Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy

Carlos Ortiz Miranda*

I. INTRODUCTION

The Caribbean nation of Haiti is located on the western third of the island of Hispañiola, and shares that island with the Dominican Republic. To its northwest lies the Windward Passage, a strip of water that separates Haiti from the island of Cuba by approximately fifty miles.[1] Throughout the 1980s and 1990s the Windward Passage has been used as the maritime route of choice by boatpeople fleeing Haiti for political reasons or seeking greater economic opportunity abroad.[2]

---

* Assistant General Counsel, United States Catholic Conference. B.A. 1976, University of Puerto Rico; J.D. 1980, Antioch School of Law; LL.M. 1983, Georgetown University Law Center. Adjunct Professor, Columbus School of Law, Catholic University of America.

The views expressed in this Article are those of the author and do not necessarily reflect the views his employer, nor the Columbus School of Law.

1. *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1993 167-69 (1994). *See generally* FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, DOMINICAN REPUBLIC AND HAITI: COUNTRY STUDIES 243-373 (Richard A. Haggerty ed., 1991) [hereinafter COUNTRY STUDIES].

2. Haiti is the poorest country in the Western Hemisphere. *See* COUNTRY STUDIES, *supra* note 1, at 881. There is no question that poverty is widespread, but poverty is not the only reason why people have fled the island throughout the 1980s and 1990s. *See* Robert D. Novak, *Collison Course on Haiti*, WASH. POST, May 2, 1994, at A19 (explaining that the Clinton administration is taking a harder line against "[t]he military rulers that will expand the flow of refugees, who are fleeing economic

Haiti was one of the first nations in the Americas to obtain independence. During the last decades of the eighteenth century, the Haitian Revolution, a fierce reaction to slavery and the socio-economic structures of the sugar plantation, created the first black republic in modern times. The revolution also resulted in Haiti being the second country in the Americas, after the United States, to declare its independence from European colonial masters.[3] However, unlike the United States, independence did not lead to a democratic political culture in Haiti. For most of its independent history, Haiti has been governed by a repressive minority. Thus, as the 1980s decade began, Haitian citizens found themselves suppressed.[4]

---

deprivation rather than tyranny").

Historians have written that poverty and land pressure have led Haitians to seek opportunities abroad, especially in Cuba and the Dominican Republic to work in sugar plantations. Haitians experienced cruelty from the governments of those countries. In Cuba they were harshly expelled in large numbers during the 1930s. In the Dominican Republic, from 5,000 to 15,000 Haitians living on the underpopulated Dominican side of the border were massacred by the Dominican army in 1937. As late as the 1980s Haitians working in Dominican sugar plantations were living in forced labor conditions. The Dominican Republic has periodically repatriated Haitian workers. For example, in 1991 it is estimated that between 25,000 to 50,000 Haitians were coerced to return to Haiti "voluntarily." *See* Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675, 684-85 (1993).

In the 1950s and 1960s Haitians were employed in the construction industry in the Bahamas. The shift of Haitians from those countries closest in geography to their homeland (Cuba, Dominican Republic, and Bahamas) to South Florida in the 1970s and 1980s has three root causes: (1) the construction industry declined in the Bahamas, (2) an economic boom in South Florida which was a consequence of the economic activity of the newly arrived Cuban refugees, and (3) "the increasing political repression of the Haitian dictator François (Papa Doc) Duvalier." Political repression continued under Papa Doc's son and successor, Jean Claude (Baby Doc) Duvalier. *See* J.H. PARRY ET AL., A SHORT HISTORY OF THE WEST INDIES 296-97 (4th ed. 1987).

3. *See* COUNTRY STUDIES, *supra* note 1, at 203. Formal emancipation against France occurred in 1804. However, Haitians had been fighting the Europeans since the 1790s. Haitians were at the forefront of the slave revolts throughout the West Indies during those decades. *See* PARRY ET AL., *supra* note 2, at 137-50 (discussing the second American War of Independence and the leading role that Haitians performed in that conflict).

4. *See* ELIZABETH ABBOTT, HAITI: THE DUVALIERS AND THEIR LEGACY 8-77 (1988). This section describes Haiti's political history, including the nineteen year (1915-1934) occupation by United States armed forces, up to the Duvalier dynasty. The American occupation came at a time when the United States was expanding beyond its continental borders. In the Caribbean, the 1898 Spanish-American War brought Cuba and Puerto Rico directly under United States military control, Panama was taken in 1903, and a customs presence was established in the Dominican Republic in 1905. The ostensible excuse for the Haiti invasion was to stabilize its political culture which suffered from chaos, and authoritarian and corrupt administration. However, the American troops were heavy handed in their attempts to control the populace who resented the invaders. The American occupation ended Haiti's isolation from the world and improved Haiti's transportation and communication infrastructure. The most

This Article discuses various aspects of United States/Haitian relations during the 1980s and 1990s. It begins with a brief narrative of Haiti's political culture during the 1980s and 1990s. It will then examine United States domestic immigration law and policy as applied to Haitian asylum-seekers who have reached the shores of the United States or who have been apprehended in the territorial sea. Additionally, this Article will examine foreign policy aimed at preventing Haitians from fleeing their homeland by establishing an interdiction program in international waters as well as an in-country refugee processing center. Further, this Article will discuss the legislative policies of the United States Congress in light of the domestic and foreign policies pursued by the executive branch toward Haiti. Finally, it will conclude with certain observations and recommendations.

A. Duvalierism and Post-Duvalierism

Haiti began the 1980s under the rule of the dictator Jean-Claude Duvalier, who took over the government upon the death of his father, François Duvalier.[5] Jean-Claude Duvalier's mismanagement and corruption alienated various sectors of Haiti's establishment, not to mention the majority of Haitians themselves.[6] Widespread antipathy toward the Duvalier regime seemed to ignite after a 1983 visit to Haiti by Pope John Paul II, who called for greater social and economic justice, as well as for greater democracy.[7] By the beginning of 1986, street demonstrations, rioting, and looting had spread throughout the provinces and Port-au-Prince, the country's capital.[8] During this time it was evident that Haiti's army was plotting against the Duvalier regime. For its part, the United States began to pressure Duvalier to give up the reins

---

enduring legacy of the American occupation was the change made in Haiti's military establishment. Before 1915, the Haitian military was very political and over-officered. After the Americans left in 1934, it was well-trained and efficient. *Id.* at 34, 46-373.

5. François Duvalier became President of Haiti in 1957. In 1964 he declared himself President-for-Life and controlled the country through terror institutionalized by the Ton-Ton Macoutes. The feared Ton-Ton Macoutes were initially designed as rural militia, but developed into a secret force that mainly controlled the countryside. It is estimated that more than 30,000 Haitians were killed for political reasons during François Duvalier's regime. *See* COUNTRY STUDIES, *supra* note 1, at 232-35.

6. *Id.* at 234-36.

7. For a description of the Pope's visit see ABBOTT, *supra* note 4, at 261-63.

8. COUNTRY STUDIES, *supra* note 1, at 237.

of the government and leave the country.[9] Finally on February 7, 1986, Jean-Claude Duvalier, his family, and close advisors departed from Haiti.[10] While the Duvalier dynasty in Haitian politics had ended, its political and human rights legacy remained.[11]

The post-Duvalier period began with the expectation that the Duvalier legacy of political terror, human rights abuses, and economic despair would be improved.[12] Jean-Claude Duvalier left a civilian-military junta, the National Council of Government, to administer the government. Unfortunately, Haiti experienced a succession of short term governments which did not make any significant improvement in the political or economic life of the country. Human rights conditions saw only marginal improvement during the post-Duvalier period.[13] Consequently, this period failed to advance in the democratization process.[14]

B. Election of President Aristide and Neo-Duvalierism

In March 1990 Ertha Pascal-Trouillot, a judge sitting on Haiti's highest court, was sworn into the Presidency.[15] The provisional government turned to the Organization of American States (OAS) for assistance in preparing and monitoring the upcoming December

---

9. *Id.* The United States worked through its intermediary, Jamaica.
10. *Id.* at 238.
11. *See* AMERICAS WATCH & NATIONAL COALITION FOR HAITIAN REFUGEES, DUVALIERISM SINCE DUVALIER 1-4 (1986). For twenty-nine years the Duvaliers had accumulated one of the Western Hemisphere's worst human rights records. The United States government had certified that human rights were steadily improving under the Duvalier regime during the early 1980s. It was only in the year of the Duvalier government's collapse, 1986, that the United States refused to certify that the Haitian government complied with human rights conditions under United States law. The certification was a prerequisite for continued military aid. While not an excuse for United States certification of Haiti's human rights conditions during this period, certification should be considered in the context that Haiti's neighbor is Cuba, which was an important client state of the former Soviet Union. *Id.*
12. Domingo E. Acevedo, *The Haitian Crisis and the OAS Response*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 126 (Lori F. Damrosch ed., 1973).
13. *Id.* at 127. A particularly traumatic experience occurred during the 1987 elections when on election day, November 29, 1987, numerous voters were massacred and the National Council of Government disbanded the Presidential Electoral Council, in effect ending the democratization process which began immediately after the downfall of Jean-Claude Duvalier.
14. *Id.* at 128.
15. *Id.*

elections.[16] In addition to the Organization of American States, the United Nations also provided observers to monitor the elections.[17]

Free and fair elections took place on December 16, 1990. The Reverend Jean-Bertrand Aristide won those elections with popular support, garnishing sixty-seven percent of the vote.[18] On February 7, 1991, Jean-Bertrand Aristide became the country's first democratically elected President.[19] The Aristide regime barely lasted seven months. On September 30, 1991, the commander-in-chief of the military, who had been appointed by President Aristide himself, took over control of the government and forced the president to leave the country.[20] President Aristide quickly found himself living in exile in Washington, D.C.[21]

In the aftermath of the *coup d'etat*, the military forces returned to the politics of repression which had characterized the Duvalier dynasty.[22] The many civic, peasant, youth, grass roots, professional, and other organizations that were established during the post-Duvalier period were systematically attacked by the military, police, paramilitary, and affiliated forces.[23] By dismantling these organizations, the de facto rulers further diminished the possibility of a return to democracy. For example, even if President Aristide were to have been returned, it would have been difficult for him to transform his personal appeal into a

---

16. *Id.* at 128, 129. The OAS and Haitian government agreed that the OAS would provide advisors and observers to the election. Advisors were to provide legal, professional, logistic, and technical support in preparing and implementing the elections, while observers followed the progress of the elections including providing reports on complaints after an investigation of facts. By the time the elections actually took place the OAS group consisted of approximately 200 persons from 26 member OAS countries. *Id.*

17. *Id.* at 129.

18. *Id.* at 130.

19. *Id.* Even before President-elect Aristide took control of the government, a former Interior Minister in the Duvalier government attempted a bloodless *coup d'etat*. However, this attempt was squashed by military forces loyal to the newly elected government.

20. *Id.* at 131-32.

21. Catherine S. Manegold, *Innocent Abroad: Jean-Bertrand Aristide*, N.Y. TIMES, May 1, 1994, (Magazine), at 38.

22. *See* AMERICAS WATCH & NATIONAL COALITION FOR HAITIAN REFUGEES, SILENCING A PEOPLE: THE DESTRUCTION OF CIVIL SOCIETY IN HAITI (1993) [hereinafter SILENCING A PEOPLE].

23. *Id.* at 1-7.

meaningful and organized coalition capable of operating the government.[24]

II. UNITED STATES LAW AND POLICY

United States foreign policy toward Haiti during the 1980s and 1990s has been largely focused on stemming the flow of refugees and fostering democracy. During the neo-Duvalierist period, after the Clinton administration took office, the United States worked with the Organization of American States and the United Nations to coerce the military rulers into relinquishing power.[25] The primary diplomatic weapon was the imposition of economic sanctions.[26] Economic sanctions were

---

24. *Id.* at 3-6. A basic tool used by the military and its supporters to further its assault on civil society was to bar all public meetings. This included activities such as church prayer meetings, peasant cooperatives, and political gatherings. Reports of warrantless arrests, short term detentions, and demanding payments to avoid detention or torture were common. *Id.* at 56. Of particular importance to the military and their supporters was the progressive wing of the Roman Catholic Church in Haiti. This part of the Roman Catholic Church preaches liberation theology, and from its ranks came Father Aristide. It has been noted that the Roman Catholic hierarchy is generally not sympathetic to the *Ti Legliz* (or Little Church as it is known in Haiti) movement, however, there are some bishops who have spoken against the human rights abuses committed by the Haitian military and their supporters. The *Ti Legliz* maintains an underground network which is considered one of the few resistance movements capable of challenging complete control of the de facto authorities over the Haitian population. The Roman Catholic Church is perhaps the only viable national institution apart from the military in Haiti—thus the military's traditional suspicion against the Roman Catholic Church in general and persecution against its more radical liberation theology adherents in particular. *See* Larry Rohter, *Liberal Wing of Haiti's Catholic Church Resists Military*, N.Y. TIMES, July 24, 1994, at A3.

25. The United Nations has created a mission in Haiti (UNMIH), which was headed by Special Representative Dante Caputo. The UNMIH has been extended several times, and is especially important because it authorizes 700 military personnel, 567 police monitors, 99 international and 271 local staff to restructure elements of Haiti's national law enforcement authorities. Such restructuring would take place after the present rulers step down and democracy is again attempted. While the United Nations Security Council has passed several resolutions concerning the Haitian situation, perhaps the most important resolution authorizes military and police training during the time of reconstruction. *See* S.C. Res. 867, U.N. SCOR, 3282nd Mtg., U.N. Doc. S/RES/867 (1993).

26. The Organization of American States imposed economic sanctions on Haiti in November 1991. The embargo does not cover basic needs such as food and medicine. In February 1992, the United States lifted the embargo for Haitian exports of goods coming from American-owned assembly plants. In May 1993, the United Nations Security Council imposed an oil and weapons embargo, and in May 1994, it tightened the sanctions by freezing the assets and revoking travel visas of the military and *coup d'etat* leaders. *See* Julia Preston, *U.N. Widens Sanctions Against Haiti, U.S.-Initiated Moves Directed at Generals*, WASH. POST, May 7, 1994, at A1. Commentators have noted that the military leaders and their supporters circumvented the embargo through various methods, including the use of non-OAS ships to transport goods into the country, allowing airplanes to land at the international airport at night, and most importantly,

intended to foster discontent among Haitian business interests that supported the military. Without imported goods, discontent would eventually erupt, forcing the de facto rulers to negotiate for the establishment of democracy and the return of President Aristide. Had the economic embargo failed to remove the de facto rulers, there was always the possibility of using military force. This option was initially resisted by United States military leaders and publicly opposed by certain Latin American countries, including the Dominican Republic.[27] The notion of using force to restore democracy and President Aristide to power also ran into difficulty in Congress, where it re-ignited a long-standing dispute between the executive branch and Congress over the

---

using the land border with the Dominican Republic to bring goods, especially gasoline, into the country. President Aristide and his supporters in Haiti supported international economic sanctions. *See* Claudette Antoine Werleigh, *Haiti and the Halfhearted*, BULL. ATOM. SCIENTISTS, Nov. 1993, at 20, 22-23 (Ms. Werleigh is the Foreign Affairs Minister appointed by President Aristide). Those opposed to sanctions express the opinion that sanctions only serve to impose hardship on the already poor Haitian civilians. Sanctions pose a moral dilemma because they mostly harm those who are not responsible for the wrongdoing and are the least able to bring about a change in the political situation. *See* Drew Christiansen & Gerard Powers, *Unintended Consequences*, BULL. ATOM. SCIENTISTS, Nov. 1993, at 41-44. For a general discussion on international economic sanctions see, BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME (1988); *see also* UNITED STATES GENERAL ACCOUNTING OFFICE, ECONOMIC SANCTIONS: EFFECTIVENESS AS TOOLS OF FOREIGN POLICY (1992) (Report to the Chairman, Committee on Foreign Relations, U.S. Senate).

