executive order further stated that the Attorney General, “in
The Bush program differed from the Reagan program in one critical aspect: it terminated the screening requirement altogether, so that even bona fide refugees with legitimate claims of persecution were returned to Haiti.

When the new program was implemented, immigration officials found that one-third of those interdicted had a credible claim for asylum. Thus, the Bush Administration’s immediate repatriation policy “jeopardize[d] Haitian refugees, and mean[ed] that the example of the United States will be cited whenever other nations decide to slam their own doors on refugees and force them back into the hands of their oppressors.” President Clinton’s decision to pursue temporarily the Bush policy of forced repatriations, therefore, continues to endanger the lives of those Haitians who qualify for refugee status.

B. Challenges to the Interdiction Program

President Reagan’s interdiction program, was first challenged in Haitian Refugee Center v. Gracey. In that case, the plaintiffs claimed that the program violated the United States’ non-refoulement obligation under section 243(h) and article 33 by creating a substantial risk that the government would forcibly return refugees to countries where they faced persecution. After a cursory analysis, the district court dismissed this

his unreviewable discretion, may decide that a person who is a refugee will not be re-

turned without his consent.” Id. § 2(c)(3). President Bush, however, emphasized that this order should not be "construed to require any procedures to determine whether a person is a refugee." Id. § 3.

Though the executive order did not specifically mention Haiti, a statement issued the same day from the White House Press Secretary noted that the president had "issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti." Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1353 (2d Cir.) (quoting Office of the Press Secretary (May 24, 1992)), cert. granted, 113 S. Ct. 52 (1992).

President Bush defended his policy: “Yes, the Statue of Liberty still stands and we still open our arms to people that are politically oppressed. We cannot, as long as the laws are on the books, open the doors to economic refugees all over the world.” 138 Cong. Rec. H3,911, H3,911 (daily ed. May 28, 1992) (statement of Rep. Conyers quoting President Bush). This statement does not address the issue because § 243(h) and article 33 were adopted for that very reason—to distinguish between economic and political refugees.

40. See 138 Cong. Rec. S13,096, S13,096 (daily ed. Sept. 9, 1992) (statement of Sen. Kennedy). Applications for asylum now may be brought at the U.S. Embassy in Port-au-

Prince. Those who fear persecution, however, do not feel that this is a practicable alter-

native. See infra notes 177-78 and accompanying text.


42. See French, supra note 14.


44. See id. at 1401. The plaintiffs also alleged that the government violated the Fifth Amendment by depriving the interdicted Haitian refugees of their liberty and rights pro-

vided by the Refugee Act and the INA. Additionally, the plaintiffs charged the govern-

ment with violating an extradition statute and the Extradition Treaty between the United States and Haiti. See id.
claim, holding that section 243(h) does not apply to those interdicted on the high seas.45

Following the military coup in Haiti, the United States continued to "screen-out" and return to Haiti those refugees who failed to demonstrate a credible fear of persecution. The government, though, started to bring the "screened-in" Haitians to the U.S. Naval Base at Guantánamo Bay, Cuba.46 In November 1991, the Haitian Refugee Center, representing the class of "screened-out" Haitians, brought suit challenging the adequacy of the screening process. The Southern District of Florida immediately issued a temporary restraining order precluding the forced repatriations.47 Because the interdiction program continued, the government decided to house all the interdictees at Guantánamo Bay.48 The district court subsequently issued a preliminary injunction continuing the prohibition against the forced repatriations until the screening interviews improved or a hearing on the merits could be held.49 Citing Gracey, the Eleventh Circuit held that section 243(h) does not protect aliens interdicted at sea and reversed the district court's injunctions.50 Although the Supreme Court denied certiorari, Justice Blackmun, in his dissent, recognized that the question of whether interdicted Haitians have a right to protest forced repatriations "is difficult and susceptible to competing interpretations."51 Moreover, he noted that if Haitians are to be returned

---

45. See id. at 1404.
48. See Brief for Petitioners, supra note 19, at 4.
49. See Baker, 789 F. Supp. at 1578. The Haitian Refugee Center sought relief under (1) article 33, (2) the First and Fifth Amendments to the Constitution, (3) Executive Order 12,324 and the INS guidelines, (4) The Refugee Act of 1980, (5) the Immigration and Nationality Act, and (6) the Administrative and Procedures Act ("APA"). See id. at 1567. The district court granted the preliminary injunction because it found that the plaintiffs had demonstrated a substantial likelihood that the interdiction program violated article 33 and that the Haitian Refugee Center could succeed on its First Amendment claim. See id. at 1571, 1574.

50. See Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1510, 1515 (11th Cir.), cert. denied, 112 S. Ct. 52 (1992). The court also rejected the Haitian Refugee Center's claims under (1) the APA, (2) Executive Order 12,324 and the INS Guidelines, and (3) the First Amendment. See id. at 1505-15.
to possible persecution "that ruling should come from this Court, after full and careful consideration of the merits of their claims." 52

The next challenge to the interdiction program was brought in Haitian Centers Council, Inc. v. McNary. 53 This time, the certified class consisted of "[a]ll Haitian citizens who have been or will be "screened in."" 54 The plaintiffs contested the United States government's new policy of reinterviewing and repatriating "screened-in" Haitians detained in holding areas on Guantánamo Bay without attorneys present. 55 The district court issued a preliminary injunction 56 and held that the "screened-in" plaintiffs comprised a new class and as such the court was not bound by the outcome in Baker. 57 The Second Circuit affirmed the district court's injunction with modifications. 58

The latest challenge followed the May 24, 1992, executive order by President Bush that authorized immediate repatriations to Haiti without any screening for refugees. The Haitian Centers Council contended that the new interdiction program violated article 33 of the 1951 Convention and section 243(h) of the INA. 59 Focusing on the scope of section 243(h), the Second Circuit rejected the Eleventh Circuit's reasoning in Baker, and held that the statute encompassed Haitians interdicted at sea. 60 On October 5, 1992, the Supreme Court granted certiorari 61 to resolve the split in the circuits that this decision created.

