Florida State University Journal of Transnational Law & Policy

Volume 3 | Issue 1 Article 12

1994

United States Haitian Interdiction Policy: Sale v. Haitian Centers Council, Inc.

Dario Perez
Florida State University

NOTE

UNITED STATES HAITIAN INTERDICTION POLICY: *SALE V. HAITIAN CENTERS COUNCIL, INC.*

DARIO PEREZ*

> Sometimes, we must interfere. When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant. Wherever men or women are persecuted because of their race, religion or political views, that place must—at that moment—become the center of the universe.[1]

I. INTRODUCTION

Traditional patterns of migration throughout the world have dramatically changed over the past ten years. Conflict and repression have forced millions of refugees from their homelands. This exodus, fueled by racial, religious, ethnic and political fear of persecution has significantly impacted the United States. In response, the U.S. has restricted access to its borders.

Efforts by the U.S. to stem the flow of illegal immigration has been severely criticized.[2] United States policy toward Haitian refugees has been met with particularly sharp criticism; labeled by critics as both racist and illegal.[3] Despite concerns regarding the legality of U.S policy toward Haitian refugees intercepted at sea, in May 1992, the Bush Administration increased the authority of the Coast Guard to intercept Haitians and refuse them entrance to the United States. A class action suit was immediately filed on behalf of all refugees who either entertained credible fears of persecution upon return to their country or had been repatriated under the new policy.[4]

The purpose of this note is to review the appropriateness of the U.S. policy of interdicting Haitian vessels on the high seas and summarily repatriating their occupants without a hearing on their

---

* J.D. expected 1995, Florida State University College of Law. This note was selected as the best paper of the *Journal's* Summer 1993 Writing Competition.

1. Elie Wiesel, Nobel Peace Prize Acceptance Speech at Oslo, Norway (1986)

2. Jean-Pierre Benoit & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421 (1992); Suzanne Gluck, *Intercepting Refugees At Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865 (1993) (hereinafter *Intercepting Refugees*).

3. Malissia Lennox, *Refugees, Racism and Repatriations: A Critique Of The United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 687 (1993); Abigail D. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 773, 787 (1988).

4. *See* Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (2nd Cir. 1992).

individual asylum claims. The note will first review the factual and procedural history of *Sale v. Haitian Centers Council, Inc.*,[5] and then examine the main arguments advanced by the defendants, focusing particularly on the Supreme Court's interpretation of section 243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act) and Article 33 of the United Nations Convention relating to the Status of Refugees. Finally, the note will analyze the humanitarian framework of the Act, the ordinary meaning of the language of section 243(h)(1), and its legislative history to critique the U.S. interdiction policy.

II. HAITIAN CENTERS COUNCIL, INC. V. MCNARY

A. Factual Background

On September 30, 1991, a military coup overthrew the democratically elected President of Haiti, Jean-Bertrand Aristide.[6] Hundreds of Aristide supporters were killed, tortured, detained without a warrant, and terrorized by the new regime.[7] Within a month, the number of refugees fleeing Haiti by boat had dramatically increased, outstripping the ability of the Coast Guard to process and safely accommodate them.[8] Unable to offer the Haitians proper screening procedures to determine their status as refugees or protect against the influx of illegal immigrants, the U.S. chose the most politically expedient option—closing its borders.

On May 24, 1992, George Bush signed Executive Order 12807 which directed the Coast Guard to return interdicted vessels to the country of origin.[9] Although the Executive Order, which came to be

---

5. — U.S. —, 113 S.Ct. 2549, 120 L.Ed. 2d 932 (decided June 21, 1993).

6. Jason Ackerman, *Military Coup In Haiti*, N.Y. TIMES, Sept. 30, 1991, at A1, A6.

7. *Haiti: Update on Recent Political Violence*, HUM. RHTS. REP., Notisur-s. A.M & Caribbean Pol. Aff., July 7, 1992.

8. During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because of the increase in crossings, the Coast Guard established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to process the Haitians. The temporary facilities, however, had a capacity of only about 12,500 persons. In May 1992, the Coast Guard intercepted 127 vessels with 10,497 undocumented aliens and the U.S. Navy determined that no additional migrants could safely be accommodated at Guantanamo. Sharon E. Jacks, *Bound By Past Policy: The Scope Of Executive Discretion In Political Asylum Determinations*, 15 HAMLINE L. REV. 389, 403 (1992).