27. *See* Carroll J. Doherty, *President Broadly Criticized For Talk of Military Action*, 52 CONG. Q. 1134, 1135 (May 7, 1994); Howard W. French, *Hands Off Haiti, Dominicans Say*, N.Y. TIMES, May 15, 1994, at A9; Howard W. French, *U.S. Hint of Force to End Haiti Crisis Draws Opposition*, N.Y. TIMES, May 13, 1994, at A3; John M. Goshko, *U.S. Relying on Tough Haiti Sanctions-for Now*, WASH. POST, June 9, 1994, at A14 (detailing the testimony of William Gray, special Haiti adviser to President Clinton, before the House Foreign Affairs Committee; many committee members expressed concern that the administration policy would invariably lead to armed intervention); Daniel Williams, *U.S. Proposes Peacekeepers for Haiti, Tentative Plan Aimed at Safeguarding Return of President Aristide*, WASH. POST, May 10, 1994, at A3 ("President Clinton has said he does not rule out the use of military forces to remove . . . Haitian leaders . . . . The Pentagon is wary of military involvement."). *See generally* Alex de Waal & Rakiya Omarr, *Can Military Intervention Be "Humanitarian"?*, MIDDLE E. REP., Mar.-June 1994, at 3-9 (discussing the use of military force to achieve humanitarian goals; such humanitarian intervention is "fraught with problems" and should be subject to strict preconditions that have not been practiced).

constitutional role of the Legislature in United States military actions abroad.[28]

The extent to which the United States was willing to publicly condemn human rights abuses in Haiti during most of the 1980s and 1990s has been influenced by Haiti's strategic location next to Cuba, and more importantly, by the United States' attempt to stem the flow of refugees.[29] This policy dates back to the Reagan administration and has continued throughout the Bush and Clinton administrations. During this period the United States domestic and foreign policy regarding Haitian boatpeople and refugees has had three objectives: (1) to exclude, detain, and restrict the use of parole for Haitians physically present in the United States, (2) to interdict Haitians on the high seas, and (3) to process Haitian refugees in their own country.

A. Exclusion, Detention, and Restrictive Parole

The field of immigration experienced two important events in 1980. First, the Refugee Act of 1980 was enacted by Congress.[30] The Refugee Act amended the Immigration and Nationality Act (INA), the basic statute governing immigration affairs, in a variety of ways.[31] The Refugee Act amended the INA by including a universal definition of refugee.[32] The Refugee Act also added two new sections: INA sections 207 and 208. Section 207 covers overseas and emergency refugee

---

28. Ruth Marcus, *Administrator Is Challenged on Issue of Haiti Invasion Vote*, WASH. POST, Sept. 14, 1994, at A14.

29. SILENCING A PEOPLE, *supra* note 22, at 125-28 (discussing U.S. policy in Haiti regarding human rights).

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

31. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1525 (1994).

32. 8 U.S.C. §1101(a)(42)(1993) reads:

> (A) [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, or (B) in such circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who 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.

8 U.S.C. § 1101(a)(42) (1993).

admissions, while section 208 provides asylum procedures for refugees who are physically present in the United States, or at a port of entry or land border.[33]

Further, the Refugee Act amended INA section 243(h) to allow refugees to request withholding of deportation (or *nonrefoulement*) during exclusion proceedings.[34] With the Refugee Act, the United States aligned its domestic law with international obligations it incurred by signing the 1967 Protocol Relating to the Status of Refugees, which incorporated by reference the 1951 Convention Relating to the Status of Refugees.[35]

The second major event in the field of immigration during 1980 was the massive influx of Cuban refugees who were allowed to leave Cuba through the port of Mariel. The Mariel Cubans numbered more than 100,000.[36] Along with the Cubans, more than 1000 Haitians entered the United States each month during this same period.[37] The Cubans, unlike the Haitians, were protected by special legislation that allowed them to stay in the country. Responding to foreign policy concerns toward the communist regime in Cuba, Congress had enacted legislation

---

33. 8 U.S.C. §§ 1157, 1158 (1994). Refugee determination is intended to be made on a case-by-case basis. *See generally* Carlos Ortiz Miranda, *Toward a Broader Definition of Refugee: 20th Century Development Trends,* 20 CAL. W. INT'L L.J. 315 (1990). However, this has not always been the situation. *See generally* THOMAS A. ALEINKOFF ET AL., IMMIGRATION PROCESS AND POLICY 745-59 (3d ed. 1995) (citing instances in which case-by-case refugee determinations were not applied by the United States government in overseas refugee processing as a matter of administrative and legislative policy).

34. Refugee Act § 203(e) made the following amendment: "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." Refugee Act of 1980, Pub. L. No. 96-212, sec. 203(e), § 243(h), 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1253(h)(1) (1982)).

35. Protocol Relating to the Status of Refugees, *signed* January 31, 1967 (*entered into force* October 4, 1967), 19 U.S.T. 6223, 606 U.N.T.S. 267 (*entered into force for the United States* November 1, 1968), *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 110.1 (R. Lillich ed., 1986) [hereinafter 1967 or UN Protocol]; *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436-40 (1987) (discussing the Refugee Act as it relates to the 1967 Protocol).

36. *See* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 64.01[2][b] (rev. ed. 1993).

37. *See* THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 294 (1985). Since the 1970s, Haitians had been coming to the United States in small boats, and many of them applied for political asylum upon coming into contact with the INS. *Id.*

in 1966 authorizing the Attorney General to grant permanent resident status to any native or citizen of Cuba who was admitted or paroled into the United States after January 1, 1959, and had been physically present in the United States for at least one year.[38] This special treatment resulted in charges of unfair and discriminatory treatment by the U.S. against Cuba's neighbors, the Haitians.

In 1981, President Reagan responded to the influx of Cubans and Haitians by changing the immigration parole policy on excludable aliens.[39] Rather than paroling excludable aliens into the community, the Immigration and Naturalization Service (INS) detained them pending exclusion hearings, particularly those without documents.[40] As a result of this new parole policy, Haitian refugees who had reached the U.S. shores or "threshold of entry" were subjected to exclusion proceedings and incarceration.[41] Furthermore, this restrictive parole policy prompted litigation on behalf of Haitian asylum-seekers.

---

38. Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966); *see also* GORDON ET AL., *supra* note 36, § 34.04[5][a].

39. Only those aliens who were deemed a national security risk or were likely to abscond were kept in detention. While the Refugee Act created new mechanisms for admitting refugees and expressly prohibited the use of the parole power for that purpose, the overwhelming number of Cubans and Haitians reaching the United States in 1980 forced President Carter, after consulting with Congress, to use the parole power to admit Cuban and Haitian refugees. *See* GORDON ET AL., *supra* note 36, at § 33.01[4]; *see also* S. REP. No. 96-256, 96th Cong., 2d Sess. 17 (1979) ("Once the bill [Refugee Act] takes effect . . . the Attorney General does not anticipate using this [parole] authority . . . unless he determines that compelling reasons in the public interest . . . require that they be paroled into the United States, rather than be admitted in accordance with proposed Sections 207 or 208."). The Cuban and Haitian refugees were granted special parole status for fixed periods of time known as "Cuban-Haitian (Status Pending)." For a discussion on parole in the exclusion context see GORDON ET AL., *supra* note 36, at § 63.05[3]. Congress later authorized the allocation of monies to assist in resettling this special category of refugees and the Secretary of Human Services was charged with the responsibility to administer the program. In 1986, Congress authorized the adjustment of status to permanent residency for eligible "Cuban-Haitian (Status Pending)" entrants. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404 (1986).

40. ALEINIKOFF & MARTIN, *supra* note 37, at 294. *See generally* GORDON ET AL., *supra* note 36, §§ 65.01-65.15 (explaining exclusion proceedings). The Immigration and Naturalization Service, the federal agency with primary responsibility over the administration and enforcement of immigration laws, is part of the Department of Justice. Its governmental regulations are found in 8 Code of Federal Regulations. 8 C.F.R. §§ 1-499.1 (1995).

41. "Entry" means "any coming of an alien into the United States, from a foreign port or place or from an outlying possession," when that alien "reaches any land, water or air space within the territorial limits" of the United States. An "entry" is made only when an alien is on United States soil and is free from official restraint. *See* GORDAN ET AL., *supra* note 36, § 71.03[6].

1. Court Challenges: The Jean Litigation

Louis v. Nelson,[42] while not the first class action filed on behalf of Haitian asylum seekers during the 1980s,[43] was the first class action on behalf of Haitians who arrived in Florida on or after May 21, 1981, and were detained without parole. The *Louis* plaintiffs were held at several INS facilities until their asylum applications were decided pursuant to the restrictive policy change made by the Reagan administration.[44] The issue before the *Louis* court was whether an excludable alien can be incarcerated during the pendency, and possible appeal, of a claim for admission into the country.[45] The Haitian plaintiffs challenged their detention on two grounds. First, they claimed that the INS did not comply with the Administrative Procedure Act (APA) provisions on notice and comment in adopting the new practice of incarcerating aliens who could not show prima facie eligibility for admission to the country.[46] Second, they asserted that the detention policy was illegal because it unconstitutionally discriminated against Haitians on its face, or alternatively, in its application.[47] The district court held that the detention policy was not applied in a discriminatory manner, but further

---

42. 544 F. Supp. 973 (S.D. Fla. 1982).

43. On May 9, 1979, a class action was filed on behalf of more than 4,000 Haitians who had sought political asylum in South Florida. The basic thrust of the complaint was that the INS had instituted a program "to achieve mass deportation of Haitian nationals." Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 457 (S.D. Fla. 1980). The district court, in its 90-page decision, ordered the INS to submit a detailed plan for an "orderly, case-by-case, nondiscriminatory and procedurally fair" asylum application processing. *Id.* at 532. This included a full administrative record that could serve as the basis for meaningful judicial review. *Id.* The case was appealed by the government which challenged the district court's jurisdiction over the subject-matter, its constitutional finding that the Due Process and Equal Protection Clause of the Fifth Amendment were violated by the INS program, judicial notice of the country conditions in Haiti, and the burden of proof on asylum applicants. The court of appeals affirmed the lower court's decision with some modifications. *See* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1027 (5th Cir. 1982).

44. Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982).

45. *Id.* at 976. The case begins with a quote from Carl Sandburg:

> Life is like an onion;
> you peel off one layer at a time,
> and sometimes you weep.

Id. at 975.

46. *Id.* at 984.

47. *Id.*

held that the INS failed to comply with the APA and ordered the detained class members released.[48]

An appeal and cross-appeal of *Louis v. Nelson* (*Jean I*) followed the district court's ruling.[49] In the lengthy opinion, the court of appeals concluded that the government had failed to define the scope of the changed parole policy, thus notice and comment rulemaking were required. The court of appeals reversed the district court's finding on the question of discrimination and held that the ultimate result was the same because the Haitians had been impermissibly denied parole.[50] During the course of litigation, the INS complied with APA notice and comment requirements by promulgating regulations that were facially neutral in the treatment of Haitians, because the regulations forbade consideration of race and nationality in parole determinations. These INS actions rendered the APA question moot.[51]

A petition for rehearing and rehearing en banc was granted (*Jean II*).[52] The central issue before the appellate court in *Jean v. Nelson* (*Jean III*) was whether the plaintiffs could avail themselves of the Fifth Amendment's equal protection guarantee to challenge the "government's refusal to grant them parole."[53] Before it answered that question though, the court of appeals discussed the federal government's plenary power as a sovereign nation to control the admission of aliens.[54] Paramount to the court of appeals decision was the case of *United States v. Curtiss-Wright* in which the Supreme Court postulated: "The investment of federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[55] With this jurisprudential introduction, the appeals court discussed the constitutional rights of Haitians in view of the "entry" doctrine. According to the court, the Haitians had not technically or legally entered the country, but were incarcerated pending a determination of their admissibility, or actual entry, as asylees.[56] As such, they had no equal protection rights under the Fifth Amendment to challenge the government's parole discretion. Although the President and the Attorney General had the power "to draw distinctions between classes of aliens,"

---

48. *Id.* at 1002-04.
49. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983).
50. *Id.* at 1509.
51. *See* 47 Fed. Reg. 30,044 (1982), *amended by* 47 Fed. Reg. 46,494 (1982); *see also Jean*, 711 F.2d at 1502.
52. Jean v. Nelson, 714 F.2d 96 (11th Cir. 1983) (granting rehearing en banc)
53. 727 F.2d 957, 962 (1984) (en banc).
54. *Id.* at 964.
55. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).
56. *Id.* at 967-69.

lower level INS officials had no such power and could only follow the policies established in Washington, D.C.[57] Moreover, regarding the larger issue of the authority to deny parole to unadmitted aliens, the court of appeals stated that immigration officials clearly have that authority if they have a "facially legitimate and bona fide reason" for their decision.[58] The case was remanded on this question.[59]

The *Jean III* decision was appealed to the Supreme Court and was granted certiorari. This was the first time the Supreme Court had addressed the federal government's handling of Haitian refugees during the 1980s.[60] The Supreme Court, in what has been named *Jean IV*, was quick to reprimand the court of appeals for considering the constitutional question, since the case could have been decided on statutory and regulatory grounds.[61] As a matter of judicial restraint, constitutional adjudication by the federal courts should not occur unless it is unavoidable.[62] Therefore, leaving the constitutional question aside, the Supreme Court affirmed the decision to remand the case to the district court, compelling the district court to consider whether the INS officials exercised proper parole power in making individual determinations and whether such determinations were made "without regard to race or national origin."[63]

The dissent in *Jean IV* felt that the constitutional question could not be avoided.[64] The dissent argued that the majority's reasoning was flawed because the majority had incorrectly relied on the parole statute and regulations promulgated in the course of litigation as the means

---

57. *Id.* at 984.