II. THE REFUGEE ACT OF 1980

The primary issue that has divided the circuits is whether section 243(h) of the INA, as amended by the Refugee Act of 1980, protects aliens interdicted on the high seas. The humanitarian framework of the Refugee Act, the ordinary meaning of the language of section 243(h), and its legislative history all point towards an extraterritorial application.

The Refugee Act of 1980 reflects the United States' commitment to

52. Id.
54. Brief for Respondents, supra note 46, at 4-5 (quoting Memorandum of Law in Support of Plaintiffs’ Motion for Provisional Class Certification at 3).
56. See id. at *10.
57. See id. at *4.
60. See id at 1361. The Second Circuit found that the plaintiffs certified in McNary were not members of the class certified in Baker and thus were not bound by the Eleventh Circuit's decision. See id. at 1355-56. The government, however, argues that this decision was barred by collateral estoppel. See supra note 19.
"human rights and humanitarian concerns," particularly the need to protect those aliens fleeing persecution. This commitment is articulated in two separate provisions of the Act. First, section 208(a) authorizes the Attorney General to grant political asylum to refugees on a discretionary basis. This provision recognizes, however, that the United States can only accept a limited number of refugees from around the world. Therefore, in order to ensure compliance with the humanitarian objective of the Act, Congress added a second protection by amending section 243(h) to prohibit the return of any aliens to a country where their safety would be threatened. Section 243(h), as amended, provides the following:

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

Prior to 1980, section 243(h) had authorized the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." By contrast, the revised statute makes the Attorney General's responsibilities under this provision obligatory rather than discretionary and expands the scope of the statute to include "any alien" as opposed to "any alien within the United States.

The deletion of the term "within the United States" led to the current controversy over whether section 243(h), as amended, applies to aliens intercepted in international waters.

A. Statutory Construction

The argument supporting extraterritorial application of section 243(h) of the INA relies on the most basic principle of statutory construction—

63. See Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1988). Section 208 defines the Attorney General's discretionary authority as follows:
(a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee . . . .
(b) Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee . . . owing to a change in circumstances in the alien's country of nationality . . .
8 U.S.C. § 1158(a)-(b).
66. Id. at 1357-58.
67. See id. at 1358.
that in the absence of "a clearly expressed legislative intention to the contrary," the plain meaning of the statute controls. On its face, section 243(h) prohibits the return of "any alien," without limiting its application to aliens physically located in the United States. Because the term "alien" includes "any person not a citizen or national of the United States," Congress has made it clear that "aliens are aliens, regardless of where they are located."

Nevertheless, the Bush Administration contended that section 243(h) must be construed in light of the presumption against extraterritorial application. This presumption is used to discern "unexpressed congressional intent," but should only be employed after all traditional methods of determining congressional intent are exhausted. Accordingly, the Second Circuit found the presumption irrelevant because Congress had articulated its intent "by making [section] 243(h) apply to 'any alien' without regard to location." Additionally, the presumption against extraterritorial application is based on the premise that Congress "is primarily concerned with domestic conditions." Section 243(h), however, expressly reflects the United States' commitment to an international concern. Because it applies to persons fleeing other countries, sec-

69. See supra note 64 and accompanying text.
72. See EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230 (1991); McNary, 969 F.2d at 1358; Brief for Petitioners, supra note 19, at 27.
73. See McNary, 969 F.2d at 1358 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
74. See Arabian Am. Oil, 111 S. Ct. at 1237 (Marshall, J., dissenting). To strengthen the presumption against extraterritoriality, the government employed the same "selective quotation[s]" that the dissent criticized the majority for using in Arabian Am. Oil. See id. at 1238-39; Brief for Petitioner, supra note 19, at 33. The government stated that legislation with "broad definitional or jurisdictional provisions," will only apply domestically in the absence of "specific language" to the contrary. Brief for Petitioners, supra note 19, at 33 (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1963)). The full sentence in McCulloch reads as follows: "[P]etitioners have been unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent." McCulloch, 372 U.S. at 19 (emphasis added). Additionally, the government quoted New York Central R.R. v. Chisholm, 268 U.S. 29 (1925), as declaring that such legislation will only apply in the United States "in the absence of 'words which definitely disclose an intention to give it extraterritorial effect.'" Brief for Petitioners, supra note 19, at 33 (quoting New York Central R.R., 268 U.S. at 31). The Court in New York Central R.R., however, did not apply the Federal Employers Liability Act extraterritorially, finding that the statute "contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose." New York Central R.R., 268 U.S. at 31 (emphasis added) (citation omitted); see Arabian Am. Oil, 111 S. Ct. at 1238-39 (Marshall, J., dissenting).
75. McNary, 969 F.2d at 1358.
tion 243(h), by its very nature, does not concentrate on purely domestic affairs. Furthermore, the presumption against extraterritorial application is normally invoked "to protect against unintended clashes between our laws and those of other nations which could result in international discord." With respect to the interdiction program, a broad interpretation of section 243(h) will not create international conflicts, as "Haitian law—particularly, the U.S.-Haiti Agreement—forbids the return of refugees interdicted on the high seas."