9. Exec. Order No. 12,807 (1992) reads in pertinent part:

> Section 1. The secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration into the United States by Sea.
>
> Section 2. (1) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the

known as the "Kennebunkport Order," did not specifically mention Haiti, it was accompanied by a statement from the Administration declaring that the Coast Guard would immediately begin to return Haitian refugees picked up at sea.[10] These Haitian refugees were to be returned without an interview or determination on the merits of their individual asylum claims.[11] The government reasoned that since all Haitians fled economic chaos, not physical oppression, an investigation into their refugee status was unnecessary.[12] Furthermore, the Bush Administration feared that a policy granting some Haitians asylum, would work as a magnet, drawing other Haitians towards the United States.[13]

The interdiction program had dramatic effects on the flow of Haitian emigrants to the United States. Shortly following the "Kennebunkport Order", the number of aliens returned to Haiti

---

suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(c) Those instructions to the Coast Guard shall include appropriate directives for the Coast Guard:

(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 carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, where 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 arrangements to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Section 3. This order is intended only to improve the internal management of the executive branch, neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitaiton any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

10. *McNary*, 969 F.2d at 1353.

11. The "Kennebunkport Order" effectively removed the requirement that the Attorney General assure that no political refugee be returned. Although Haitians remain eligible to apply for refugee asylum, withholding of deportation, or temporary protective status, few were granted. In fact, one percent of those who reached U.S. shores and applied for asylum succeeded. 1990 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 106 (GPO, 1991).

12. Richard Preton, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91 (1986).

13. *Id.*

increased from 200 to 3,000 per month.[14] Furthermore, the U.S. Coast Guard returned all Haitians on Guantanamo Base, Cuba, back to Haiti. Several individuals and groups representing the returned Haitians responded immediately and demanded a change in the Government's new policy.[15]

B. Procedural Background

On May 28, 1992, a motion for a preliminary injunction prohibiting the government from returning the interdicted Haitians was filed as a class action on behalf of the refugees.[16] The Plaintiffs challenged the actions under the new policy as *ultra vires*, and as violating (1) section 243(h)(1) of the INA; (2) Article 33 of the 1951 Convention relating to the Status of Refugees; (3) the 1981 U.S.-Haiti Executive Agreement; (4) the Administrative Procedure Act; and (5) the equal protection component of the Fifth Amendment's Due Process Clause.[17] Judge Sterling of the United States District Court for the Eastern District of New York, denied the motion for preliminary injunction. The Court concluded that section 243(h) of the Act and Article 33 of the 1951 Convention were unavailable as a source of relief for Haitian aliens in international waters.[18] The Court stated that the right to counsel under 8 U.S.C. section 1362 and 8 C.F.R. section 208.9 was limited to aliens found in the United States. Furthermore, the court explained that although Article 33 seemed to impose a mandatory duty upon the U.S. not to return refugees to countries in which they face political persecution, the convention's provisions were not self-executing and the court was thus unable to grant the motion.[19]

On appeal, George C. Pratt, Circuit Judge, held that actions taken by the government to implement Executive Order 12807 violated section 243(h)(1) of the Immigration and Nationality Act. Relying on a plain language analysis of section 243(h)(1), the court held that the Act does not apply to aliens within the U.S. and that Article 33, like

---

14. United States Department of State, COUNTRY REPORTS ON THE WORLD REFUGEE SITUATION: REPORT TO THE CONGRESS FOR FISCAL YEAR 1992 87 (1993).

15. These groups and individuals included the Haitian Centers Council, Inc.; National Coalition for Haitian Refugees, Inc.; Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut; Dr. Frantz Guerrier; Pascual Henry; Lauriton Guneau; Medilieu Sorel St. Fluer; Dieu Renel; Milot Baptiste; Jean Doe, Roges Noel.

16. The motion was filed before Judge Sterling Johnson, Jr., in the United States District Court for the Eastern District of New York.

17. *McNary*, 969 F.2d at 1353.