58. *Id.* at 977 (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)). The *Kleindienst* decision is the leading Supreme Court case on First Amendment challenges to alien exclusion. *See* Carlos Ortiz Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301, 313-14 (1988).

59. Jean v. Nelson, 727 F.2d 957, 984 (1984).

60. Jean v. Nelson, 472 U.S. 846 (1985).

61. *Id.* at 854.

62. *Id.* (citing Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981); Three Affiliated Tribes of Berthold Reservation v. Wold Eng'g, 467 U.S. 138 (1984); Kolender v. Lawson, 461 U.S. 352, 361 n.10 (1983); Larson v. Valente, 456 U.S. 228, 257 (1982) (Stevens, J., concurring)); Mobile v. Bolder, 446 U.S. 55, 60 (1980); United States v. Gerloch Livestock Co., 339 U.S. 725, 737 (1950).

63. *Jean*, 727 F.2d at 857.

64. *Id.* at 858 (Marshall, J., Brennan, J., dissenting).

through which the Haitians could seek relief.[65] The dissent found the regulations flawed in three respects. First, the regulations contained a catch-all category which allowed continued detention in the public interest as determined by the INS District Director.[66] The regulations, however, did not define what the "public interest" was.[67] Second, there was no prohibition on considering national origin in the parole statute. This was essentially left to the District Directors.[68] Finally, the presumption that the regulations were neutral as to race and national origin was misplaced. Such a presumption simply was not supported. An authoritative statement by the Attorney General or the INS that the parole statute and regulations prohibit classifications on account of race and national origin did not exist.[69]

The dissent then turned to the constitutional inquiry and, after considerable analysis of procedural due process, found that the court of appeals should have remanded the case to determine the scope of petitioned equal protection rights.[70] It is interesting to note that the dissent found that national-origin classifications have a strong constitutional claim when they are used in decisions that lie "at the heart of" immigration policy.[71]

The *Jean* line of cases regarding Haitian asylum-seekers reiterate the legal principle enunciated by the Supreme Court in the 1950s: unadmitted aliens (subject to exclusion proceedings, detention, and parole) are on the "threshold of initial entry."[72] As such, they are *not* entitled to constitutional guarantees, and are limited to whatever procedures the Attorney General establishes in her discretion.[73]

---

65. Jean v. Nelson, 472 U.S. 846, 857. On remand, the district court had to consider if INS officials properly made individualized determination of parole, and if INS officials exercised their discretion under the law and regulation without regard to race or national origin. *Id.*

66. *Id.* at 861.

67. *Id.*

68. *Id.*

69. *Id.* at 865.

70. *Id.* at 882.

71. *Id.* at 871. At the conclusion of the underlying litigation, there was further federal court activity concerning the award of attorneys' fees granted to the attorneys representing the Haitians as the prevailing party under the Equal Access to Justice Act. *See* Louis v. Nelson, 646 F. Supp. 1300 (S.D. Fla. 1986); Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), *aff'd*, INS v. Marie Lucie Jean, 469 U.S. 154 (1990). In addition, Haitian refugees detained upon arrival in the country between 1981-1982 brought an unlawful detention tort and civil rights action against INS agents who had incarcerated them. Adras v. Nelson, 917 F.2d 1552 (11th Cir. 1990). These claim were not successful. *Id.*

72. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953)).

73. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

However, that discretion is not unfettered. The Attorney General must comply with relevant statutes such as the Refugee Act and the INA, as well as implementing regulations that may fall within the purview of the APA. The same holds true for applicable case law handed down by the federal courts.

2. *Maritime Jurisdiction and Exclusion Proceedings*

The treatment of Haitian asylum-seekers who have been apprehended in territorial waters, as opposed to having actually reached a land border or a port of entry of the United States, has also provoked a certain amount of discussion. Unlike the situation with detained aliens and the INS's parole policy, there has not yet been any federal court activity on the treatment of Haitian asylum-seekers apprehended in the territorial waters of the United States. Case law discussed above makes it clear that Haitian asylum-seekers who land in the United States and request asylum are subject to exclusion proceedings. These Haitians are on the threshold of initial entry and the federal government's immigration policy has been to incarcerate them during pending exclusion proceedings, during which they may assert a claim to asylum or withholding of deportation (*nonrefoulement*).[74] The question has been raised, and not definitively answered by federal courts, whether aliens intercepted within the territorial sea of the United States are afforded exclusion proceedings.[75]

In 1988 President Reagan extended the territorial sea of the United States by presidential proclamation to twelve nautical miles.[76] The new territorial sea limit was a response to international practice codified by

---

74. *See supra* notes 32-35 and accompanying text.

75. This situation applies to Haitians and other nationalities, particularly the Chinese, who have been apprehended by the Coast Guard in increasing numbers during recent years. *See No Exclusion Hearings for Interdicted Aliens, Justice Department Legal Counsel Says*, 71 INTERPRETER RELEASES 381 (1994) [hereinafter *No Exclusion Hearings*].

76. The Presidential Proclamation defines the territorial sea as:

> The territorial sea of the Unites States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as its bed and subsoil.

Proclamation No. 5928, 3 C.F.R. 547 (1988).

the 1982 Convention on the Law of the Sea.[77] The INS implemented the change in the extension of the territorial sea in 1992.[78] On October 13, 1993, legal counsel for the Department of Justice (DOJ) issued a memorandum concluding that no exclusion hearings need be given to aliens interdicted in United States territorial waters.[79] When the DOJ Memorandum came to this conclusion, it contradicted the position taken by the INS that the presidential proclamation extending territorial waters also had the effect of extending the scope of the INA, specifically the Refugee Act.[80] The DOJ Memorandum reached its opinion by examining the requirement for exclusion proceedings[81] within the text of the

---

77. United Nations Convention on the Law of the Sea, Dec. 10, 1982, part II, § 1, art. 2, U.N. Doc. A/CONF. 62/122, *reprintedin* 1 INTERNATIONAL AND UNITED STATES DOCUMENTS ON OCEANS LAW AND POLICY 255 (1986) (John N. Moore ed., 1986). Article 2 provides:

> (1)"The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archpelagic State, its archipelagic waters, to an adjacent belt of sea described as the territorial sea."
> (3)"The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

Id. Article 3 provides:

> Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles measured from the baselines determined in accordance with this Convention.

Id. § 2, art. 3.

The United States resisted signing the U.N. Convention on the Law of the Sea, in large part, because of a dispute over deep sea-bed mining. *See* JAMES K. SEBENIUS, NEGOTIATING THE LAW OF THE SEA 81-106 (1984). Following a decade of negotiations, the United States finally signed the U.N. Convention on the Law of the Sea on July 29, 1994, but formal United States participation depends on Senate ratification. The treaty itself went into effect in November 1994. *See* Rebecca J. Fowler, *Law of the Sea: An Odyssey to U.S. Acceptance*, WASH. POST, July 29, 1994, at A3.

78. *See* 57 Fed. Reg. 47,257 (Oct. 15, 1992), *reprinted in* 69 INTERPRETER RELEASES 1385 (1992). The final rule amends 8 C.F.R. § 287.1, which now reads:

> (a)(1) *External Boundary.* The term *external boundary*, as used in section 287(a)(3) of the Act, means the land boundaries and the territorial boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.

8 C.F.R. § 287.1(a)(1) (1994).

79. *See* Memorandum For the Attorney General, by Walter Dellinger, Acting Assistant Attorney General (Oct. 3, 1993) (copy on file with author) [hereinafter DOJ Memorandum]. For a comprehensive digest of the memorandum, see *No Exclusion Hearings, supra* note 75, at 381-86.

80. DOJ Memorandum, *supra* note 79, at 3.

81. *Id.* at 5-9. The DOJ Memorandum interprets INA sections 235(b) (jurisdictional basis for exclusion proceedings) and 236(a) (providing for exclusion proceeding before an Immigration Judge) to require exclusion proceedings only to aliens who have arrived at a "port of arrival." *Id.* This interpretation, according to the memorandum, is supported by a federal district court decision, Haitian Refugee Ctr., Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985). *Gracey* states that exclusion proceedings are statutorily created procedural rights which are limited to aliens who arrive at a port within the United States. *See id.*; *see also* DOJ Memorandum, *supra* note 79, at 8.

INA and the Refugee Act's sections on asylum and withholding of deportation (*nonrefoulement*).[82] Further, the DOJ Memorandum analyzed the definition of the United States in the INA,[83] and that the presidential proclamation itself did not provide additional procedural entitlements to undocumented aliens interdicted within the territorial waters of the United States.[84] The DOJ Memorandum cited various cases to support its position, but no federal case has explicitly decided the question.[85]

A careful reading of *Sale v. Haitian Centers Council*,[86] the Supreme Court case that decided the INA's nonextraterritorial application of the mandatory INA requirement of *nonrefoulement*, provides interesting references to exclusion proceedings and maritime jurisdiction. The issue before the Supreme Court, in its own terminology, was "whether . . . forced repatriation, authorized to be taken *beyond the Territorial Sea* of the United States," violates 243(h)(1), or Article 33 of the Protocol Relating to the Status of Refugees (the *nonrefoulement* provision).[87] These are actions on the high seas, not the territorial sea, as expressed by the Court's phrasing of the issue.[88] First, the Supreme Court made it clear that the INA's provision extending to *nonrefoulement* applies to exclusion proceedings.[89] Second, exclusion proceedings are domestic

---

82. DOJ Memorandum, *supra* note 79, at 9-15. INA § 208 stipulates that the Attorney General has to provide asylum procedures to aliens "physically present in the United States or at a land border or port of entry." INA § 208, U.S.C. § 1185 (1988). INA § 243(h) requires the Attorney General to withhold deportation if an alien's life or freedom would be threatened as a refugee. INA § 243, 8 U.S.C. § 1253 (1988). Here, the requirement obligates the Attorney General, not the President's directive to the Coast Guard, according to the DOJ Memorandum. DOJ Memorandum, *supra* note 79.

83. DOJ Memorandum, *supra* note 79, at 20. The INA does not specifically mention the territorial sea as being part of the United States; it only includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands.

84. *Id.* at 20-23.

85. *Id.* at 15.

86. 113 S. Ct. 2549 (1993).

87. *Id.* at 2552 (emphasis added). The Court stressed that this language appears in the executive orders by both Presidents Reagan and Bush. *Id.* at 2552 n.1.

88. *Id.* at 2552.

89. *See id.* at 2560; *see also* DOJ Memorandum, *supra* note 79 (quoting Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1510 (11th Cir. 1992)):

> [T]he plaintiffs in this case—who have been interdicted on the high seas . . . cannot assert a claim based on the INA or the Refugee Act . . . . The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry . . . . The plaintiffs in this case have been interdicted on the high seas

procedures used by the Attorney General to determine whether a nonadmitted alien will remain in the United States.[90] Third, the Court found that although the *nonrefoulement* provisions did not apply to exclusion proceedings before the 1980 Refugee Act, the INA did offer some protection to excludable aliens.[91] The Court went on to state that the INA offered no such protection to any alien who was *beyond the territorial waters* of the United States, and it would not expect the federal government to assume the burden of protecting aliens beyond the territorial sea without some acknowledgement of its dramatically broadened scope.[92]

The *Sale* Court's decision implies that the protection offered by domestic law to refugees before 1980 did not encompass the right to request *nonrefoulement* in exclusion proceedings, although a certain degree of protection did exist. After 1980, refugees could avail themselves of *nonrefoulement* in exclusion proceedings. In either event, both pre-1980 and post-1980 law did not apply extraterritorially as defined by the Court to mean *beyond the territorial waters of the United States*.

The Supreme Court went on to state that no published consideration existed to the effect that the United States was assuming any extraterritorial obligations by its accession to the 1967 Protocol. No nation could invoke Article 33(1) jurisdiction under Article 33(2)'s stipulation that *nonrefoulement* need not be extended to those who are "a danger to the security of the country in which he is" because "an alien intercepted on the high seas is in no country at all."[93] Toward the end of its opinion the Court again made direct reference to the territorial sea of the United States: "[W]hile we must, of course, be guided by the high purpose of both the treaty [1967 Convention] and the statute [INA-Refugee Act], we are not persuaded that either one places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States."[94]

---

and have not yet reached "a land border" or a "port of entry." *Id.*

Also cited was the *Sale* case for the proposition that INA's protections apply only to those aliens who reside in or have arrived at the border of the country. *See* DOJ Memorandum, *supra* note 79, at 10.

90. *Sale*, 113 S. Ct. at 2552.

91. *Id.* at 2561; *see id.* at 2561 n.33 (citing H.R. REP. NO. 608, 96th Cong., 1st Sess. 30 (1979)); S. REP. NO. 256, 96th Cong., 1st Sess. 17 (1979), *reprinted in* 1979 U.S.C.C.A.N. 141, 157 (expressing clear congressional intent that withholding of deportation applies to aliens in both deportation and exclusion proceedings).

92. *Sale*, 113 S. Ct. at 2562.

93. *Id.* at 2563.

94. *Id.* at 2567.

Given the holding in *Sale*, a valid argument can be made in analyzing the above text that the 1967 Protocol, and especially the INA, impose limits on the President's authority (and by extension the Attorney General, the INS, and the Coast Guard) to repatriate aliens interdicted *within the territorial sea* of the United States. At the very least, *nonrefoulement* applies. It is logical also to conclude that the federal government's recourse in handling refugees in the territorial waters of the United States is either to tow the interdicted vessel to a land border or port of entry for exclusion proceedings, or to turn the vessel away to a third country, but not to the country of origin if the refugees qualify for either asylum or withholding of deportation.[95]

On April 23, 1994, approximately six months after the DOJ Memorandum was written, a boat loaded with more than 400 Haitians was intercepted within the United States' territorial sea.[96] The United States response was to bring the vessel to shore and process the Haitians at the Krome detention center located in Florida. These actions made the United States the country of first asylum for the Haitian refugees.[97] Some Haitians were ultimately paroled into the community, while others were put into criminal facilities.[98] More importantly, President Clinton stated two reasons for allowing the Haitians to be brought on shore: (1) there was evidence that they were being abused, and (2) "[t]hese people were only *four miles from the shore*."[99] Once on land, the Haitians were allowed to make asylum and withholding of deportation claims before the INS. If they were not found eligible, they then had an

---

95. *See id.* at 2563.
96. *Id.* at 2567.
97. A country of first asylum is one where the refugee comes into contact with authorities and requests protection. Principles of first asylum would not apply if a refugee has been firmly resettled elsewhere, or has come into contact with an intermediate country in which the refugee does not request state protection. There is no agreement between states on responsibilities over first asylum. The United States does not grant protection to refugees who have been firmly resettled before entering the country. *See* INA § 207(c)(1), 8 U.S.C. § 1157(c) (1994). In addition, the Supreme Court has held that a person seeking refuge in the United States must be "reasonably proximate to the flight and not following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." Rosenberg v. Yee Chien Woo, 402 U.S. 49, 57 (1971); *see also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 52-56 (1983) (discussing the principle of first asylum).
98. William Booth, *400 Haitians Intercepted, Held in Florida; Clinton Calls Case Unique*, WASH. POST, Apr. 23, 1994, at A3.
99. *Id.* (emphasis added).

opportunity to make those claims de novo in exclusion proceedings while the United States sought to remove them from the country.[100]

Under international law the coastal state has unrestricted jurisdiction over its territorial sea. However, the extent to which the state chooses to exercise that jurisdiction depends on its particular domestic legislation.[101] President Clinton's statement is a strong indication that there is an obligation to provide a "safe harbor" to aliens who are apprehended within the territorial sea of the United States. The next question then is whether the United States will follow through on the conclusions postulated in the DOJ Memorandum or whether Congress will ultimately legislate in this area.