Moreover, limiting the statute to those aliens found in the United States would return the section to its pre-1980 status—in effect adding "terms or provisions where [C]ongress has omitted them." But courts should not supply omitted terms, for "few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded."

In response, the government maintained that Congress deleted the phrase "within the United States" merely to bring excludable aliens—aliens whose characteristics deny them legal entry—within the scope of section 243(h). In 1958, the Supreme Court, in Leng May Ma v. Barber, held that excludable aliens paroled in the United States are not entitled to relief under section 243(h). Therefore, the government reasoned that Congress amended section 243(h) in an attempt to remedy the holding in Barber. The legislative history supports this view by stating that section 243(h), as amended, applies to aliens seeking asylum in ex-

77. See Brief for Respondents, supra note 46, at 36.
78. Arabian Am. Oil, 111 S. Ct. at 1230.
79. Reply Brief for Appellants at 5, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d. Cir.) (No. 92-6144) [hereinafter Reply Brief for Appellants] (footnote omitted), cert. granted, 113 S. Ct. 52 (1992); see U.S.-Haiti Agreement, supra note 24, at 3560. Additionally, applying § 243(h) to the high seas does not conflict with Haiti's laws because "no nation can claim the sovereign right to have political refugees returned to it for persecution." Brief for Respondents, supra note 46, at 37.
80. See supra note 65 and accompanying text.
81. McNary, 969 F.2d at 1359.
82. Id. (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).
83. An excludable alien has reached the United States border but "has not been formally permitted to enter the country." Bertrand v. Sava, 684 F.2d 204, 205 n.1 (2d Cir. 1982). Even if he is temporarily admitted on parole, the excludable alien will be "treated as if stopped at the border." Id. (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953)). Section 212(a) of the INA lists the statutory grounds for exclusion. See 8 U.S.C. § 1182(a) (1988 & Supp. III 1991).
84. See Brief for Petitioners, supra note 19, at 52-53; McNary, 969 F.2d at 1373-74 (Walker, J., dissenting).
clusion as well as deportation proceedings. As the Haitian Centers Council has pointed out, however, this theory does not explain why Congress removed the entire geographic limitation from section 243(h) rather than simply substituting the words "physically present within the United States" as it did in section 208.

The location of section 243(h) within the INA appears to provide the strongest support for a purely domestic interpretation. The Eleventh Circuit in *Haitian Refugee Center, Inc. v. Baker* and the District of Columbia in *Haitian Refugee Center, Inc. v. Gracey* relied primarily on the fact that section 243(h) is included in part V of the INA, the section addressing deportation. Both courts reasoned that because deportation provisions in part V only affect aliens in the United States, section 243(h) must be similarly limited.

Section 243(h)'s location, however, merely reflects its pre-1980 placement, when it applied only to deportation proceedings. The courts' analysis would limit each section in part V to deportation proceedings. But, as stated above, section 243(h) clearly applies in exclusion proceedings as well. Moreover, other sections in part V limit their scope to aliens in or within the United States. This fact further supports a broad reading of the term "any alien" in section 243(h), because "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Similarly, the language in section 243(h)(2)(C) specifically excluding

---

88. See Brief for Respondents, supra note 46, at 18-19, 24-25; supra note 63. The Haitian Centers Council also questions the absence of any mention of *Barber* in the legislative history and why twenty-two years passed before Congress "'corrected'" *Barber*. Id. at 25.
91. See *Baker*, 953 F.2d at 1510; *Gracey*, 600 F. Supp. at 1404.
92. See Brief for Respondents, supra note 46, at 18.
95. Paragraph 2 of section 243(h) states that the following groups are not entitled to the benefits of 243(h)(1):
   (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
   (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
   (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
   (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.
aliens who committed a serious crime prior to their arrival "in the United States," does not limit the application of the entire section to aliens present in the United States. The interest of Congress in barring the entry of criminal aliens does not suggest an intent to permit the forcible return of "noncriminal aliens who have not entered, and may have no desire ever to enter, United States territory." Instead, Congress may have intended this section to expand the prohibition to a broader class of aliens while preserving the limitation in its exceptions clause.

A literal reading of section 243(h) suggests that the phrase "if the Attorney General determines" does not require the Attorney General to determine whether a particular alien is fleeing persecution. Commentators have rejected this argument with respect to article 33 of the U.N. Protocol, the section analogous to 243(h) of the INA. Article 33 and section 243(h) were both designed to protect those refugees fleeing persecution. Therefore, "it would scarcely be consonant with considerations of good faith for a state to seek to avoid the principle of non-refoulement by declining to make a determination of status."

Furthermore, simply because section 243(h) restricts only the Attorney General's actions, the President is not vested with the authority to order the Coast Guard to execute the interdiction program. Indeed, Congress constrained the Attorney General's actions specifically because the Attorney General is the President's agent with respect to immigration matters. Section 243(h) would lose its meaning if "returning an alien to his persecutors — was forbidden if done by the [A]ttorney [G]eneral but permitted if done by some other arm of the executive branch."

Finally, the dissent in Barber, recognized that when constructing "a human provision" such as section 243(h), "[t]he spirit of the law provides the true guide." Interpreting section 243(h) in accordance with its humanitarian objectives mandates a broad application encompassing refugees at sea.

---


96. Brief for Respondents, supra note 46, at 19-20; see McNary, 969 F.2d at 1359.

97. See Brief for Petitioners, supra note 19, at 30.

98. See supra note 4; infra notes 105-07 and accompanying text.

99. Goodwin-Gill, supra note 3, at 73.


102. McNary, 969 F.2d at 1360.


104. Id.
B. Legislative History and Purpose

One of Congress' primary purposes in enacting the Refugee Act of 1980 was to bring United States refugee law into conformance with the U.N. Protocol. Specifically, Congress amended section 243(h) to conform its language to article 33 of the Protocol. Accordingly, section 243(h) "has the same scope and force as article 33."  