18. *Id.*

19. *Id.*

the statute, covers all refugees, regardless of location.[20] Furthermore, the court also rejected the government's contention that the subjects in this action were bound by principles of collateral estoppel by the Eleventh Circuit's holding in *Haitian Refugee Ctr. v. Baker*.[21]

The Second Circuit's decision in *McNary v. Haitian Ctr. Council*[22] conflicted with the Eleventh Circuit's decision in *Haitian Refugee Ctr. v. Baker*[23]. Noting the conflict between the Eleventh Circuit's decision in *Haitian Refugee Ctr. v. Baker* and the Second Circuit's decision in *McNary v. Haitian Ctr. Council*, the Supreme Court granted *certiorari*[24]

C. *The Refugees' Claims*

In the Supreme Court, respondent refugees argued that the plain language of section 243 (h) (1) is dispositive. Section 243(h)(1) states:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251 (a) (4) (D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Respondents emphasized the words "any alien" and "return." Relying on the statutes' plain language, the refugees argued that aliens are considered aliens, regardless of where they are located. The refugees also contended that section 243(h)(1) of the INA, as amended by the Refugee Act of 1980, protected Haitians interdicted at sea.[25] As proof, Respondents offered a 1980 amendment deleting the words "within the United States" from the text of section 243 (h), which they argued gave the statute extraterritorial effect. Furthermore, respondents argued that this change was required in order to conform the statute to the text of Article 33.1 of the United Nations Convention.

---

20. *Id.*

21. 953 F.2d 1498 (11th Cir. 1992).

22. The Court in *McNary* held that it did not believe that any of the sub-groups of plaintiffs could fairly be characterized as a party to the Florida action; thus, the issues they present to us are not barred by collateral estoppel. The plaintiffs in the *McNary* case did not meet one of the characteristics necessary for membership in the *Baker* class–they were not being interdicted "pursuant to the United States Interdiction Program," but instead had been or would be interdicted by a different program.

23. 969 F.2d 1350 (2nd Cir. 1992).

24. 506 U.S. –, 113 S.Ct. 52, 121 L.Ed. 2d 22 (decided Oct. 5, 1992).

25. Respondent's Brief No. 92-344 October Term, 1992, page 10.

1. The Scope of Section 243(h)(1)

The refugees reasoned that, absent a "clearly expressed legislative intent to the contrary," the plain meaning of the statute controls.[26] Respondent's called on the Court to reject the government's argument that section 243(h)(1) should be construed in light of the presumption against extraterritorial application.[27] Respondents also argued that the presumption that United States law has no extraterritorial application was immaterial in the *Haitian Centers* case since Congress often placed the high seas within the jurisdictional reach of a statute.[28]

The Supreme Court disagreed with the refugees, holding that the Acts of Congress do not ordinarily apply outside the borders and thus, section 243(h)(1) must be construed to apply only within United States territory. The Court held that the word "return" in section 243 (h) (1) is not limited to aliens in this country and does not render the section applicable extraterritorially, since it could be reasonably concluded that Congress used the phrase "deport or return" only to make the section's protection available both in proceedings to deport aliens already in the country and proceedings to exclude those already at the border.[29] Section 243(h)(2)(C) of the INA states that the statute will not apply if "there are serious reasons for considering that the alien has committed a serious crime outside the United States prior to the arrival of the alien." The refugees argued that the Court should reject the governments contention that the language "prior to the arrival in the United States" indicated that the statute does not apply to the plaintiffs. Interpreting the statute in this manner would be reading the words "within the United States" back into section 243(h)(1) which would counter Congress' plainly expressed intent to eliminate those limiting words in 1980.

The Supreme Court disagreed, holding that the 1980 amendment only erased the long-maintained distinction between deportable and excludable aliens for purposes of section 243(h). By adding the word "return" and removing the words "within the United States" from

---

26. *Id.* at 18.

27. This presumption serves to protect against unintended clashes between the laws of the U.S. and those of other nations which could result in international discord. According to Respondents, the presumption is used to discern unexpressed congressional intent, but should only be employed after all traditional methods of determining congressional intent are exhausted. *Id.* at 26

28. That presumption is a canon of construction "whereby unexpressed congressional intent may be ascertained . . . which serves to protect against unintended clashes between U.S. laws and those of other nations which could result in international discord." *Id.* at 27. *Sale,* 113 S.Ct. 2549, 2558.