B. The Interdiction Program and the Interdiction Cases

The interdiction program is the second component of the United States policy regarding the migration of undocumented aliens into the southeastern part of the country, the first component being the restrictive parole policy discussed earlier. Much commentary has been written about the interdiction program.[102] It has also been the subject of a series of cases in the federal judiciary.[103] This section will briefly

---

100. The federal government decided to parole most Haitians into the community, however, the INS imposed the requirement that they must report to those nongovernmental agencies that assist in finding sponsors for Haitian refugees until their cases are adjudicated. Given the backlog of asylum adjudications, the Haitians could be required to report for several years. The reporting requirement caused a controversy because no other refugee group is subject to it. Some nongovernmental agencies backed out of the arrangement with the INS to resettle the refugees. Singling out Haitians for the reporting requirement brought about renewed charges of racism against the government. Others felt that the requirement was to appease the state political establishment in Florida that had been upset at the cost that refugees and other aliens cause state and local instrumentalities. *See CWS Objects to Special Release Conditions Put on 350 Haitians*, NEWS RELEASE (Church World Service), May 11, 1994 (Church World Service (CWS) is a joint voluntary agency which participates in refugee resettlement) (copy on file with author).

101. *See* MALCOM N. SHAW, INTERNATIONAL LAW 350 (1991) (discussing the juridical nature of the territorial sea).

102. *See generally* Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boatpeople to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993); Stephen H. Legomsky, *The Haitian Interdiction Programme, Human Rights, and the Role of Judicial Protection*, 2 INT'L J. REFUGEE L. 181 (1990); Symposium, *The Haitian Refugee Crisis: A Closer Look*, 7 GEO. IMMIGR. L.J. 1, 1-147 (1993); Symposium, *Refugee Law and Policy*, 33 VA. J. INT'L L. 473-526 (1993).

103. *See, e.g.*, Haitian Refugee Ctr., Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985); Haitian Refugee Ctr., Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987); Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council, 113 S. Ct. 3028 (1993).

discuss the interdiction program and the fate of repatriated Haitians, while concentrating on the line of cases from the mid-1980s to the 1993 Supreme Court decision challenging the validity of various aspects of that program.

1. Bilateral Agreement with Haiti and Presidential Declaration

On September 23, 1981, the United States and the Republic of Haiti, through an exchange of diplomatic letters, entered into an agreement authorizing the Coast Guard to intercept Haitian vessels on the high seas.[104] Coast Guard personnel were authorized to board intercepted vessels under the agreement to ascertain if they contain undocumented aliens and, if so, return the vessel with its crew and passengers to Haiti.[105]

Intercepted Haitians were to be repatriated forcibly; however, the Haitian government would not punish its repatriated citizens for their illegal departure. For its part, the United States would not repatriate any passengers whom the United States authorities determined to qualify for refugee status.[106] During the early 1980s, the INS guidelines implementing the interdiction program required that interviews be held on the Coast Guard cutters. Only those Haitians with plausible asylum claims would be transported to the United States and allowed to apply for asylum.[107] On September 29, 1981, President Reagan issued a presidential proclamation suspending the entry of undocumented aliens from the high seas into the United States and ordering the Coast Guard to intercept vessels suspected of carrying undocumented aliens and return them to their point of origin. The executive order prohibited the return of refugees without their consent.[108]

---

104. Agreement on Migrants-Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241.

105. For a detailed description of the program, see STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 970 (1992).

106. *Id.*

107. *Id*; *see also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEE REFOULEMENT: THE FORCED RETURN OF HAITIANS UNDER THE U.S. HAITIAN INTERDICTION AGREEMENT (1990) [hereinafter LAWYERS COMM. REPORT].

108. Exec. Order No. 12,324, 46 Fed. Reg. 48,107, 48,109 (1981), *reprinted in* 8 GORDON ET AL., *supra* note 36, at 454-55.

During the first ten years of the interdiction program, 364 vessels were intercepted and 21,000 Haitians were returned to Haiti.[109] Only six Haitians were transported to the United States and allowed to file asylum applications.[110] Some commentators have noted that the primary objective of the interdiction program has been to prevent Haitians from obtaining certain procedural rights, especially the right to a formal evidentiary exclusion hearing before an immigration judge. The interdiction program precludes their arrival to the United States and thus prevents Haitians from acquiring the statutory right to a formal hearing under the INA on any asylum or withholding of deportation claim.[111] If allowed into the United States, Haitian asylum seekers would have the right to a formal evidentiary proceeding represented by counsel before an immigration judge during exclusion proceedings, and the right to be represented by counsel in preparing the asylum application before the INS asylum corps. Legal representation is particularly important in the asylum context and is denied under the current procedure.[112]

---

109. LAWYERS COMM. REPORT, *supra* note 107, at 9.

110. Legomsky, *supra* note 102, at 183.

111. *Id.* On October 1, 1990, a complaint against the interdiction program was filed with the Inter-American Commission on Human Rights (IACHR), which is part of the Organization of American States. The petition was filed by various organizations, located both in Haiti and the United States, and unnamed Haitian nationals who have been and are being returned to Haiti against their will. They allege that U.S. agents violate international law following "interdiction" of their vessels on the high seas by the United States Coast Guard. ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993 334-35 (1994) [hereinafter IACHR REPORT].

On October 3, 1991, the petitioners submitted an Emergency Application for Provisional OAS Action to Halt the United States' Policy of Interdicting and Deporting Haitian Refugees. *Id.* at 340. The petition alleged that the United States' interdiction policy denies Haitians an opportunity to present their claims for political asylum in a fair manner. In addition, the petition alleges that the United States is in violation of the American Declaration of the Rights and Duties of Man. *Id.* at 340-41.

On October 4, 1991, the IACHR sent a cablegram to then Secretary of State for the United States, James A. Baker, III, urging the United States to desist in its policy of interdicting and deporting Haitian refugees pending the current political climate in Haiti. The cablegram states in part, "[The IACHR urges that] for humanitarian reasons [the United States government] suspend its policy of interdiction of Haitian nationals who are attempting to seek asylum in the United States and are being sent back to Haiti, because of the danger to their lives, until the situation in Haiti has been normalized." *Id.* at 341.

112. *See* SARAH IGNATIUS, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 167-79 (1993) (National Asylum Study Project, Harvard Law School, Immigration and Refugee Program). This part of the assessment concludes:

> Unrepresented [asylum] applicants suffer disproportionate harm compared to represented applicants from some of the shortcomings in asylum officers' work, such as hostile and aggressive manner of certain asylum officers in interviews; fundamental legal errors of certain asylum officers; difficulty of certain asylum officers in questioning applicants; and certain asylum officers'

In addition to precluding refugees from acquiring procedural rights upon reaching the United States, the interdiction program has also been criticized for ignoring the INS guidelines for conducting private hearings.[113] In fact, eye witnesses stated that some interviews took place in front of other passengers, while other interviews were conducted within hearing distance of passengers.[114] This was a serious failure in the refugee processing procedure given the sensitive nature of asylum claims. Another grievous problem with the on-board interviews was that they did not elicit facts needed to determine if the interviewee had a credible claim to asylum.[115]

The interdiction program was changed for approximately five months after the *coup d'etat* that toppled the Aristide regime.[116] This period saw an increase of Haitian boatpeople intercepted at sea and brought to Guantanamo Bay naval station in Cuba for processing.[117] Those

---

lack of knowledge of country conditions.
Id. at 178.

113. LEGOMSKY, *supra* note 105, at 970.

114. *Id.*

115. LAWYERS COMM. REPORT, *supra* note 107, at 6.

116. On February 6, 1992, another petition was filed before the IACHR. The petitioning organizations filed an Emergency Application for Provisional OAS Action to Halt the United States Government's Policy of Returning Haitian Refugees Interdicted since the Military Coup of September 30, 1991. On March 11, 1993, the IACHR issued a declaration calling upon the governments of the hemisphere to take the emergency measures necessary to prevent the dangers and suffering experienced by those Haitians who, although forced to flee their country because of repression and persecution, have been or are being repatriated. The IACHR also requested that the United States government review its interdiction policy of Haitians and ensure that Haitians residing in the United States be provided refuge. *See generally* IACHR REPORT, *supra* note 111, at 341, 554.

In its Report on the Situation of Human Rights in Haiti, the IACHR, under its recommendations and conclusions, calls "upon member states to comply with their obligations under international conventions and instruments, including the American Declaration of the Rights and Duties of Man, [sic] to ensure that persons who flee their countries from political persecution are afforded the right to determine their claims for asylum or refugee status." ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI 152 (1994).

117. Over 36,000 refugees were screened at Guantanamo Bay from November 1991 to June 1993. Noted accomplishments of the refugee screening program include the fact that asylum officers assumed extra duties on an emergency basis, that the INS produced a memorandum on refugee and asylum law as well as the country conditions on Haiti to assist in the screening effort, and the asylum director at the Miami office worked closely with representatives of the Haitian applicants. Defects in the screening process included a wide disparity between asylum officers in screening Haitians into the United

Haitians with a credible claim to asylum were brought to the United States under parole status.[118] They were not incarcerated, but had to file their asylum applications with the INS. As parolees in the United States, refugees are afforded procedural remedies such as exclusion hearings should the INS deny their asylum applications. Refugee processing at Guantanamo Bay lasted approximately two years. The interdiction program was again changed in May 1992 through another executive order, known as the Kennebunkport Declaration. Under this order, intercepted vessels were returned immediately to Haiti without a hearing to establish plausible claims for asylum.[119]

The Kennebunkport Declaration superseded the original executive order which established the interdiction program in 1981.[120] For ten years the United States had recognized, in theory, its international human rights obligation to protect refugees by not returning them to Haiti under either the bilateral agreement with Haiti or the ensuing Executive Order for the High Seas Interdiction of Illegal Aliens. The Kennebunkport Declaration changed that implicit recognition. However, the processing of refugees in the interdiction program was changed yet again in May 1994. This policy reversal will be discussed below.

States. Some asylum officers used the incorrect standard in requiring that Haitians demonstrate that they were being "singled out" for persecution, relying almost exclusively on Department of State materials and not enough on information provided by nongovernmental organizations. Another serious problem concerned the use of handwritten notes by the asylum officers from the screening interviews to challenge the credibility of the Haitian applicants during their asylum adjudication interviews before the INS. Nongovernmental organizations representing the Haitian applicants objected to this practice, especially because they did not have the opportunity to review the notes before the asylum hearing. The use of the prescreening notes "turned what should have been an impartial, nonadversarial hearing into a hostile credibility examination." *See* Letter from Emma Navajas, Chief Operating Officer, Catholic Legal Immigration Network, Inc. to Rex Ford, Assoc. Deputy Attorney General, Department of Justice, and Ricardo Inzunza, Deputy Commissioner, INS (Aug. 24, 1992) (copy on file with author); *see also* IGNATIUS, *supra* note 112, at 141-66 (chapter on the treatment of Haitian asylum cases).

118. The INS has extended parole status and work authorization to those Haitians who were processed at Guantanamo Bay during the 1991 and early 1992 period. The re-parole was needed to allow the Haitians to pursue asylum applications. *See INS Extends Parole, Work Authorization for Guantanamo Haitians,* 71 INTERPRETER RELEASES 835 (1994) (the extension was sent to all INS field offices on June 2, 1994, via cable (file CO 274a-P/208-P)).

119. Exec. Order No. 12,807, 57 Fed. Reg. 231,333 (1992), *reprinted in* 8 GORDON ET AL., *supra* note 36, at 474-76.

120. *Id.* § 4, *reprinted in* 8 GORDON ET AL., *supra* note 36, at 476 ("Executive Order 12324 is hereby revoked and replaced by this order.").

2. *Fate of Repatriated Haitians*

Those Haitians who were prescreened into the United States to pursue their asylum applications before the Kennebunkport Declaration were indeed fortunate. Under the Kennebunkport order, the Coast Guard forcibly returned all Haitians back to their country, without screening boatpeople who might have had a credible fear of persecution. President Bush dismissed concern over the policy through assertions that repatriated boat people would not face persecution.[121] This argument was plausible to the Bush administration because the majority of boat people were considered economic migrants.[122] To support its position, the administration relied on surveys conducted by the State Department and the INS in which approximately 2,500 repatriates were interviewed, and not one of those interviewed stated that he or she had been subject to persecution upon returning to Haiti. However, human rights monitors believe that such statements and surveys were clumsy attempts to rationalize and justify forced return.[123] The Bush administration also felt that they were protecting the safety of boatpeople who were leaving the country in "unseaworthy vessels without navigation equipment and life preservers."[124]

The inquiries made by the United States government were conducted by individuals who did not have sufficient experience in refugee law, nor

---

121. "I am convinced that the people in Haiti are not being physically oppressed. I would not want on my conscience that . . . anyone that was fleeing oppression would be victimized upon return." President George Bush, May 28, 1992, *quoted in Half the Story: The Skewed U.S. Monitoring of Repatriated Haitian Refugees*, AMERICAS WATCH, June 30, 1992, at 1-2 [hereinafter *Half the Story*].

122. *Id.* This issue of Americas Watch is dedicated to critiquing the monitoring of repatriated Haitian refugees. The critique was based on three sets of documents: (1) several hundred pages of unclassified telegrams sent from the U.S. Embassy in Port-au-Prince between mid-February and mid-May 1992; (2) the "Special Intelligence Report, Haiti" issued by the Department of Justice dated February 24, 1992; and (3) the "Haitian Situation Report," issued by the Department of Justice, INS, HQINT Dallas, Texas summarizing February and March visits by INS personnel. *Id.* at 4-5.

123. *Id.* at 6.