In his May 1992 executive order, President Bush declared that the United States' international obligations under article 33 "do not extend to persons located outside the territory of the United States." In determining whether this pronouncement accurately defines article 33's scope, the Court must interpret the U.N. Protocol "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Additionally, "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."  

The Second Circuit concluded that the plain meaning of the language of article 33 shows that where the refugee is to be returned to, not where

---

109. Vienna Convention on the Law of Treaties, concluded May 23, 1969, § 3, art. 31, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Other considerations that must be taken into account for the purposes of interpreting a treaty include the following:  
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:  
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;  
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.  
3. There shall be taken into account, together with the context:  
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;  
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;  
   (c) Any relevant rules of international law applicable in the relations between the parties.  
4. A special meaning shall be given to a term if it is established that the parties so intended.  
Id.  
the refugee is returned from, is the most important criterion. The court's analysis rested upon the fact that the definition of a "refugee" under the U.N. Protocol, just as with "any alien" under section 243(h) of the INA, focuses on one's past rather than present location. Furthermore, if the parties to the 1951 Convention intended to limit article 33's application to those "refugees who have entered the territory of the contracting state," they would have specified this limitation as they had in other articles of the Convention.

Article 33, however, provides that "[n]o Contracting State shall expel or return ("refouler") any refugee." The placement of the French word "refouler" after "return" clouds the plain meaning of the provision. One definition of refouler is to "expel (aliens)." Under this meaning, the term "connotes ejection of an alien from within the territory of the Contracting State." Alternatively, Dictionnaire Larousse "suggests that ['refouler'] implies repelling or driving back an alien who has not yet entered." In contrast, commentators have defined refoulement as a term of art "to be distinguished from expulsion or deportation." Because of these conflicting interpretations, the term "is not susceptible to a plain language analysis."

Paragraph 2 of article 33, like section 243(h)(2)(C), delineates an exception to the prohibition of refoulement. Under this exception, a refugee may not claim the benefit of article 33 if he is a danger to the security

111. See Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1362 (2d Cir.), cert. granted, 113 S. Ct. 52 (1992). In his dissent, Judge Walker disagreed with the meaning attributed to the term "return." Judge Walker believed that the plain language did not indicate "where the Article prohibits 'return from.'" Id. at 1377 (emphasis added). Therefore, he concluded that the court needed to look to the negotiating history to determine the meaning of "return." Id. For an analysis of the negotiating history, see infra notes 141-53 and accompanying text.

112. The definition of a refugee under the Refugee Act of 1980 is based on the U.N. Protocol's definition which includes any person "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Convention, supra note 4, art. 1, ¶ A(2) at 152 (as amended by U.N. Protocol, supra note 4, art. 1, ¶ 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

113. See McNary, 969 F.2d at 1362.

114. Id.; see e.g., 1951 Convention, supra note 4, art. 4, at 156 ("refugees within their territories"); id., supra note 4, art. 15, at 162 ("refugees lawfully staying in their territory").

115. See 1951 Convention, supra note 4, at 176.

116. See Brief for Petitioners, supra note 19, at 38-39 (quoting Cassell's French Dictionary 627 (1978)).

117. Id.


119. Goodwin-Gill, supra note 3, at 69.

120. McNary, 969 F.2d at 1377 (Walker, J., dissenting).

121. See 1951 Convention, supra note 4.

122. See supra note 95 and accompanying text.
of "the country in which he is." Thus, the government claims that, as the only geographic reference in the article, this phrase limits both paragraphs. The Second Circuit, nevertheless, found that article 33(1)'s "silence on geographic limitation shouts loudly its proper meaning." In other words, as stated above, the express territorial limitations in other articles of the 1951 Convention prove that "the parties knew how to restrict a provision's territorial reach when they wanted."  

The objective and purpose of article 33 further support a broad application. The U.N. Protocol was "designed to protect refugees fleeing bona fide political persecution." As a result, it is inconsistent to claim that the U.N. Protocol "could have been intended not to provide protection to the Haitians fleeing the brutal, military regime now in power on the ground that those fleeing had not yet reached the territory of a Party to the Protocol."  

More specifically, the desperate plight of Jewish refugees during World War II prompted the international community to adopt the principle of non-refoulement. As Judge Hatchett explained:  

Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States's responsibility for the consequences of its inaction would have been any less if the United States had stopped the refugee ships before they reached our territorial waters? Having promised the international community of nations that it would not turn back refugees at the border, the government yet contends that it may go out into international waters and actively prevent Haitian refugees from reaching the border. Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.  

President Bush's interpretation of article 33 states that it does not apply to aliens outside the United States. Although this interpretation is entitled to "great weight," it must still follow the dictates of the Vi-

---

123. See 1951 Convention, supra note 4.
125. McNary, 969 F.2d at 1364.
126. Reply Brief for Appellants, supra note 79, at 7; see supra note 114 and accompanying text.
128. Id.
131. Louis Henkin, Foreign Affairs and the Constitution 167 (1972). Additionally, the Restatement provides that the President "has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states." Restatement (Third) of the Foreign Relations Law of the United States § 326(1).
INTERCEPTING REFUGEES AT SEA

enna Convention, i.e., to be rendered in good faith and consistent with the plain meaning of the treaty’s terms in their context and in light of its object and purpose. As stated above, article 33’s ordinary meaning and purpose support extraterritorial application. If a United States President construes the treaty outside the constraints of the Vienna Convention “it represents not construction or interpretation, but the making of a new treaty.”