29. *Sale,* 113 S.Ct. 2549, 2558.

section 243(h), Congress extended the statute's protection to both types of aliens, but it did nothing to change the presumption that both types of aliens would continue to be found only within United States territory.[30] The possibility that Congress also intended to remove any territorial limitation of the statute was rejected as unsubstantiated by the legislative history of the amendment.

The Court held that the placement of section 243 in part V of the INA suggested that the statute only applied to aliens in the United States. The court also rejected the refugees argument that the location of section 243 in part V reflected its original, pre-1980, position where section 243(h) applied by its terms only to deportation.[31] The refugees argued that after the 1980 amendment, section 243(h)(1) applied to more than just deportation, but also applied to the word "return."[32] The Court disagreed that section 243, which applies to all aliens regardless of their whereabouts, has broader application than most other portions of Part V, each of which is limited by its terms to aliens "in" or "within" the United States.[33]

The refugees also argued that the President's agent for dealing with immigration matters was the Attorney General and that it was inconsistent with congressional intent to read section 243(h)(1) as forbidding the return of aliens if done by the Attorney General, but permitted if done by some other arm of the Executive branch.[34] The Supreme Court however, refused to hold that the interdiction program created by the President, which the Coast Guard was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General. The Court read the reference to the Attorney General in the statute to apply to the normal responsibilities of the office under the INA–the conduct of deportation and exclusion hearings within the United States.[35]

---

30. *Id.*

31. *McNary*, 969 F.2d at 1360.

32. The former, according to the Court, is necessarily limited to aliens in the United States; the latter applies to all aliens. *Id.*

33. The fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself. The Court argues that "If anything, its placement has an effect opposite to what the government suggests: it tends to prove that if Congress had meant to limit § 243(h)(1)'s secope to aliens in the United States, it knew how to do that. . . . Where Congress includes particular language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

34. Respondents' Brief, *supra* note 25, at 19.

35. *Sale*, 113 S.Ct. 2549, 2556.

2. "Return" Under Section 243(h)(1)

Relying on plain language analysis, the refugees argued that Article 33.1's prohibition against "return" plainly applied to all refugees, regardless of location.[36] This reading was supported by the object and purpose of the convention as a whole.[37] The purpose of Article 33.1, according to the refugees, is to prevent all "refugees," "in any manner whatsoever", from being put in the hands of those who would prosecute them.

The refugees recognized that the negotiating history of the convention was ambiguous and indicated that the representatives of at least six countries construed Article 33.1 narrowly.[38] However, they insisted that those views represented dissenting opinions only, and were insufficient grounds to overturn the convention's plain text. The Court, however, held that the 1980 amendment to section 243(h)(1) made the language of the statute read similar to Article 33 which would prohibit the return of only those refugees who had entered the United States.[39]

3. Article II Powers and Justification

The refugees argued that in the instant case, the Kennebunkport Order did not deal with the sovereign right to refuse entrance to the U.S. of any alien or class of aliens; but rather, dealt with the interception of aliens that were far from, and by no means necessarily heading for, U.S. borders. The refugees contended that by enforcing the INA's prohibition against forcible return of refugees, it left unimpaired the President's authority to regulate entry into the country.

---

36. The Appellate court agreed and held that the plain language of Article 33.1 of the Refugee Convention lead one to conclude that, just as with § 243(h)(1), the word "return" means "return," without regard to where the refugee is to be returned from, and just as with § 243(h)(1), what is important is under Article 33.1 is where the refugee is to be returned to. *McNary*, 969 F.2d at 1362.

37. Respondents' Brief, *supra* note 25.

38. Among those nations were: Belgium, The Netherlands, The Federal Republic of Germany, Italy, Sweden, and Switzerland. *Id.* at 22.

39. Article 33 of the Refugee Convention reads in relevant part:

> 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 benefits 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 176 (1954).

The Court disagreed holding that the interdiction program fell within the President's constitutional powers as Commander-in-Chief to act as "the sole organ of the nation in its external relations."[40] The Court reasoned that the President has ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on U.S. territory.[41] The fact that the method the President chose to employ posed a greater risk of harm to Haitians who might otherwise face a long and dangerous voyage, was irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits.