124. Letter from Lee M. Peters, Deputy Director, Office of the Caribbean, Department of State, to Don Hammond, Chairman, Committee on Migration, American Council for Voluntary International Action (Interaction) (June 26, 1992) (copy on file with author).

were they knowledgeable in the country conditions in Haiti.[125] Other serious problems with federal efforts to ascertain the fate of repatriated boatpeople included the fact that interviews were brief and conducted in semi-private conditions, and that the sample interviews were skewed because the government interviewed those who were more willing to go public, as opposed to those who were in hiding.[126] Human rights groups that focused closely on Haiti simply could not believe United States pronouncements on the safety of repatriates as reliable.[127] Instead, they pointed to sworn statements of refugee advocates that painted a canvas of "renewed political repression, widespread violence, and the targeting of returned Haitians . . . by the security and paramilitary forces."[128]

Reports of human rights abuses continued against the Haitian population supporting President Aristide.[129] The death toll rates during 1993 are telling. During May and June only 14 deaths were reported.[130] Soon after the early July signing of the Governor's Island Agreement,[131] which was aimed at finding a political solution to the

---

125. According to human rights advocates, those chosen to lead the INS teams were experts in detecting the smuggling of aliens and drugs, not in monitoring human rights abuses on the part of the Haitian authorities or their supporters. *See Half the Story, supra* note 121, at 6.

126. *Id.* at 7-9.

127. *See Lawsuit Challenges Policy on 'Screened-In' Refugees*, HAITI INSIGHT, May-June 1992, at 2, 9. Haiti Insight is a bulletin which focuses on refugee and human rights affairs published by the National Coalition for Haitian Refugees.

128. *Id.* at 9.

129. *See* HAITI INSIGHT, Winter 1993, at 8-9, 13-16.

130. *News Briefs*, HAITI INSIGHT, Mar. 1994, at 5.

131. International efforts at finding a solution to the Haiti situation increased significantly during 1993. On July 3, 1993, the Governor's Island Agreement drafted by mediators of the OAS/UN (Dante Caputo) and the United States Special Envoy to Haiti (Lawrence Pezzullo) was agreed to by President Aristide and the de facto military rulers. Under the agreement President Aristide would return on October 30, 1993, to resume power after confirming a new prime minister. Lt. Gen. Raoul Cedras, Commander-in-Chief of the military, would go into early retirement and a new military commander would be appointed by members of the army general staff. In addition, amnesty would be granted by the Presidency, and a law would be adopted establishing a new police force separate from the armed forces. The commander of the new police force would be named by President Aristide. President Aristide appointed his Prime Minister on July 27 (Robert Malval), and he was sworn in on September 2, 1993.

On October 11, 1993, the USS *Harlan County* arrived in Port-au-Prince carrying lightly armed U.S. and Canadian troops. When the troops tried to disembark they were confronted by an angry crowd of armed thugs. President Clinton ordered the USS *Harlan County* to withdraw. This incident marked the collapse of the Governor's Island Agreement. October 30 came and went with the de facto military rulers still in power. Not only was there no implementation of the accord, the military rulers installed as provisional president a pro-military judge, Emile Jonassaint, on May 11, 1994. *See* AGREEMENT OF GOVERNORS ISLAND, *reprintedin* ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF

Haitian problem, 34 were killed in July, and the numbers continued to climb with more than 70 deaths reported in November 1993.[132] The same holds true for the first part of 1994, with more than 80 deaths occurring in the months of January and February.[133]

During the early part of 1994 it was becoming increasingly evident to President Aristide that the United States' and international diplomatic efforts would not restore him to power any time soon. Given the collapse of the only vehicle in place to achieve that goal, the Governor's Island Agreement, and the increased violence against his supporters in Haiti, President Aristide renounced the 1981 United States-Haiti agreement that had been consistently cited in the Interdiction Cases as the legal basis for the United States' interdiction program.[134]

3. *The Interdiction Cases*

During the 1980s and 1990s court challenges to the interdiction program created a line of cases, the Interdiction Cases, discussed in this section. These cases demonstrate that Haitian refugees subject to the interdiction program would not be protected by the federal judiciary. While the federal courts have agonized over the human suffering surrounding the factual circumstances of the cases, they make it abundantly clear that solutions to the problems posed by the Interdiction Cases should be left to the political branches of government, the executive and the legislative.

HUMAN RIGHTS IN HAITI 166-67 (1994); *see also* John M. Goshko, *Effects of Shifts on Haiti Unclear, Changes Unlikely to Resolve Situation, Foreign Diplomats Say*, WASH. POST, May 13, 1994, at A42.

132. *See* HAITI INSIGHT, Mar. 1994, at 5. Another 34 deaths were reported in December 1993. *Id.*

133. *See generally Terror Prevails In Haiti, Human rights Violations and Failed Diplomacy*, HUMAN RIGHTS WATCH (publication formerly entitled AMERICAS WATCH), Apr. 1994, at 6 [hereinafter *Terror Prevails in Haiti*]. *See also Haiti Policy Brings Blast At Clinton*, N.Y. TIMES, Apr. 10, 1994, at A14.

134. John M. Goshko, *Groups Call U.S. Haitian Policy a 'Disaster,'* WASH. POST, Apr. 10, 1994, at A26 (noting the letter sent to President Clinton ending the accord states that refugees returned to Haiti are exposed to "persecution including imprisonment and execution"). The State Department has taken the position that the Coast Guard can legally stop those vessels that are not registered under the Haitian flag. *See* Steven Greenhouse, *Aristide to End Accord That Allows U.S. to Seize Refugee Boats*, N.Y. TIMES, Apr. 8, 1994, at A6. The agreement itself expired on October 6, 1994. *See "A Slow-Motion Mariel": Cubans (and Haitians) Take to Sea*, 71 INTERPRETER RELEASES 1091, 1093 (1994) [hereinafter *Slow-Motion Mariel*].

a. Gracey

A few years after the interdiction program was in place, the Haitian Refugee Center, a nonprofit organization whose mission was to assist Haitian refugees, and two of its members brought an action in a federal district court challenging the interdiction program.[135] In *Haitian Refugee Center, Inc. v. Gracey*, the plaintiffs alleged that the interdiction program, implemented through the bilateral agreement with Haiti, violated the Refugee Act and the provisions of the INA relating to asylum and withholding of deportation.[136] Plaintiffs further alleged that their liberty rights were being violated because the interdiction program did not afford them due process in accordance with the Refugee Act and the INA. Therefore, plaintiffs alleged it violated the Due Process Clause of the Fifth Amendment of the Constitution.[137] Finally, the complaint alleged a violation of certain international law principles, in particular the *nonrefoulement* provisions of the 1976 Protocol and the Universal Declaration of Human Rights.[138]

---

135. Haitian Refugee Ctr., Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985).

136. *Id.* at 1403-04. INA § 208, 8 U.S.C. § 1158 (1993) reads in relevant part:

> 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 within the meaning of section 101(a)(42)(A).

Id. INA § 243(h)(1), 8 U.S.C. § 1253 (1993) states in relevant part:

> 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.

Id.

137. *Gracey*, 600 F. Supp. at 1405.

138. *Id.* at 1405-06. The *nonrefoulement*(Article 33) provision of the 1967 Protocol was incorporated into INA § 243(h)(1) through the Refugee Act. It reads:

> 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 race, religion, nationality, membership in 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

1951 Convention Relating to the Status of Refugees, art. 33, 19 U.S.T. 6223, 189 U.N.T.S. 137, *reprintedin* HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 57, 70 (1979).

The government countered with the argument that both the organization and individual plaintiffs lacked standing to bring the lawsuit.[139] However, the federal district court did not have difficulty finding standing for both plaintiffs.[140] Having found standing, the court dismissed the entire complaint for failure to state a claim upon which relief can be granted.[141] With regard to the first allegation relating to the right to apply for asylum and withholding of deportation, the court, citing the text of the statute, found that these rights attach only if the aliens were in the United States.[142] The procedures established by the Attorney General only apply to aliens who are *physically present in the United States or at a land border or port of entry.*[143] The court further concluded that there was no due process violation of the Fifth Amendment because aliens have no constitutional right to enter the United States and, by extension, the Constitution has no extraterritorial

---

139. *Gracey*, 600 F. Supp. at 1401.

140. *Id.* at 1402-03. The Haitian Refugee Center met the constitutional requirement of standing under the ruling of Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). *Gracey*, 600 F. Supp. at 1402. Similar to the nonprofit organization in *Havens*, the Haitian Refugee Center's *raison d'etre* is to provide counseling, legal, and other services to a limited class of individuals—Haitian refugees. In addition, the Haitian Refugee Center alleged that the interdiction program impaired its ability to provide its basic functions, that is to provide counseling to Haitian refugees. The Haitian Refugee Center also satisfied the prudential standing requirements under Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977):

> [An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

Gracey, 600 F. Supp. at 1402 (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

According to the court, the Haitian Refugee Center members had standing to sue in their own right. Therefore, the germaneness prong is satisfied because the primary purpose of the Haitian Refugee Center (HRC) is to assist indigent Haitians confronting federal authorities. Similarly, the third part of the prudential test is satisfied because the defendants do not make any serious assertion that the relief sought, injunctive and declaratory relief, requires the participation of individual members. The two Haitian plaintiffs, the court found, have alleged injury to their associational rights as a result of the government's actions sufficient to acquire standing. *Id.* at 1402-03.

141. *Id.* at 1403-07.

142. *Id.* at 1403-04.

143. *Id.* at 1404.

reach.[144] The court relied on *Jean v. Nelson* to buttress its conclusion.[145] With regard to the allegation that the interdiction program violates international obligations of the United States such as the 1967 Protocol prohibition against *nonrefoulement* and the Universal Declaration of Human Rights, the court held that these instruments do not provide rights upon which the plaintiffs can rely.[146] According to the court, Congress incorporated the 1976 Protocol into domestic law through the Refugee Act, and the 1976 Protocol is not self-executing.[147] The court further found that the Refugee Act does not provide refugees with rights outside of the United States.[148] Similarly, the court held that the Universal Declaration of Human Rights is a nonbinding international instrument.[149]

With regard to the interdiction program itself, the court noted that interdiction is only allowed outside the territorial waters of the United States and therefore the Coast Guard was acting properly under its enabling statute.[150] The court then concluded that "an agreement with another country specifically granting the United States permission to return seized vessels and migrants to that country makes such return proper" under federal law.[151] But the court did not stop here. The court also found that the President's power to prevent the entry of migrants from the high seas is constitutionally based in the President's foreign relations power.[152] Some scholars would disagree that there

---

144. *Id.* at 1405 (citing Kleindienst v. Mandel, 408 U.S. 753 (1972), Galvan v. Press, 347 U.S. 522 (1954), and Landon v. Plascencia, 459 U.S. 21 (1982)).

145. *Id.* "Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress." *Id.* (quoting Jean v. Nelson, 727 F.2d 957, 967 (11th Cir. 1984)).

146. *Id.* at 1405.

147. *Id.* at 1406 (citing Bertrand v. Sava, 684 F. 2d 204, 218-19 (2d Cir. 1982) for the proposition that "the United Nations Protocol is not self-executing").

148. *Id.*

149. *Id.* The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc.1/777 (1948), *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 440.1 (R. Lillich ed., 1986).

150. *Gracey*, 600 F. Supp. at 1400 (citing 14 U.S.C. § 89(a) (1994)). The statute reads as follows:

> (a) The Coast Guard may make inquiries, examinations, inspections, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States . . . . When from such inquiries . . . it appears that a breach of the laws of the United States . . . has been committed . . . other lawful and appropriate action shall be taken.

14 U.S.C. § 89(a) (1994).

151. *Gracey*, 600 F. Supp. at 1400.

152. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)).

is a constitutional basis for the President's foreign affairs power because it, like the federal immigration power, is extra-constitutional in nature and stems from the attributes of sovereignty rather than directly from the Constitution.[153] In fact, the very case cited by the court to support this proposition stands for the theory that the foreign affairs power does not have a basis in the Constitution, but rather from the inherent attributes of a sovereign state.[154] The *Gracey* decision was promptly appealed.[155] The court of appeals affirmed the lower court, but on a different ground.[156] After considerable discussion of standing under Article III of the Constitution, the appeals court concluded that the individual appellants lacked standing, and that all appellants, including the Haitian Refugee Center lacked prudential standing.[157] Toward the end of his concurring opinion, Judge Edwards acknowledged that the Haitian human crisis was compelling, but that there was no solution to be found in a judicial remedy.[158]

While the *Gracey* case precluded Haitian refugees from seeking and obtaining protection from the federal courts, pressure from refugee advocacy groups continued. In particular, an influential report was released in 1990 that was highly critical of the interdiction program.[159]

---

153. *See* ALEINIKOFF & MARTIN, *supra* note 37, at 12 (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 16-18 (1972)):

> The attempt to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution has not been accepted as successful. It requires considerable stretching of language, much reading between the lines, and bold extrapolation from the 'Constitution as a whole,' and that still does not plausibly add up to all the power which the federal government in fact exercises.

Id.

154. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.").

155. Haitians Refugee Center, Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

156. *Id.* at 796 (each member of the panel wrote their own opinion).

157. *Id.* at 796 n.1. At least one member of the panel did find that the HRC has standing in its organizational capacity following the general analysis applied by the district court under Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19 (1982). However, the same member concurred with the rest of the panel in that neither violation of the Fifth Amendment nor the United Nations Protocol provide claims upon which relief could be granted. *Gracey*, 802 F.2d at 823, 828-41.

158. *Id.* at 841 (Edwards, J., concurring).

159. Lawyers Committee for Human Rights, *Refugee Refoulement: The Forced Return of Haitians under the U.S. Haitian Interdiction Agreement, reviewed by* 67 INTERPRETER RELEASES 323, 324 (1990) (summarizing the reports and its recommenda-

The report called for a suspension of the interdiction program while recommended changes were implemented.[160] In concluding that hundreds of Haitians were wrongfully returned to Haiti under the interdiction program, the report suggested certain changes, some of which were eventually adopted by the federal government.[161] Furthermore, during the latter part of 1990, there was discussion within the INS as well as inter-agency meetings within the federal government regarding the interdiction program.[162] On March 1, 1991, short term changes were implemented through an INS intra-agency memorandum.[163] Meanwhile, political events in Haiti during that same year seemed encouraging. For the first time in its political history, democratic elections were held. However, as stated earlier, democracy was short-lived and lasted just seven months. The military staged a successful *coup d'etat* forcing President Aristide to leave the country.

In the aftermath of the *coup d'etat*, the interdiction program was fundamentally changed. Instead of on-ship interviews, Haitians intercepted at sea were taken to the United States naval station at Guantanamo Bay where they were prescreened for initial determination of having plausible asylum claims. Those with plausible claims were

---

tions).

160. *Id.*

161. *Id.* The recommended changes include the expansion of personnel and resources to make on board interviews more meaningful; that interviewers be provided with proper training and receive adequate information on country conditions in Haiti; that interviews be conducted in private and that they be recorded; that a comprehensive interview questionnaire be developed; and that an independent monitor be present to observe the interdiction procedures, preferably someone from the United Nations High Commission for Refugees.