Furthermore, although “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement” is extremely influential, the government has offered conflicting interpretations. When the interdiction program began in 1981, a memorandum opinion for the Attorney General stated that article 33 applied on the high seas. In addition, the U.S.-Haiti Agreement expressly provided that the United States will not return “any Haitian migrants whom the United States authorities determine to qualify for refugee status.” Further, President Reagan’s Executive Order 12,324 mandated that the INS and Coast Guard observe our international obligations by ensuring that “no person who is a refugee will be returned without his consent.”

In 1985, the government formally reversed its position while defending the interdiction program in Gracey. The government argued that its earlier interpretations should not control because the state simply assumed “the premise that Article 33 applied on the high seas” without the analysis employed in Gracey. The Second Circuit, however, found the government’s present position to be “the sort of post hoc litigation posture that is entitled to no deference” and, as such, cannot negate the plain language of article 33.

The government has also attempted to use the negotiating history of the 1951 Convention to discredit the above analysis. Article 32 of the Vienna Convention provides that “supplementary means of interpretation,” such as the negotiating history, may be used when the ordinary meaning of the treaty language is “ambiguous or obscure; or . . . [i]n...
to a result which is manifestly absurd or unreasonable."\textsuperscript{141}

Nevertheless, the government has relied on the comments of the Dutch delegate made to the Conference of Plenipotentiaries, which drafted the final version of article 33.\textsuperscript{142} The Dutch delegate stated that, based on conversations with other representatives, he believed the general consensus was that the word "return" should only apply to refugees already in the territory and that "the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33."\textsuperscript{143} The President of the Conference ruled that "the interpretation given by the Netherlands representative should be placed on the record."\textsuperscript{144} This ruling can be read either as an "agreement" to this interpretation,\textsuperscript{145} or merely as "recording the view of a dissenting member."\textsuperscript{146} Only the joint intent of all the parties, however, can provide a treaty's meaning.\textsuperscript{147}

According to Louis Henkin, who served as the United States Representative to the Committee responsible for drafting the 1951 Convention,\textsuperscript{148} the drafters understood article 33 to mean that a state would not be compelled to grant asylum to any refugee. But, once a refugee was within its borders, a state could not return him to his oppressors. Further, a state may not "a fortiori—reach out beyond its borders, pick up a refugee off of the high seas and forcibly return him into the hands of his oppressors."\textsuperscript{149} In an affidavit to the Supreme Court, Professor Henkin explains that the delegates wanted to prevent the right of non-refoulement from requiring a country to admit a mass of migrants as a group without an individual determination that each migrant qualified for refugee status. Thus, "[b]y expressing a caveat about mass migrations, the delegates were confirming the right of non-refoulement attached to individual refugees and not to groups. They were not limiting the territorial

\textsuperscript{141}. Vienna Convention, \textit{supra} note 109, § 3, art. 32, at 340; \textit{see also} Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) (plain meaning of treaty controls unless there is strong evidence to the contrary).

\textsuperscript{142}. \textit{See} Brief for Petitioners, \textit{supra} note 19, at 43.


\textsuperscript{144}. \textit{Id}.


\textsuperscript{146}. \textit{McNary}, 969 F.2d at 1365. Twenty-six states participated in the 1951 Convention. Therefore, "[a]lthough the Dutch delegate's comments were placed on the record without objection, it cannot be assumed that all delegates were in accord simply because they did not object to their colleague's request to memorialize his view." \textit{Brief of Amicus Curiae Office of the United Nations High Commissioner for Refugees at 15-16, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir.)} (footnote omitted), \textit{cert. granted}, 113 S. Ct. 52 (1992).

\textsuperscript{147}. \textit{See} Glennon, \textit{supra} note 132.


\textsuperscript{149}. \textit{Id}. ¶ 10.
Professor Henkin expressed this interpretation of article 33 one year prior to the Conference. After the drafting committee rejected a mandatory asylum provision, Henkin noted the following:

It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same. Whatever the case might be, . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country, or place him in an internment camp. 151

George Warren, the United States delegate to the Conference in 1951, never took any action to rescind Henkin's interpretation or to support another interpretation. 152 Accordingly, Henkin's statement "continued as the official position of the United States government with regard to the meaning of Article 33." 153

Article 33 may provide an independent basis for requiring the Court to enjoin the forced repatriations154 if it is considered a self-executing treaty binding upon the United States irrespective of any act of Congress. 155 In 1982, the Second Circuit held that article 33 was not self-executing. 156 The Supreme Court, however, subsequently ruled that article 33 "imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons." 157 Alternatively, the United States could be considered bound under the principle of customary interna-

150. Id. ¶ 7.

151. Id. ¶ 8 (quoting Summary Record of the Twentieth Meeting of the Ad Hoc Committee on Statelessness and Related Problems held Feb. 1, 1950, U.N. DOC. E/AC.32/ SR.20).

152. Id. ¶ 9. Warren, along with delegates of 21 other countries, never endorsed the Dutch delegate's interpretation of article 33. Reply Brief for Appellants, supra note 79, at 8 nn.9, 10.


154. For an analysis of the United States' obligation to observe non-refoulement under article 33, see Arthur Helton, Ecumenical, Municipal and Legal Challenges to United States Refugee Policy, 21 Harv. C.R.-C.L. L. Rev. 493, 508-11 (1986); King, supra note 26 at 778-87.