III. ANALYSIS

The Supreme Court holding in the *Haitian Centers*[42] case is mistaken. The U.S. interdiction policy endangers the lives of those refugees seized at sea and returned to Haiti. As a result, this policy violates international law, as expressed in Article 33 and section 243(h) of the INA. The humanitarian framework of the Refugee Act, the ordinary meaning of the language of section 243(h), and its legislative history demonstrate the illegality of the policy.

A. Humanitarian Framework

The Refugee Act of 1980 reflects the United States' commitment to "human rights and humanitarian concerns".[43] It is regarded by some observers as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress."[44] The Act firmly committed the U.S. to a legal regime of comprehensive protection and treatment of refugees, particularly those refugees fleeing persecution.[45] This commitment is illustrated in two separate provisions of the Act. Section 208(a) authorizes the Attorney General to grant political asylum to refugees on a discretionary basis,[46] and

---

40. The government argued that the exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not only from the legislative power, but is inherent in the executive's power to control the foreign affairs of the country. *Sale* at 1262.

41. *Id.*

42. 113 S.Ct. 2549, 120 L.Ed. 2d 932 (1993).

43. S. REP. NO. 256, 96th Cong., 2d Sess. 1 (1979) *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

44. 126 CONG. REC. 4501 (1980) (remarks of Rep. Peter Rodino).

45. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 436-437 (1987), 107 S.Ct. 1207, 94 L.Ed. 2d 434.

46. *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

recognizes that the United States can only accept a limited number of refugees. 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.[47] As amended, section 243(h)(1) provides as follows:

> 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.[48]

Prior to 1980, section 243(h) 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."[49] The revised statute removes any discretion available to the Attorney General and makes the responsibilities obligatory while expanding the scope of the statute to include "any alien" as opposed to "any alien within the United States." Furthermore, instead of authorizing the Attorney General to "withhold deportation", it states that he "shall not deport or return" an alien found to have been threatened by persecution.[50]

The Supreme Court should have interpreted section 243(h) in accordance with its humanitarian goal which mandates a broad application, encompassing refugees at sea. As stated by the dissent in the lower court, when construing a "humane provision" such as section 243, the spirit of the law provides the true guide. The Court should, thus, have been guided by the core purpose of section 243(h) which was to embed into United States law its humanitarian international obligation to prevent refugees from being delivered into the hands of their persecutors.

> 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), quoted in Gluck, *Intercepting Refugees, supra* note 2 at 865.

47. *See* Gluck, *supra* note 2, at 870.

48. Immigration and Nationality Act, § 243(h)(1), codified at 8 U.S.C. § 1253(h)(1) (1988 & Supp. III 1991).

49. *McNary*, 969 F.2d at 1357.

50. *Id.*

B. *Statutory Construction*

Extraterritorial application of section 243 of the INA, denied in the *Haitian Centers* case, is supported by the most basic principle of statutory construction–that in the absence of "a clearly expressed legislative intention to the contrary," the plain meaning of a statute controls.[51] Based upon plain language analysis, section 243 prohibits the return of "any alien" without limiting its application to aliens physically located in the United States.[52] Because the term "alien" includes "any person not a citizen or national of the United States,"[53] Congress has made it clear that "aliens are aliens, regardless of where they are located."[54]

The Supreme Court should have rejected the government's contention that section 243(h) be construed in light of the presumption against extraterritoriality.[55] That presumption is insufficient to overcome the plain statutory language.[56] A presumption such as that against extraterritoriality has no evidentiary weight; it operates only where there is an "unexpressed congressional intent."[57] Congressional intent that section 243(h) be applied extraterritorially was stated unambiguously by making section 243(h) apply to any alien without regard to location.

Moreover, the presumption against the extraterritorial application of law is based on a premise that Congress is primarily concerned with domestic issues.[58] Section 243(h), however, applies to

---

51. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (*quoting* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

52. Gluck, *Intercepting Refugees, supra* note 2, at 873.

53. Immigration and Nationality Act, § 101(a)(3), codified at 8 U.S.C. § 1101(a)(3) (1988).

54. *See* Hatian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1358 (2d Cir.), *cert. granted*, 113 S.Ct. 52, as cited in Gluck, *Intercepting Refugees, supra* note 2.