162. INS Deputy Commissioner Ricardo Izunza was an important "mover" for INS discussion. *Id.* This change in the government's attitude was motivated by the Lawyer's Committee Report. Additionally, the key player in the interagency context was the U.S. Coordinator for Refugee Affairs, Jewel LaFontant-Mankarious. *INS Revises Policy for Screening Haitians Interdicted at Sea*, 68 INTERPRETER RELEASES 793, 794 (1991) [hereinafter *INS Revises Policy*].

163. Memorandum from Gregg A. Beyer, Director of Asylum, to Leon Tennings, Chief Asylum Pre-Screening Unit and Erich Cauller, Director, Miami Asylum Office (Mar. 1, 1991), *in* Appendix I, 68 INTERPRETER RELEASES 804 (July 1, 1991). The changes included an opening presentation by the INS of the purpose of on board interviews and recognition that a person may be brought to the United States to seek asylum. Further, interdicted Haitians were asked specific questions designed to measure the reasons for leaving Haiti and the fear of returning. Any Haitian who expressed a fear of returning would be given a more in-depth interview. Those expressing reasonable fears of returning would be sent to the United States and allowed to submit an asylum application. The INS Asylum Branch and Office of General Counsel also conducted specialized training in country conditions for individuals who interviewed interdicted Haitians. *Id.* These changes have allowed at least 17 Haitians to be taken to Miami since the beginning of 1991. This was more than in the entire 10-year history of the interdiction program. *INS Revises Policy, supra* note 162, at 795-96.

paroled into the United States in order to pursue formal asylum applications.[164] Between the *coup d'etat* and the end of May 1992, the Coast Guard intercepted more than 35,000 Haitians, 9,000 of which were allowed to pursue their asylum claims in the United States.[165]

Because of concern that the prescreening policy was enticing Haitians to leave their politically troubled and economically embargoed country, the United States changed its policy concerning the interdiction program yet again. The new policy, embodied in the Kennebunkport Declaration, was to return immediately all Haitians intercepted at sea to Haiti without any prescreening process. As a result, the only way Haitians could apply for political asylum was at the United States embassy in Haiti.[166] The Kennebunkport Declaration and the forcible return policy without the possibility to apply for asylum led to the next round in the Interdiction Cases.

b. Baker

In *Haitian Refugee Center, Inc. v. Baker*,[167] the Federal District Court for the Southern District of Florida got beyond the obstacles of standing and the political question doctrine to discuss the merits of the case involving, among other issues, *nonrefoulement*. The immediate decision before the court was whether to grant plaintiffs, the Haitian

---

164. For a comprehensive analysis of the treatment of Haitian asylum cases screened at Guantanamo Bay see IACHR REPORT, *supra* note 111, at 141-66.

165. Al Kamen, *U.S. Phasing Out Tent City for Haitian Refugees at Guantanamo*, WASH. POST, May 29, 1992, at A24. Approximately 240 of the applicants that were found to have plausible asylum claims were also found to be infected with the human immunodeficiency virus ("HIV"), which is believed to cause Acquired Immune Deficiency Syndrome ("AIDS"). Infection with the HIV virus is a ground for exclusion under 8 USC § 1182(a)(1)(A)(i) (1995). Moreover, the U.S. government kept the HIV-infected Haitians at Guantanamo Bay even after everyone had either been sent back to Haiti or paroled to enter the United States, notwithstanding the fact that military doctors declared that these Haitians could not be treated adequately at Guantanamo Bay. It took a court order to force the government to move on this issue and either allow the Haitians to enter the United States for medical treatment or to evacuate the Haitians to another place, other than Haiti, for treatment. They were ultimately brought into the United States. *See* Haitian Ctrs. Council v. Sale, 817 F. Supp. 336 (E.D.N.Y. 1993); *see also Judge Orders Adequate Medical Treatment for HIV Haitians*, 70 INTERPRETER RELEASES 414-15 (1993).

166. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

167. 789 F. Supp. 1552 (S.D. Fla. 1991). For the court's discussion on standing and justiciability, see *id.* at 1559-66. See *supra* note 34 and accompanying text for the definition of *nonrefoulement*.

Refugee Center (HRC) and individual Haitian refugees, a preliminary injunction against continued interdiction and forcible repatriation.[168] While plaintiffs advanced several arguments that their rights were violated by the interdiction program, the court focused on two of those arguments: (1) Article 33 of the UN Protocol relating to *nonrefoulement*, and (2) the First Amendment to the U.S. Constitution.[169]

i. UN Protocol

The court recognized that the question was a close one, but it determined that there was a substantial likelihood that the UN Protocol is self-executing, and that its *nonrefoulement* protections extended to Haitians interdicted on the high seas.[170] The court began its discussion on self-execution by stating that a treaty can become binding through implementing legislation on the part of a signatory state, or through self-execution.[171] The court found that the UN Protocol was partially implemented through the Refugee Act.[172] However, since the Refugee Act does not extend to aliens outside of the United States, *nonrefoulement* protection abroad had not been implemented through domestic legislation.[173] The self-executing provisions of a treaty become binding on a signatory state upon the treaty's ratification.[174] The court then cited two cases which supported the proposition that the UN Protocol is self-executing.[175] While acknowledging that the UN

---

168. *Baker*, 789 F. Supp. at 1554.

169. *Id.* at 1567. Plaintiffs alleged that the interdiction program violated their rights and the rights of the class members. Plaintiffs alleged the sources of those rights as: (1) Article 33 of the UN Protocol (*nonrefoulement*); (2) the First Amendment to the Constitution; (3) the Fifth Amendment to the Constitution; (4) Executive Order 12,324 and the guidelines implementing that order; (5) the Refugee Act; (6) the Immigration and Nationality Act; and (7) the Administrative Procedures Act. *Id.* at 1567-78.

170. *Id.* at 1568, 1570.

171. *Id.* at 1567-68.

172. *Id.* at 1569.

173. *Id.* at 1567 (quoting Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982)).

174. *Id.* at 1568.

175. *Id.* The court relied on Nicosia v. Wall, 442 F.2d 1005, 1006, n.4 (5th Cir. 1971) ("[W]ithout acknowledging implementing legislation the UN Protocol *binds* acceding countries."). The court also relied on Fernandez-Roque v. Smith, 539 F. Supp. 925, 935 n.25 (N.D. Ga. 1982) (stating inclination toward position that the UN Protocol is self-executing). *Baker*, 789 F. Supp. at 1568. The court further relied on INS v. Stevic, 467 U.S. 407, 416 (1984) ("The Protocol *bound* parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees."). *Baker*, 789 F. Supp. at 1568. The court did acknowledge cases contrary to its finding that the UN Protocol was self-executing: Haitian Refugee Ctr. v. Gracey, 600 F. Supp. 1396, 1403-04 (D.C. Cir. 1985); Bertrand v. Sava, 684 F. 2d 204, 218-19 (2d Cir. 1982). *Baker*, 789 F. Supp. at 1568-69.

Protocol itself contains no express provision on self-execution, the court found that the subject matter of the treaty, the legislative history, and subsequent constructions of the treaty support the determination affirming self-execution.[176] Finding the *nonrefoulement* provision under the UN Protocol to be self-executing, the court then concluded that it applies to Haitians interdicted on the high seas.[177] The federal district court entered an order granting limited injunctive relief which prohibited the federal government from forcefully repatriating Haitians in their custody until the underlying merits of the case were decided, or

---

176. *Baker*, 789 F. Supp. at 1568 (citing Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 656 n.122 (1986)). The court noted that the intent of the parties was unclear because of the treaty's multilateral nature. In the United States, determining whether a treaty provision is self-executing is even more confusing because many countries lack an equivalent of the Supremacy Clause. The court's reasoning considered the following areas:

1. *Subject Matter:* The *nonrefoulement* provision does not call for or require explicit state legislative action such as the appropriation of money or the imposition of sanctions. Since the provision does not mandate material assistance, or expenditure of funds, it should operate by itself without the aid of legislation. Further, the mandatory nature of the provision supports the finding of self-execution. *See* UN Protocol, art. 7, para. 1 (prohibiting parties from excluding or modifying the non-refoulement provision).

2. *Legislative History:* Of the various grounds given by the court under legislative history, the most persuasive is that the Department of State specifically noted that legislation was not required to implement the Protocol. CONG. RESEARCH SERV., LIBRARY OF CONG., 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 14 (Comm. Print 1979), *reprinted in* Note, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. Rev. 773, 785-861 (1988).

3. *Subsequent Construction:* The court disagreed with the two cases deciding against self-execution: Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982); Haitian Refugee Ctr. v. Gracey, 600 F. Supp. 1396, 1403-04 (D.C. 1985). *Baker*, 789 F. Supp. at 1568-69. The court relied on various cases in addition to those already cited: Sannon v. United States, 427 F. Supp. 1270, 1274 (S.D. Fla. 1977); *In re* Dunbar, No. 2191 (Int. Dec. Immigration Ct. App., Apr. 17, 1973), *in* 14 ADMINISTRATIVE DECISIONS UNDER IMMIGRATION AND NATIONALITY LAWS (1971-1974) (referring to the Protocol, the BIA stated "[s]uch a treaty, being self-executing, has the force and effect of an act of Congress").

177. *Baker*, 789 F. Supp. at 1569-71. The court relied on three grounds. First, Article 32 of the UN Protocol specifically states that unless the ordinary meaning of the Protocol's text is obscure or unreasonable, an interpreting body cannot look to supplementary means in aiding interpretation such as *Travaux Preparatoire* (development and negotiation of an agreement). Second, the plain language of the Protocol itself manifests a purpose to provide ample protection to those fleeing persecution. Third, subsequent construction by the United States government indicates coverage. In particular, Executive Order 12,324, which establishes the interdiction program in international waters, provides that "no person who is a refugee will be returned without his consent." Exec. Order No. 12,324, 46 Fed. Reg. 48, 49 (1987).

until the government implements the INS guidelines aimed at ensuring that bona fide refugees are not returned to Haiti under the *nonrefoulement* provisions of Article 33 of the UN Protocol.[178]

ii. Right of Access under the First Amendment

The *Baker* plaintiffs further argued that HRC's right of access to the interdicted Haitians was violated because the government was forcibly repatriating the interdictees.[179] Because the HRC's basic mission is to provide free counsel as United States citizens to Haitian refugees, the district court found that the HRC could invoke constitutional rights abroad.[180] While the court had some difficulty extending the right of access to the naval station at Guantanamo Bay because it is a military installation, the extraordinary facts surrounding the case justified access as long as it was reasonable in terms of time, place, and manner.[181]

This decision caused the government sufficient concern to immediately appeal that part of the preliminary injunction related to the First Amendment claim and Article 33 of the UN Protocol.[182] The court of appeals found that the district court misapplied the law in granting the preliminary injunction.[183] The appellate court dissolved the preliminary injunction and remanded the case with specific instructions to dismiss, on the merits, the allegations based on Article 33 of the UN Protocol.[184]

On remand, the district court once again granted a temporary restraining order and an appeal was immediately taken.[185] Because the appellate court instructed that the claims based on Article 33 could not prevail, the district found that the HRC plaintiffs showed a likelihood of

---

178. *Baker*, 789 F. Supp. at 1570-71.
179. *Id.* at 1571.
180. *Id.* at 1572-73. The court relied on Reid v. Covert, 354 U.S. 1, 5 (1957) and United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). *Baker*, 789 F. Supp. at 1573.
181. *Baker*, 789 F. Supp. at 1574-75.
182. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991).
183. *Id.* at 1110.
184. *Id.* at 1111. The dissent to the panel's decision sided with the district court. *Id.* at 1111-17. The dissent reasoned that the government prevented the Haitians from reaching the territorial limits of the United States through the interdiction program in order to prevent them from obtaining proper, fair, and adequate screening procedures. Further, once entering United States territory, Haitians would have greater access to counseling from the HRC and volunteer lawyers for the correct application of immigration laws. Like the district court, the dissent found that the treaty's subject matter, legislative history, and subsequent construction support the proposition that Article 33 is self-executing. Consequently, Article 33 applies abroad. For this latter proposition, the dissent relied on United States v. Stuart, 489 U.S. 353 (1989). *Baker*, 949 F.2d at 1115.
185. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir. 1992).

prevailing under an Administrative Procedure Act (APA) claim.[186] The district court also found that the plaintiffs' claim was based on enforceable rights under various authorities, including customary international law.[187] Finally, the district court reiterated its holding that the First Amendment rights of access would prevail on the merits.[188]

The legal wrangling became rather complicated during this period with various orders issued by the district court halting the interdiction program, followed by corresponding stays by the court of appeals.[189] In consolidating the various actions, the Eleventh Circuit made some clerical errors that added to the confusion. For example, a clerical error let the district order regarding the interdiction program stand. The government filed an emergency petition to stay the lower court's order.[190] When the Eleventh Circuit did not act on the emergency stay fast enough for the federal government, an emergency stay petition was filed with the Supreme Court.[191] The Supreme Court finally stayed the district court order by a six to three vote pending the appeals court decision on the merits.[192]

A decision by the court of appeals came soon thereafter. After considerable discussion of the APA and First Amendment claims, the appellate court remanded the case once again to the district court with the mandate that the action be dismissed for failure to state a claim upon which relief can be granted.[193] The Supreme Court denied certiorari to hear the case.[194] This effectively ended the *Baker* litigation. However, the High Court could not avoid deciding questions arising out of the United States' *nonrefoulement* obligations under Article 33 of the UN Protocol nor could it ignore the INA's withholding of deportation provisions relating to Haitian boatpeople.

---

186. *Id.* at 1504.
187. *Id.* at 1505. The authorities include the Executive Order, the INA, the Refugee Act, and the INS Guidelines.
188. *Id.*
189. *See Supreme Court Lifts Ban on Forced Repatriation of Haitians*, 69 INTERPRETER RELEASES 149, 150 (1992).
190. *Id.* at 150.
191. *Id.*
192. *Id.*
193. *See Baker*, 953 F.2d at 1516. There was yet another dissent supporting the district court. *Id.* at 1515-25 (Hatchett, J., dissenting).
194. Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1122 (1992).

c. Sale v. Haitian Centers Council

Soon after the *Baker* case was denied certiorari, a complaint was filed in the Second Circuit that challenged various policies of the United States government affecting Haitians and Haitian service organizations.[195] The lawsuit challenged the government's refusal to allow immigration counseling organizations access to Haitian refugees who were aboard Coast Guard cutters and at Guantanamo Bay. The government's refusal was alleged to be in violation of the First Amendment.[196] The complaint further alleged that the interdiction program violated the Fifth Amendment, the APA, domestic immigration laws, certain executive proclamations, and certain treaties and international agreements.[197]

During oral argument, the government claimed that the *Baker* litigation, or "Florida Action" as it was called by the court, barred the claims advanced by the New York action.[198] However, the district court disagreed, reasoning that the Florida Action only applied to "screened-out" Haitians, not those who were "screened-in."[199] On March 27, 1992, the district court entered a temporary restraining order against the government and on April 7, 1992, issued a preliminary injunction.[200] The government's motion to stay the April 7 order was denied by both the district court and the court of appeals.[201] Moreover, the court of appeals granted the government's application to expedite the appeal given the weighty questions involved and the

---

195. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1331 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council, 113 S. Ct. 3028 (1993).