155. A self-executing treaty is effective upon ratification, whereas a non self-executing treaty requires an act of Congress to bind the United States. See Henkin, supra note 131, at 157-58.

156. See Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) ("[T]he Protocol’s provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation.").

C. Executive Power

The government claimed that the interdiction program falls under the President's exclusive power to act as "the sole organ of the nation in its external relations."\textsuperscript{159} According to the Supreme Court "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."\textsuperscript{160} The legality of the interdiction program, however, does not implicate the "President's power to regulate 'entry' into the United States."\textsuperscript{161} While the President can exclude the Haitians from the United States, forced repatriation prevents these Haitians from finding refuge in any other country.

Furthermore, in immigration matters, the executive's authority "is limited to the zone charted by Congress. If such officers depart from the channels of authority fixed by statute they act illegally."\textsuperscript{162} President Bush relied on sections 212(f)\textsuperscript{163} and 215(a)(1)\textsuperscript{164} of the INA to authorize the interdiction program.\textsuperscript{165} These sections grant the President the authority to limit entry into the United States and to establish rules governing an alien's departure or entry to the United States. Under settled rules of statutory construction, however, sections 212(f) and 215(a)(1) must be read consistently with section 243(h) of the same statute. Thus, the Court cannot interpret these sections as providing the authority to void section 243(h)'s mandatory duty.\textsuperscript{166}

III. Analysis

Inconsistencies in the interdiction programs implemented by the Reagan and Bush Administrations and the onset of litigation challenging the legitimacy of these programs demonstrate the need for an authoritative definition of the term "alien" in section 243(h) of the INA, as amended by the Refugee Act of 1980. The absence of an authoritative definition allowed the Bush and Clinton Administrations to pursue a policy of interdiction at sea and immediate repatriation of Haitian nationals—a pol-

\textsuperscript{158} See Goodwin-Gill, supra note 3, at 97-100; King, supra note 26 at 787-94.
\textsuperscript{161} See McNary, 969 F.2d at 1366.
\textsuperscript{166} See Brief for Respondents, supra note 46, at 39; 2A Norman J. Singer, Sutherland Statutory Construction § 47.04, at 146-47 (5th ed. 1992).
icy that contradicts the Refugee Act's stated purpose of responding "to the urgent needs of persons subject to persecution."\textsuperscript{167} Both the plain meaning and the legislative history of the Refugee Act indicate that Congress intended to strike a balance between the practical necessity of limiting the number of refugees entering the nation with the moral necessity of protecting aliens possessing legitimate refugee status. To this end, section 208 of the INA directed the government to grant political asylum to such aliens on a discretionary basis,\textsuperscript{168} while section 243(h) prohibited the return of aliens who qualify for refugee status into the hands of their persecutors.\textsuperscript{169} The Bush and Clinton Administrations' policy of intercepting and repatriating all Haitians without determining refugee status endangers the lives of those Haitians who possess a legitimate fear of persecution. As a result, their policy violates both international law, as expressed in article 33 of the U.N. Protocol, and the Refugee Act of 1980.

With this in mind, the Supreme Court should take the opportunity presented in \textit{McNary v. Haitian Centers Council, Inc.}\textsuperscript{170} to define the term "any alien" in section 243(h) to encompass those individuals interdicted at sea. Any less comprehensive or definitive reading will ensure that the government will continue to interpret section 243(h) according to the ideological biases of particular presidential administrations.\textsuperscript{171} In the context of the present crisis, any less comprehensive definition may also result in the United States continuing to "return Haitian[ ] refugees to the jaws of political persecution, terror, death and uncertainty."\textsuperscript{172}

Alternatively, Congress should amend section 243(h) by adding a provision stating that the statute has extraterritorial application.\textsuperscript{173} This would conclusively resolve the debate over the scope of section 243(h) and would prevent future administrations from using this ambiguity to justify policies that contradict the clear intent of the statute.

\section*{A. The United States' Legal Obligations}

Assuming that the Supreme Court or Congress extends the term "alien" in section 243(h) of the INA to encompass Haitians interdicted

\begin{footnotesize}
\begin{enumerate}
\item[169.] See supra note 64 and accompanying text.
\item[170.] No. 92-344 (U.S. 1992).
\item[173.] Senator Edward Kennedy has already proposed "the International Refugee Protection Act, which would write clearly into our immigration laws that the United States cannot return persecuted refugees, regardless of where they come into U.S. custody." 138 Cong. Rec. S13,096, S13,096 (daily ed. Sept. 9, 1992) (statement of Sen. Kennedy).
\end{enumerate}
\end{footnotesize}
in international waters, the United States must still determine how to deal with those Haitians possessing refugee status. According to the U.N. High Commissioner for Refugees (UNHCR), "[a]pplication of the principle of non-refoulement obviously presupposes that the asylum-seekers be allowed to present a request to the competent authorities, that their claim be duly examined and that they be in the meantime fully protected against forcible return to their country of origin." Therefore, the Clinton Administration must restore a screening process. This will bring the United States into compliance with domestic and international law and will ensure that the government does not return to their persecutors those Haitians with a legitimate claim for protection.