55. *See Sale*, 113 S.Ct. 2549 at 2556, for a summation of the government's argument against extraterritorial application of § 243(h).

56. When a statute's language is unambiguous, the courts must presume that the legislature meant what it said. *See* Connecticut Nat'l Bank v. Germain, – U.S. –, 112 S.Ct. 1146, 1149 (1992) (ruling only plain language and refusing the examine the legislative history); U.S. v. Stuart, 489 U.S. 353, 371 (1989), 109 S.Ct. 1183, 103 L.Ed. 2d 388.

57. This presumption is used to discern unexpressed congressional intent, and should only be employed after all traditional methods of determining intent are exhausted. *See* Epley Bros. Inc. v. Filardo, 335 U.S. 808, 69 S.Ct. 35 (1949).

58. This presumption is used to discern unexpressed congressional intent, and should only be employed after all traditional methods of determining intent are exhausted. *See* Epley Bros. Inc. v. Filardo, 335 U.S. 808 (1949), 69 S.Ct. 35. *See Foley Bros.*, 36 U.S. 281 at 285, 69 S.Ct. 575, 577, 93 L.Ed. 680; *also see* Equal Employment Opportunity Comm. v. Arabian American Oil Co., 499 U.S. 244 (1991), 111 S.Ct. 1227, 1230, 113 L.Ed. 2d 274. This presumption "serves 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 interpre-

persons fleeing other countries, expressly reflecting the U.S.'s commitment to an international concern.[59] As one observer noted, section 243(h) "by its very nature does not concentrate on purely domestic affairs."[60] Whatever force the presumption has with regard to domestic statutes evaporates when considering a statute that regulates distinctively international subject matter, such as immigration, nationality, and refugees.[61]

As Justice Blackmun's dissent in *Sale* notes, the Court's dictum that the presumption has "special force" when it construes "statutory provisions that may involve foreign and military affairs for which the President has unique responsibility," is completely wrong.[62] The presumption that Congress did not intend to legislate extraterritorially has less force, perhaps, indeed, no force at all when the statute on its face relates to foreign affairs.[63]

While it is true that in some areas the President, and not Congress, has sole constitutional authority, immigration is not one of those areas. Blackmun's dissent notes, over no conceivable subject is the legislative power of Congress more complete than that of the refugee issue

Blackmun is correct when he asserts that if any canon of construction should be applied in this case, it is the well settled rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[64] The Court's construction of section 243(h) stands in sharp contrast to the international obligations imposed by Article 33 of the Convention, and therefore violates that established principle.

In addition, limiting the statute to only those aliens found within the United States would return section 243(h) to its pre-1980 content. The Court read "return" only to mean "expel from the United States" and read "any alien" only to mean "any alien within the United States."[65] This reading restores precisely the language that Congress removed when in 1980 it excised the words "within the United

---

tation of § 243(h) will not create international conflicts, as Haitian law—particularly the U.S. Haiti Agreement—forbids the return of the refugees interdicted on the high seas. Gluck, *supra* note 2, at 877.

59. Gluck, *Intercepting Refugees, supra* note 2, at 867.

60. *Id.*

61. *Sale* at 2571 (Blackmun, dissenting).

62. *Id.* at 2572.

63. *Id.*

64. *Id.*

65. *Id.*

States."[66] 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 favor of other language.[67] As the lower court reasoned, such behavior would transcend judicial function.[68]

The Supreme Court should have rejected the government's argument that section 243's location in part V of the INA limits its applicability to aliens found within the United States. Congress originally placed section 243(h) in Part V of the INA at a time when it governed only withholding of deportation, and, thus, applied only to those aliens located within the United States who were subject to deportation.[69] However, since 1980, section 243(h)(1) has applied to more than deportation, it applies to "return" as well.[70] Furthermore, unlike section 243 (h), other sections of Part V limit their scope to aliens in or within the United States.[71] The Court should have interpreted this broadly 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."[72] The Court seemed to be saying that Congress failed to say what it really meant and didn't really mean what it actually said.

C. *Legislative History and Purpose*

One of Congress' primary purpose in enacting the Refugee Act of 1980 was to bring United States refugee law into conformity with the 1967 United Nations Protocol.[73] Specifically, Congress revised section 243(h) in 1980 to conform to Article 33 of the Protocol.[74]

---

66. As the lower court noted, "To accept the government's reading of the statute, we would in effect be reading . . . words . . . back into § 243(h)(1) . . . which would counter Congress' plainly expressed intent to change those words in 1980." *Id.* at 1359.

67. *Id., quoting* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359. 392-93 (1980 (Stewart, J., dissenting)).

68. *McNary,* 969 F.2d at 1359.

69. Gluck, *Intercepting Refugees, supra* note 2, at 877.

70. *See McNary,* 969 F.2d at 1360.

71. The Court of Appeals held that the fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself. *McNary,* 969 F.2d at 1360.

72. Gluck, *Intercepting Refugees, supra* note 2, *quoting* Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

73. *See* Immigration and Naturalization Service v. Stevic, 467 U.S. 407, 421 (1984) (holding that § 203(e) of the Refugee Act of 1980 amended the language of § 243(h), conforming it to the language of Article 33 of the United Nations Protocol); *see also Cardoza-Fonseca,* 480 U.S. at 436-437.

74. The language of § 243(h) "is not an accident . . . the nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory nonrefoulement obligations under Article 33.1

Consequently, the Supreme Court should have held that section 243(h) has the scope and force of Article 33.[75] In construing treaties, courts rely on principles analogous to those that guide them in the task of interpreting statutes. Therefore, "if the treaty's language resolves the issue presented, there is no necessity of looking further to discover the intent of the treaty parties."[76]

As the appellate court held, treaties are to be construed first with reference to their "ordinary meaning . . . unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."[77] Furthermore, to stray from the clear language of a treaty requires extraordinary evidence of a contrary meaning.[78] No such evidence exists in the case of Haitian refugees.

Instead, the Court erroneously relied on a remark by one delegate at the convention's negotiating conference to support its contention that Article 33 does not apply extraterritorially. Reliance on a treaty's negotiating history is a disfavored alternative, a last resort, appropriate only where the terms of the document are obscure or lead to "manifest absurd or unreasonable results."[79] Moreover, as Blackmun's dissent notes, even the general rule of treaty construction allowing limited resort to negotiating history" has no application to oral statements made by those engaged in negotiating the treaty which embodied in writing were not communicated to the government of the negotiator or its ratifying body."[80] There is no evidence in the record that the delegate's comment was ever communicated to the United States' Government or to Congress.

When determining the meaning of a statute, courts look not only to the particular statutory language, but to the design of the statute as a whole.[81] Additionally, Article 31 of the Vienna Convention on the Law of Treaties requires that treaties first be construed not only according to their "ordinary meaning" but also in "light of their object

---

of the United Nations Convention relating to the Status of Refugees." Immigration & Naturalization Service v. Doherty, -- U.S. --, 112 S.Ct. 719, 729 (1992).

75. Gluck, *Intercepting Refugees, supra* note 2, at 878.

76. United States v. Stuart, 489 U.S. 353, 371, 109 S.Ct. 1183, 1194, 103 L.Ed.2d 388 (1989).

77. *McNary*, 969 F.2d at 1362. *See also* United States v Stuart, 489 U.S. at 365-66, 109 S.Ct. at 1191.

78. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982), 185, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765.

79. *See* Vienna Convention on the Law of Treaties, art. 32, 1155 U.N.T.S. at 340, 8 I.L.M., at 692 (1969).

80. *Sale* at 2549, *quoting* Arizona v. California, 292 U.S. 341, 360, 54 S.Ct. 735, 742-43, 78 L.Ed. 1298 (1934).