On January 14, 1993, then President-elect Clinton announced that while he would continue the forced repatriations, he would upgrade the screening process in Haiti. This proposal, however, continues to violate section 243(h) of the INA because Haitians interdicted at sea will only be screened upon their return to Haiti. But if any of the intercepted Haitians qualify for refugee status, non-refoulement prohibits their return to Haiti. Furthermore, Grover Joseph Rees, General Counsel of the INS, has offered additional reasons illustrating why this solution is inadequate. First, many Haitians are unable to apply for asylum due to a shortage of telephones, a high illiteracy rate, and poor transportation to Port-au-Prince. More importantly, applying for asylum in Haiti may substantially increase an applicant's risk of identification and persecution by Haitian government authorities. Similarly, Amnesty International has warned:

Due to surveillance, intimidation and other factors, this opportunity may only be illusory for those most in need of political asylum. For a Haitian asylum seeker who is a victim of political persecution in his own country, and who is on the run from the military or the police, any attempt to apply for refugee status at the U.S. Embassy or Consulate in Haiti would expose them to a substantially increased risk of additional political persecution.

Another option is for the United States simply to resume the policy of screening for refugees—those with a well-founded fear of persecution—on board Coast Guard vessels or at the United States naval base at Guantánamo Bay, Cuba, as was the practice from 1981 until the executive order of May 1992. Although this approach would be an improvement over the Bush Administration's policy, the shipboard interviews, nevertheless, are an inadequate screening device.

175. See Clinton to Continue Forcible Repatriations, supra note 12.
177. See id.
179. See King, supra note 26, at 794-97; supra notes 28-29 and accompanying text.
INS officials have not always adhered to the established guidelines regulating the interviews conducted at sea. In March 1986, for example, the government intercepted a Haitian boat with thirty-eight passengers. The assigned INS official spent a total of eighteen minutes interviewing the aliens and concluded that not one of the passengers qualified for refugee status, and returned the boat to Haiti.\(^\text{180}\) Even after the INS changed its procedures in an attempt to increase the “screen-in” rate, officials admitted that the system was “dysfunctional,” describing the ships as the worst possible place to conduct an interview.\(^\text{181}\)

Screening conducted at Guantánamo Bay may be a practical alternative.\(^\text{182}\) This solution is viable only if the interdicted Haitians have the opportunity to present their claims at a formal hearing. The UNHCR defines the standard for assessing asylum claims as follows:

"It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."\(^\text{183}\)

Accordingly, the Clinton Administration should structure new screening guidelines and should retain qualified officials, trained in asylum law, to conduct the interviews.

The government has taken the position that the Guantánamo facility can accommodate a maximum of 12,500 people and that the potential

---

\(^{180}\) See Susan Freinkel, \textit{A Slow, Leaking Boat to Limbo: The plight of Haitian boat people is now making headlines, but INS records point to years of seeming U.S. indifference to their asylum claims}, Recorder, Dec. 19, 1991 at 1.

\(^{181}\) See Beck, supra note 26, at 56. According to one officer, "'[t]he sun is a killer, and the wind makes it impossible to write. Papers are curling up under twenty-to thirty-knot winds.'" \textit{Id.} He also noted "'[t]here just is no privacy—scarce[ly] the illusion of privacy. . . . We were shoulder to shoulder with migrants while interviewing somebody else.'" \textit{Id.}

\(^{182}\) The government first brought interdicted Haitians to the United States Naval Base at Guantánamo Bay, Cuba in November 1991, following a temporary restraining order enjoining repatriations. \textit{See} Brief for Petitioners, \textit{supra} note 19, at 4; \textit{supra} notes 46-48 and accompanying text.

future mass migration of Haitian refugees may exceed Guantánamo’s capacity.\textsuperscript{184} In fact, the government asserted that this lack of space forced President Bush to initiate immediate repatriations in the first instance.\textsuperscript{185} The facts suggest, however, that the May 1992 executive order was a response, instead, to the unprecedented high “screen-in” rates.\textsuperscript{186} To the extent that limited space creates a problem, the new Administration could seek the help of a third country able to provide additional facilities at which to conduct the screening interviews. Screening aliens in a third country, or at Guantánamo Bay, would have the dual benefit of protecting Haitians while still determining refugee status prior to the aliens entering the United States mainland.\textsuperscript{187}

Once the government determines that a Haitian qualifies for refugee status, the United States must decide what further responsibilities the principle of \textit{non-refoulement} demands. At a minimum, the Clinton Administration should provide temporary refuge to those Haitians who demonstrate a well-founded fear of persecution.\textsuperscript{188} The UNHCR proposes that countries throughout the Western Hemisphere participate in a joint effort to grant temporary asylum to the interdicted Haitians.\textsuperscript{189} The success of such a program, however, depends upon the United States’ willingness to accept intercepted Haitians who prove their refugee status. Without the United States’ participation, other countries are not likely to participate in the program.\textsuperscript{190}

\section*{B. The United States’ Moral Obligations}

Humanitarian considerations implicit in the Haitian crisis prompted legislative proposals granting Haitian refugees temporary safe haven in the United States until the political crisis in Haiti is resolved. The concern that the United States has a “moral responsibility to protect those Haitians who have sought refuge from the turmoil in their homeland” motivated these resolutions.\textsuperscript{191} Recognizing the oppressive conditions in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} See Beck, supra note 26, at 57.
\item \textsuperscript{185} See Brief for Petitioners, supra note 19, at 7.
\item \textsuperscript{186} See supra notes 37-38 and accompanying text.
\item \textsuperscript{187} See Pear, supra note 176.
\item \textsuperscript{188} Arthur Helton, Director Refugee Project for the Lawyers Committee for Human Rights has stated that “the Clinton Administration must commit itself to resettling here all the Haitian boat people who demonstrate a well-founded fear of persecution.” \textit{Id.}
\item \textsuperscript{189} See \textit{id.}
\item \textsuperscript{190} See \textit{id.}
\item \textsuperscript{191} 137 Cong. Rec. S18,335, S18,409 (daily ed. Nov. 26, 1991) (statement of Sen. Deconcini). The United States’ humanitarian commitment is etched in its history: [W]e should remember that the United States is a land of immigrants, and since the founding of the Republic we have had a special national heritage of concern for the uprooted and persecuted . . . beyond our national ethos of humanitarian concern for the uprooted and persecuted, there are solid foreign policy reasons why we should involve ourselves substantially and regularly in resolving refugee problems . . . it is decidedly in our foreign policy interest to project in countries around the world the image of U.S. humanitarian assistance for refugees. Such humanitarian assistance is a glowing example of the purposes and processes of
\end{enumerate}
\end{footnotesize}
Haiti, the proposals granted temporary refugee status to Haitians in United States custody regardless of whether they could demonstrate an individual fear of persecution.

Temporary refuge is a recognized practice under customary international law that prohibits a country from forcibly repatriating aliens who have fled civil strife in their homeland. The prohibition continues until the hostilities in the aliens' homeland ceases. This practice is "premised upon the principles of humanity owed by the state to the international community as a whole." The UNHCR adopts the position that "in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge." Temporary refuge is awarded to all members of a particular country upon a showing of "de facto lack of national protection due to occurrences within the country of nationality," and does not require each asylum-seeker to prove an individualized fear of persecution.

By contrast, section 243(h) of the INA and article 33 of the U.N. Protocol require each alien to demonstrate a well-founded fear of persecution to qualify for protection. Individualized determinations of refugee status are impractical, however, in cases of mass migration due to the numbers of refugees involved and the possibility that a combination of factors motivated their flight. Therefore, the policy of temporary refuge is more applicable in situations of mass migrations.

In 1990, prompted by the continuing civil war and human rights violations in El Salvador, Congress added section 244A to the INA. This provision established, for the first time, a statutory scheme for the temporary refuge of aliens in the United States. This provision authorizes the Attorney General to grant temporary protected status (TPS) to aliens not eligible for asylum under current immigration laws, but who could not, at present, return safely to their homelands. Section 303 of the INA specifically designated nationals of El Salvador as beneficiaries under sec-

---


193. Id. at 616.

194. Id. at 571 (quoting Report on the Thirtieth Session of the Executive Committee of the High Commissioner's Programme ¶ 72, U.N. Doc. A/C. 96/572 (1979)).

195. Id. at 583-84.

196. See Goodwin-Gill, supra note 3, at 116.


To qualify for TPS, an alien must remain "continually physically present" in the United States from the date of TPS designation. Furthermore, an alien may not be admitted to the United States solely in order to apply for TPS. The "physically present" clause, thus, eliminates the threat of the possible mass influx of migrants to the United States after TPS is granted to a particular nationality.

In February 1992, Representative John Conyers proposed a bill granting Haitians in United States custody temporary safe haven. The bill eliminated the "physically present" requirement so that Haitians fleeing violence and persecution could benefit from TPS until a democratic Haitian government is restored. Urging Congress to adopt his proposal, Representative Conyers emphasized the emergency nature of the situation:

Haitians are dying on the seas, and they are being murdered and tortured in their country simply for supporting democracy. Haitians are willing to risk the sharks at sea rather than face their military at home. That should tell us what we need to know about the bravery and the desperation of Haitian refugees.

The Conyers bill was defeated but similar recommendations continued to surface. Bill Frelick of the United States Committee for Refugees, for example, urged the Clinton Administration to grant Haitians TPS either in the United States or at Guantánamo Bay. Frelick views TPS as a compromise that "allows a refuge for those who truly believe their lives
are in danger, but it also shows people that Guantánamo or some other camp is not just a stepping stone into the U.S.\textsuperscript{206}

President Clinton, however, has ordered a naval flotilla around Haiti to discourage a mass exodus.\textsuperscript{207} Accordingly, it is unlikely that the Clinton Administration will adopt a policy granting TPS to all Haitians who apply. Instead the Administration is working with the United Nations in an attempt to resolve the political crisis in Haiti.\textsuperscript{208} Nevertheless, the forced repatriations without a hearing continue to violate the United States' legal and moral obligations.

If President Clinton continues to order the interception of Haitians in an attempt to keep them in Haiti, he must restore a screening process. Further, the Administration must ensure the effectiveness of the screening mechanisms employed to distinguish between political and economic migrants. Additionally, to promote the humanitarian considerations implicit in non-refoulement, the United States should grant TPS to those Haitians who prove an individualized fear of persecution, at least until the political crisis in Haiti is resolved.

In 1990, Vaclav Havel addressed Congress cautioning that morality not politics must control our actions:

\begin{quote}
We still don't know how to put morality ahead of politics, science and economics. We are still incapable of understanding that the only genuine backbone of all our actions—if they are to be moral—is responsibility. Responsibility to something higher than my family, my country, my company, my success. Responsibility to the order of Being, where all our actions are indelibly recorded and where, and only where, they will be properly judged.

The interpreter or mediator between us and this higher authority is what is traditionally referred to as human conscience.\textsuperscript{209}
\end{quote}

By acknowledging this moral responsibility, the Clinton Administration would ensure the United States' compliance with its legal and moral obligations under section 243(h) of the INA.

CONCLUSION

The humanitarian basis of section 243(h) reflects the goal of protection of human life. To realize this goal fully, the statute must necessarily apply to Haitians intercepted by the United States on the high seas. The ordinary meaning of the text as well as the legislative history substantiate this analysis. The Supreme Court or Congress must explicitly define the extraterritorial range of section 243(h) in order to remove the ideological biases currently determining who benefits from its protection.

\textsuperscript{208} See \textit{Clinton to Continue Forcible Repatriations}, supra note 12.