81. *See* Crandon v. U.S., 494 U.S. 152, 158 (1990).

and purpose."[82] Furthermore, "[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 preferred."[83]

The Supreme Court should have adopted the Court of Appeals' interpretation that the plain language and purpose of Article 33 demonstrate that where the refugee is to be returned to, not where the refugee is returned from, is the most important criterion. As one observer noted, "the court's analysis rested upon the fact that any definition of a "refugee" under the U.N. Protocol,[84] just as with "any alien" under section 243(h) of the INA, focuses on one's past rather then present location."[85] Thus, the article's prohibition against "return" plainly applies to all refugees, regardless of location. 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 other articles of the convention.[86]

The Supreme Court contends that the placement of the French word "refouler" after return in Article 33 obscures the plain meaning of the provision.[87] Relying on the meaning of "refouler" found in Cassell's French Dictionary, which it defines as expel, the Court interprets the word "return" in Article 33.1 to connote ejection of an alien from within the territory of the Contracting State. The Court has re-defined "refouler" to mean repelling or driving back an alien who has not yet entered the territory of a contracting state.[88]

In justification, the Court argued that "return" does not mean return but has a distinctive legal meaning.[89] The Court relied almost entirely on the difference between deportation and exportation in American law, citing a twenty-two year old case that does not appear in the legislative history.[90] As Blackmun's dissent noted,

---

82. Vienna Convention on the Law of Treaties, s 3, art 31, 1155 U.N.T.S. 331, 340 (1969).

83. Gluck, *Intercepting Refugees, supra* note 2, at 878.

84. 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 fear, is unwilling to avail himself of the protection of that country." 1951 Convention, *supra* note 4, art. 1, P. A(2) at 152 (as amended by U.N. Protocol, *supra* note 4, art. 1, P. 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

85. Gluck, *supra* note 2, at 878.

86. *Id.*

87. Article 33 provides that "[n]o Contracting state shall expel or return ("refouler") any refugee. *Id.*

88. *Sale* at 2560.

89. *Sale* at 2561.

90. *Sale* at 2562, referring to INS v. Stevic, 467 U.S. at 415-416.

"without explanation, the majority asserts that in light of this distinction the word "return" as used in the Treaty somehow must refer only to 'the exclusion of aliens who are . . . on the threshold of initial entry'".[91]

The Court also sought to equate "expel" and "return," by relying on a subsidiary meaning of "refouler" listed in a nonauthoritative French dictionary.[92] "Refouler" does not connote ejection of an alien from within the territory of a contracting state. The Court's interpretation of Article 33.1 would forbid a state to expel any alien, a redundant reading that would deny independent meaning to each word of the phrase "expel or return (refouler)." In refugee law, "nonrefoulement" has become a well-recognized term of art that describes the absolute right of non-return that refugees acquire as soon as they escape their homelands, regardless of whether they have also entered into another country.

The Court should also have rejected the government's argument that paragraph 2 of Article 33 of the United Nations Convention delineates an exception to the prohibition of refoulement. This exception holds that a refugee may not claim the benefit of Article 33 if he is a danger to the security of "the country in which he is."[93] Therefore, the government claims that, as the only geographic reference in the article, this phrase limits both paragraphs.[94] However, Article 33(1)'s silence on the geographic limitations 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 the provision's territorial limits when they wanted.[95]

IV. CONCLUSION

When a military coup deposed Haiti's first democratically elected president in two hundred years it ushered in an era of unprecedented political violence. President Aristide's supporters and their families were threatened, tracked down, arrested, and in some instances, tortured and killed by the new regime. Thousands of Haitians fled the political violence of their country for the United

---

91. *Sale* at 2564 (Blackmun dissent).

92. Cassell's French Dictionary has never been cited in a single Supreme Court Case, unlike Dictionary Larousee which the Plaintiffs rely on. Malissia Lennox, *Refugees and Repatriation: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993).

93. Gluck, *Intercepting Refugees, supra* note 2, at 877.

94. *Id.*

95. *Id.*

States, many in small wooden boats and other make-shift vessels. The U.S. Government, however, ignored its moral and legal duty to the Haitian refugees and responded to their plight by closing its borders. The Supreme Court permitted this action.

The U.S. policy of interdicting Haitian vessels on the high seas and summarily repatriating its occupants without a hearing on their individual asylum claims is simply mistaken. The humanitarian framework of the Act, the ordinary meaning of the language of section 243(h)(1) and its legislative history clearly mean that the U.S. not return aliens to their persecutors, no matter where in the world those actions are taken. The Supreme Court should have interpreted section 243(h) in accordance with its humanitarian goal and guaranteed that no Haitian refugees were returned to the jaws of political persecution, terror, death and uncertainty.