196. *McNary*, 969 F.2d at 1332.

197. *Id.*

198. *Id.*

199. *Id.* A "screened-out" Haitian is one who is allowed to continue to the United States in order to submit an asylum application before the INS, while "screened-in" Haitians are those who were brought to Guantanmo Bay, but whose credible claim to asylum was yet to be determined by the INS. *Id.*

200. *Id.* The district court made considerable findings of fact set forth by the court of appeals. *Id.* at 1332-33.

201. *Id.* at 1333. The April 7 order was amended by the district court on April 15; the clarified order enjoined the government from the following:

- denying the Haitian service organizations access to screened-in Haitians at Guantanamo Bay for the purpose of providing counsel and representation;
- interviewing, screening, and subjecting to exclusion or asylum proceedings any screened-in Haitian who was denied communication with counsel; and
- repatriating any screened-in Haitian who was subjected to a second interview until that person had a chance to communicate with a Haitian service organization.

See id. at 1334.

immediate foreign policy and national interest concerns at stake.[202] After further procedural wrangling, the Supreme Court accepted the government's contention that the order and clarification could potentially harm the foreign policy of the United States and stayed both the April 7 order and the April 15 clarification order pending resolution of the case by the court of appeals.[203] The court of appeals handed down its decision on June 10, 1992, and affirmed the district court's preliminary injunction with certain modifications.[204]

While the appellate decision was pending, the government changed its policy on repatriation and instructed the Coast Guard to return all Haitians intercepted at sea without providing any screening at Guantanamo Bay.[205] The new policy extended to aliens interdicted beyond the territorial sea of the United States.[206] The district court denied plaintiffs' motion for a preliminary injunction prohibiting the government from returning interdicted Haitians to their country pursuant to the new policy; plaintiffs then appealed. The court of appeals subsequently reversed the district court's denial of plaintiffs' motion.[207] The Second Circuit's decision conflicted with the decisions by the Eleventh Circuit and the Court of Appeals for the District of Columbia. The district court did not have the opportunity to decide any aspect of the case and the Second Circuit's decision was mooted by the Supreme Court's grant of certiorari.[208]

---

202. *Id.*

203. McNary v. Haitian Ctrs. Council, 112 S. Ct. 1714 (1992); *see also Supreme Court Hears Argument in Haitian Refugee Case*, 70 INTERPRETER RELEASES 278 (1993).

204. *McNary*, 969 F.2d at 1326, 1347. The appeals court vacated that part of the order requiring that screened-in Haitians have access to attorneys at Guantanamo Bay, but supported the parts enjoining further processing of screened-in Haitians at Guantanamo Bay and disallowing repatriation prior to the time they had access to attorneys through the Haitian service providers. *Id.*

205. *See supra* notes 115-20 and accompanying text.

206. 8 GORDON ET AL., *supra* note 36, at 474.

> The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted *beyond the territorial sea of the United States.*

Id. (quoting Exec. Order No. 12,807) (emphasis added).

207. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2544 (1993).

208. Sale v. Haitians Ctrs. Council, Inc., 113 S. Ct. 3028 (1993).

On June 21, 1993, the Supreme Court handed down its decision in *Sale v. Haitian Centers Council, Inc.*[209] The Court began its analysis with a historical account of the interdiction program. In 1981, the United States and Haiti entered into a bilateral agreement under which the United States would intercept Haitians on the high seas, immediately interview them for possible asylum claims pursuant to international refugee law and then return those not qualifying (the vast majority of the Haitians) to Haiti.[210] The flow of Haitian refugees greatly increased after the overthrow of President Jean-Bertrand Aristide in September, 1991.[211] On May 24, 1992, because of the interview locations, Coast Guard cutters and the United States naval base at Guantanamo Bay were filled to capacity. President Bush signed an executive order directing the Coast Guard to interdict Haitians in international waters and return them directly to Haiti without interviewing them for asylum claims. This executive order remained in effect under President Clinton while the case was being heard by the Supreme Court.[212]

The plaintiffs, organizations representing detained and interdicted Haitians, sought an injunction barring implementation of the executive order. They claimed that the order violated § 243(h)(1) of the INA and Article 33 of the 1951 United Nations Protocol Relating to the Status of Refugees, both of which prohibit the return of refugees to countries where they face persecution.[213] Plaintiffs argued that these provisions applied extraterritorially to actions by the United States in international waters. After the district court denied plaintiffs' request for an injunction, the court of appeals reversed, holding that INA § 243(h)(1), which is coextensive with Article 33 of the Convention, applies to "all [aliens], regardless of [their] location".[214]

The Supreme Court stayed the Second Circuit's order pending the government's appeal because of the potential harm to United States foreign policy if the forced returns were stopped. In an 8-1 decision, the Supreme Court reversed the Second Circuit and upheld the executive order.[215] Justice Stevens wrote the majority opinion and Justice Blackmun issued a dissent.[216]

---

209. 113 S. Ct. 2549 (1993).
210. *See supra* note 104 and accompanying text.
211. *See Thousands Flee Haiti's Terror, Fill Refugee Camps at Guantanamo*, HAITI INSIGHT, Winter 1992, at 4.
212. *Sale*, 113 S. Ct. at 2555-56.
213. *Id.* at 2556.
214. *Id.* at 2557-58 (quoting Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1362 (2d Cir. 1992)).
215. *Id.* at 2567
216. The *Sale* dissent is located at 113 S. Ct. 2549, 2567.

i. INA § 243(h)(1)

A fundamental question before the court was whether INA § 243(h)(1), which prohibited returning refugees who faced persecution, applied extraterritorially.[217] Justice Stevens reasoned that both the text and the legislative history of the current version of INA § 243(h)(1) supported the conclusion that it did not apply to acts outside the United States' territory.[218] Section 243(h)(1) requires the United States to determine the validity of an alien's *nonrefoulement* or withholding of deportation claim before returning the alien to his home country.[219] The plaintiffs argued that the statute's lack of geographical limitations and use of language such as "any alien" and "return" required the obligation to apply to United States' action against asylum seekers, even outside of its territory.[220]

First, Justice Stevens reasoned that the obligations contained in INA § 243(h)(1) do not apply to actions by the President because the section expressly references the Attorney General only. He concluded that since, in other sections of the INA, Congress expressly referred to the obligations of the President, Secretary of State, etc., the use of the term "Attorney General" in this section "cannot reasonably be construed to describe either the President or the Coast Guard."[221] Justice Blackmun, in dissent, noted that the Coast Guard acts as an agent of the Attorney General in enforcing immigration laws, and therefore the obligations should apply to actions under the executive order.[222]

Justice Stevens further reasoned that the INA does not impose any extraterritorial obligations, even on the Attorney General, because the INA nowhere provides for extraterritorial proceedings. Similarly, INA § 243(h)(1) is located in Part V of the statute, which clearly contemplates procedures held in the United States. Even if Part V dealt with international matters, Justice Stevens concluded, "the presumption that Acts of Congress do not ordinarily apply outside our borders would

---

217. *Sale*, 113 S. Ct. at 2552.
218. *Id.* at 2559-62.
219. For a discussion on withholding of deportation, see *supra* note 34 and accompanying text.
220. *Sale*, 113 S. Ct. at 2558.
221. *Id.* at 2559-60.
222. *Id.* at 2573.

support an interpretation of INA § 243(h)(1) as applying only within United States territory." [223]

The relevant legislative history involved amendments made to the INA in the Refugee Act.[224] Those amendments, enacted to bring the United States into conformity with the UN Protocol, deleted the phrase "within the United States" as a description of aliens whose asylum claims must be determined by the Attorney General.[225] Plaintiffs argued, and Justice Blackmun in dissent agreed, that in dropping this phrase Congress clearly intended to give extraterritorial application to the INA section regarding asylum determinations.[226] Justice Blackmun stated that "to read into § 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed."[227] But the majority rejected this view, stating that the phrase "within the United States" was intended to erase a legal distinction between aliens that the federal government was trying to deport (those who were "within the United States") and aliens that the federal government was trying to exclude from entering the United States at a border. Under the entry doctrine these aliens are not yet legally or technically "within the United States," even if physically on United States territory.[228] Justice Stevens cited case law to show that the phrase "within the United States" in fact had more to do with an alien's legal status than with his location.[229] From this, he concluded that the deletion of this phrase was not intended to make INA obligations applicable extraterritorially, but rather to make them applicable to aliens in exclusion proceedings at the border. Justice Stevens also used the elimination of the deportation/exclusion distinction to explain Congress' addition of "or return" in INA § 243(h), rejecting the argument that "return" was added intentionally to give INA § 243(h) extraterritorial application.[230]

To further support his argument, Justice Stevens noted that there was no explicit evidence that Congress intended to make the INA apply extraterritorially. He stated: "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an

---

223. *Id.* at 2560 (citations omitted).
224. *See supra* notes 31-34 and accompanying text.
225. *Sale*, 113 S. Ct. at 2561.
226. *Id.* at 2574-75.
227. *Id.* at 2574.
228. *Id.* at 2561. For a discussion of the entry doctrine, see *supra* notes 39-41.
229. *Sale*, 113 S. Ct. at 2561 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)).
230. *Id.* at 2562.

intent can be found in the legislative history."[231] In an interesting duel of statutory construction, Justice Blackmun reached the opposite conclusion, claiming that Congress could, and in places did, limit the applicability of the INA to United States territory, but that since INA § 243(h) contained no such limitation, it should not be so narrowly construed given the other arguments pointing toward extraterritorial application.[232] In sum, Justice Stevens found that obligations under INA § 243(h) apply only to the Attorney General, and even then only in domestic procedures.[233]

ii. UN Convention and Protocol

Another fundamental question decided by the Supreme Court was whether the United Nations Convention Relating to the Status of Refugees, as incorporated in the UN Protocol, applies extraterritorially to prohibit the United States from forcibly returning Haitian asylum-seekers.[234] Article 33 of the Convention contains two sections; the first (33.1) states that "[n]o Contracting State shall expel or return ("refouler") a refugee . . . to [a territory] where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion."[235] The second section (33.2) states that the benefits of the first section may not 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."[236]

Justice Stevens made two textual arguments to support his conclusion that Article 33 was not intended to apply extraterritorially. First, he claimed that the reference in section 33.2 to the location of the alien shows that the Convention did not contemplate aliens not yet at their country of origin. Thus, he argued that Article 33 did not apply to the Haitian case since "an alien intercepted on the High Seas is in no country at all."[237] Justice Blackmun, however, argued that the two sections are separable, making the locational reference in section 33.2

231. *Id.* at 2561.
232. *Id.* at 2570.
233. *See id.* at 2558-67.
234. *Id.* at 2563.
235. *Id.*
236. *Id.*
237. *Id.*

irrelevant to the obligations in section 33.1 which contain no geographical limitation.[238]

Justice Stevens' second textual argument responded to plaintiffs' and Justice Blackmun's argument that the use of the word "return" in Article 33, as in the analogous INA § 243(h), has an ordinary meaning which would include picking up aliens at sea and returning them to their country of origin.[239] Justice Stevens rejected this argument by relying on the meaning of the French equivalent for return, "*refouler*." He reasons that since "*refouler*" (the exact French word used in the official text of the Convention and parenthetically in the English version of the Convention) has a connotation of repel or drive back, "return" as used in the Convention, as it is in INA § 243, is meant to apply to exclusion proceedings at a country's border.[240]

Justice Stevens also cited the negotiating history of Article 33 to support his narrow reading of the word "return."[241] He cited extensively from a 1951 negotiating conference which he claimed showed a "general consensus" that the word "return" referred to an alien that was already within a territory but not yet resident there.[242] Even if some countries expressed their intent that the Convention should protect all aliens wherever found, Justice Stevens believed that the negotiating conference supported the majority's refusal to impose obligations that are broader than the text of the Convention.[243] Justice Blackmun, however, characterized Justice Stevens' citations as "fragments, not entitled to deference, were never voted on or adopted, probably represent a minority view, and in any event do not address the issue in this case, [seizing aliens not yet at a country's border]."[244] Although the Court could not bring itself to characterize the interdiction program as a violation of domestic law and even found that the Convention's *nonrefoulement* requirement was not self-executing, the Court did indicate that government actions "*may . . . violate the spirit of Article 33.*"[245]

The *Sale* opinion has been criticized on several grounds. A fundamental critique is that the decision does not recognize that under international law a State's responsibility extends beyond the actual

---

238. *Id.* at 2568.
239. *Id.* at 2568-69.
240. *Id.* at 2564.
241. *Id.* at 2565-66.
242. *Id.* at 2566-67.
243. *Id.* at 2567.
244. *Id.* at 2572-73.
245. *Id.* at 2565 (emphasis added).

territory over which it exercises jurisdiction.[246] Furthermore, unlike other provisions in the 1951 Convention, Article 33.1 does not restrict rights and benefits based on lawful presence and residence. As Justice Blackmun observed in his dissent, Article 33.1 forbids the return of a refugee *in any manner whatsoever*.[247]

Moreover, another problem with the *Sale* opinion is that it contained little analysis of international law and relied heavily on domestic law. Greater reliance on the *amicus curiae* brief submitted by the United Nations High Commissioner for Refugees would have taken the Court's reasoning more into the realm of international law.[248] Thus, the *Sale* case is more an expression of domestic law than international law.[249]

In short, the *Sale* decision further confirms the narrow scope the Supreme Court will give to domestic legislation and international agreements protecting certain human rights. Specifically, the right of *nonrefoulement* has been significantly curtailed. This development is particularly troubling when considered in the context of the United States' compliance with international human rights obligations.[250] The *Sale* decision signals that the present Court will construe United States

---

246. *See* Guy S. Goodwin-Gill, Comment, *The Haitian Refoulement Case*, 6 INT'L J. REFUGEE L 103 (1994).

247. *Id.*

248. *Id.* at 104-05. The United Nations has placed the responsibility for refugees and stateless persons under the United Nations High Commissioner for Refugees whose office was established pursuant to the Statute of the office of the United Nations Commissioner for Refugees, General Assembly Resolution 428(v) of 14 December 1950, *reprintedin* COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 3-9 (UNHCR 1979) [hereinafter UNHCR]. The UNHCR's work is considered non-political and entirely social and humanitarian. The UNHCR submitted *amicus curiae* briefs in all three Interdiction Cases at the court of appeals level and at the Supreme Court level in the *Sale* case (briefs are on file with author). In its *amicus curiae* brief to the Supreme Court the UNHCR states:

> The customary law rule of non-return reflects a judgement by the international community that the obligations of a State with respect to such a fundamental right cannot stop at the State's borders. The obligation not to return a refugee arises wherever a government encounters the individual refugee, irrespective of whether that government waits for the refugee to arrive at the border or intercepts him or her on the high seas.

Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondents, at 19-20, Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993) (No. 92-344).

249. Goodwin-Gil, Comment, *supra* note 246, at 105.

250. The UNHCR submitted *amicus curiae* briefs in all of the Interdiction Cases arguing that the international obligation of *nonrefoulement* applies to state actions within or outside of the state's territorial jurisdiction (briefs on file with author).

international obligations in the area of refugee law in particular, and human rights in general, as narrowly as possible in order to permit the executive branch to exercise its foreign policy power and the perceived interests of national security in as flexible a manner as possible. In addition, it gives impetus to the growing post-Cold War change in foreign policy whereby human rights cease to be a fundamental tenet of United States foreign policy. In essence, U.S. policy has moved away from human rights considerations and moved towards allowing economics to play a pivotal role in foreign policy.[251]

C. *In-Country Processing: Operation and Critique*

The third component of the United States' policy regarding Haitian refugees has been in-country processing. While the pre-screening program of interdicted Haitians was in effect at Guantanamo Bay, the United States established an in-country processing program in Haiti itself.[252] The creation of an In-Country Processing (ICP) program, in theory, affords Haitians the possibility of applying for refugee status while in Haiti, thereby discouraging flight. The ICP program, although not widely used by the United States, is part of the overseas refugee resettlement program permitted under the INA.[253] The overseas refugee program was established to process refugees who were "presumptively eligible" for refugee resettlement in the United States.[254] Historically, the overseas refugee program has been used to fill most of the refugee quotas with those fleeing communist regimes or United States foes in furtherance of United States foreign policy interests.[255]

The ICP program works as follows. The President, after consultation with Congress, determines a worldwide ceiling and geographic distribution limitation for refugees. The Department of State, in coordination

---

251. This shift is most evident in the Most Favored Nation status that the United States continues to grant to the People's Republic of China. *See* Douglas Jehl, *A Policy Reversal; President Seeking Other Levers to Get Beijing to Improve Rights*, N.Y. TIMES, May 27, 1994, at A1.

252. *See United States of America: Forcible return of Haitian Asylum-Seekers by the United States*, AMNESTY INT'L, Jan. 1994, at 2-4 [hereinafter *Forcible Return*]; *see also* THE AILA HUMAN RIGHTS DELEGATION REPORT ON HAITI 24-31 (1993) (a general discussion of in-country refugee processing in Haiti).

253. INA § 207, 8 U.S.C. § 1157 (1994) (establishing the annual admission of refugees for resettlement in the United States). For a discussion of the overseas refugee program, see LEGOMSKY, *supra* note 105, at 822-39.

254. *See* Ricardo Insunza, *The Refugee Act of 1980: Ten Years After, Still A Way to Go*, 2 INT'L J. REFUGEE L. 413 (1990).

255. *Id.* at 418. During 1990, 96% of the 125,000 refugees who settled in the United States were applicants from communist or communist-dominated societies. *Id.*

with the INS, then admits refugees into the United States who are not firmly resettled in any foreign country, are of special humanitarian interest to the United States, and are otherwise admissible into the country.[256]

As stated, the ICP program is designed to enhance legal protection to refugees who are physically present in their homeland. The Haitian ICP consisted of three offices and was funded and managed by the State Department.[257] The INS adjudicated applications submitted through the ICP.[258] United States policy increasingly relied on the ICP in Haiti as the primary protection offered to Haitians seeking refugee status, and saw the program as the answer to forced repatriation.[259] From May of 1992, the year of the Kennebunkport Declaration, to May 1994, the year the Clinton administration reversed that policy, the ICP was the only vehicle available for Haitians seeking protection from persecution.[260]

Even before the ICP program was established in Haiti, it was recognized that the ICP would probably not benefit those with the greatest need of protection. Simply put, such individuals would be the *least* likely to come forward to processing centers where they ran the risk of being identified and possibly arrested.[261] In addition, the ICP

---

256. LEGOMSKY, *supra* note 105, at 833.

257. *See generally No Port in a Storm, The Misguided Use of In-Country Refugee Processing in Haiti*, AMERICAS WATCH, NATIONAL COALITION FOR HAITIAN REFUGEES, AND THE JESUIT REFUGEE SERVICE/USA, Sept. 1993, at 8-9 [hereinafter *No Port in a Storm*]. There were three service centers: (1) Port-au-Prince, operated by the International Organization for Migration (IOM); (2) Les Cayes, operated by Church World Service, a joint voluntary agency (JVA); and (3) Cap Haitian, operated by the United States Catholic Conference, another JVA. Toward the middle of August 1994, the processing centers at Les Cayes and Cap Haitian were informed that no new asylum applications were to be accepted until the government evacuated from Haiti the almost 2,000 approved applicants. All new applications were to be filed through the main United States government processing center in Port-au-Prince. *See U.S. Cuts Off Applications For Asylum at 2 Haiti Offices*, N.Y. TIMES (International), Aug. 17, 1994, at A2.

258. *See No Port in a Storm*, *supra* note 257, at 9-12. The ICP process began with submitting a preliminary questionnaire, that could be completed with the assistance of personnel from the IOM or JVA's. The application was then prioritized, or vetted, into categories A, B, and C for adjudication by the Refugee Coordinator's staff. A cases were "high priority" (5%), B cases were those in which the applicant had expressed some fear of persecution; but which needed to be developed (80%), and C cases were those that were meritless (10% to 15%). *Id.*

259. *Id.* at 7-8.

260. *Id.* at 7.

261. Insunza, *supra* note 254, at 421-22.

program is fundamentally limited. The process consumes a great deal of time in adjudicating an application and for certifying the applicant as a refugee through the United States embassy.[262] Even after certification, the refugee still needs clearance from the national authorities for departure.[263] Thus, ICP programs have not been widely used by the United States.

Moreover, particular problems with the Haitian ICP surfaced. First, the processing time was lengthy and, as a result, many persons having a well-founded fear of persecution could not wait for the processing to be completed.[264] Second, the central role played by the State Department was questionable because most Haitians seeking to leave the country, or participate in the ICP program, could be viewed as economic migrants.[265] Third, the entire system was overloaded and the use of local Haitians for staff proved problematic.[266] Fourth, the ICP program could not provide the typical safeguards for an asylum-seeker, such as appropriate legal counsel or meaningful judicial review of cases that were denied.[267] Without such safeguards, the real risk of detention after visiting an ICP center often deterred those individuals who had a genuine fear of persecution from participating in the program.[268] In fact, the risk of persecution increases once an applicant is identified and awaits a decision due to the length of the process.[269] Indeed, there have been numerous documented cases in which ICP program participants have been persecuted.[270]

Perhaps the most serious criticism from human rights advocates against the Haitian ICP is that the United States considered the ICP as a "viable substitute" for the internationally recognized right to flee one's

---

262. *Id.*
263. *Id.*
264. *See No Port in a Storm*, *supra* note 257, at 14.
265. *Id.*
266. *Id.* at 19-20. The system was overloaded, in large part, because the program was seen as an immigration office, but which limited access only to refugees. Haitians serving on the staff were used in all stages of processing and there were problems of disrespectful conduct to applicants who were from a different social background or possessed a different political opinion. *Id.*
267. *See generally Forcible Return*, *supra* note 252, at 3-4 (discussing and critiquing the in-country processing system).
268. *Id.*
269. *Id.* at 4.
270. *See Terror Prevails in Haiti*, *supra* note 133, at 38 n.100. "For example, Pierre Michel Guillame, an active Artistide supporter from Les Cayes, was abducted on September 27, [1993], in Port-au-Prince. He was seized by men in a white pick-up without license plates as he left the U.S. refugee processing office, according to the International Civilian Mission." *Id.*

homeland and seek protection from persecution.[271] Therefore, in light of the United States' interdiction program which forcibly returned refugees without formal determination, the only alternative for these refugees was the ICP. Human rights advocates consider this to have eviscerated the international protections offered to refugees through the principles of *nonrefoulement* and first asylum.[272]

III. CONGRESSIONAL ACTIONS

This section of the Article will discuss some relevant congressional actions involving the Haitian situation. Certain legislative measures have been chosen to represent activities in Congress during the 1980s and 1990s. Since most of these initiatives did not become law, only those that express congressional concern during the 1990s will be discussed. Additionally, because the federal courts have put the interdiction question to the government, legislative policy choices assume more importance for those advocating greater protection for Haitian refugees. While Congress has "plenary" power over domestic immigration, the executive branch holds the reins over foreign affairs. The congressional track record on the Haitian situation has been to leave fundamental decisions to the executive, except when the question on the use of force arises.

A. House of Representatives

Criticism over the interdiction program and forced repatriation has increased in Congress over the years, especially after the fledgling democratic government in Haiti was overthrown by the military in 1991. In November 1991, House Resolution 3844, the Haitian Refugee Protection Act of 1991, was introduced to the House of Representatives and referred to the Committee on the Judiciary.[273] The bill's purpose was to ensure the protection of Haitians who were already in the United States or who were in the custody of the United States until democracy was restored in Haiti.[274] The bill proposed a temporary suspension of

271. *Id.* at 38.
272. Frelick, *supra* note 2, at 689-92.
273. *See* H.R. Res. 3844, 102d Cong., 1st Sess. (1991).
274. *Id.* pmbl.

the repatriation of Haitians housed at Guantanamo Bay,[275] the reallocation of 2,000 refugees admitted under the overseas refugee program,[276] and the granting of temporary protected status for Haitians in the United States.[277]

Temporary Protected Status (TPS) became part of United States immigration law after the enactment of the Immigration Act of 1990.[278] It established a generic safe-haven law for the first time in United States history. The law grants the Attorney General authority to permit nationals of designated countries who are otherwise admissible into the United States temporary protected status for an initial period not to exceed eighteen months.[279] This status may be granted to eligible persons in the United States if their return to the designated country is deemed unsafe due to ongoing armed conflict, natural disaster, or other extraordinary circumstances.[280] The INS is forbidden to deport persons registered in the program and must provide participants work authorization. The executive branch did not extend TPS to Haitians in the United States and the Congress did not order the Attorney General to grant them TPS.

A substitute bill to House Resolution 3844 made it out of the Judiciary Committee and was reported to the House of Representatives, albeit with weakened provisions.[281] While maintaining the reallocation of the 2,000 refugee overseas admissions, the substitute bill eliminated the grant of TPS. In addition, the substitute bill would have barred the Bush administration from repatriating those Haitians under United States custody or control for a period of 180 days after enactment of the legislation or until five days after a State Department report on human rights conditions.[282] The debate during markup made it clear that there were serious differences of opinion regarding whether repatriated

---

275. *Id.* § 2 (Protection of Haitians in United States Custody).

276. *Id.* § 3 (Reallocation of 2,000 Federally Funded Refugee Admissions During Fiscal Year 1992 to Haiti).

277. *Id.* § 4 (Temporary Protected Status for Haitians).

278. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

279. Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030 (1990) [hereinafter TPS] (creating a new INA § 244A).

280. 8 U.S.C. § 1254a (1994) (allowing additional extension).

281. The vote was mainly along party lines. For a detailed discussion of the markup session, see *House Judiciary Committee Approves Haitian Relief Bill*, 69 INTERPRETER RELEASES 215-17 (1994) [hereinafter *House Judiciary*]; *see also* 138 CONG. REC. H586 (daily ed. Feb. 25, 1992).

282. The 180 day period would begin on February 5, 1992, and the Department of State would report to Congress in 90 days on interdicted Haitians who were returned to that country and focus on reprisals against the returnees. *House Judiciary*, *supra* note 281, at 215.

Haitians were subject to mistreatment.[283] The Department of State represented to Congress that there was "no credible evidence" that retaliation had taken place.[284] On the other hand, Congress was presented with statements made by returned Haitians to United Nations officials that they experienced mistreatment sufficient to make them flee Haiti a second time.[285] After making various ammendments, the House of Representatives approved House Resolution 3844. The approved version did not, however, include an amendment granting Haitians TPS. Such a provision had been deleted from the bill by a vote of 304 to 96.[286]

After President Bush announced the Kennebunkport Declaration, requiring the return of *all* Haitians intercepted on the high seas regardless of whether any were refugees, another "Haitian" bill was introduced in the House. However, nothing became of it.[287] The Haitian bills kept coming. During the 103rd Congress, another attempt was made in the House under House Resolution 3663, the Haitian Refugee Fairness Act.[288] In addition to similar provisions in the 1991 version, House Resolution 3663 again provided TPS status to Haitians. The Haitian Refugee Fairness Act also contained a provision that would explicitly state that the international requirement of *nonrefoulement* would be applied in an extraterritorial manner.[289] The House of

---

283. *See id.* at 216.
284. *Id.*
285. *Id.*
286. *See* 138 CONG. REC. H813 (Feb. 1992). Amendments that were accepted included granting the federal government authority to reimburse state and local governments for costs associated with resettling Haitians, that no one state would have to bear a disproportionate share of the costs associated with resettling Haitians, and a Sense of Congress was adopted urging the President to seek United Nations and OAS peacekeeping forces to protect repatriated Haitians. *See also House Approves Bill Suspending Haitian Repatriations*, 69 INTERPRETER RELEASES 250 (1992).
287. H.R. 5267, 102d Cong., 2d Sess. (1992). The bill would grant Temporary Protected Status for Haitians, end the interdiction agreement between the United States and Haiti, "and expand refugee processing for Haitians." *See Bush Orders Coast Guard to Return All Haitians*, 69 INTERPRETER RELEASES 672, 674 (1992). H.R. 4360 was introduced containing provisions to prevent U.S. officials from ever returning refugees before first determining if they would face persecution. It was approved by voice vote by the House Foreign Affairs Committee on September 30, 1993.
288. H.R. 3663, 103d Cong., 1st Sess. (1993) (containing speech by Congresswomen Meeks (D-Fl) upon introduction of the bill).
289. H.R. 3663, 103d Cong., 1st Sess. § 2 (stating the adherence to the international law requirement of *nonrefoulement* "applies wherever the states act and without territorial

Representatives thus accepted the invitation given by the Supreme Court in *Sale* to make their legislative intent on the extraterritorial application of *nonrefoulement* known. The *Sale* decision was decided five months before the bill was introduced.[290]

B. Congressional Black Caucus Acts

Members of the Congressional Black Caucus did not support President Clinton's decision to adopt the Bush administration's policy on forcible return. This policy allowed the United States to forcibly return aliens without determining whether the aliens qualified for refugee status.[291] The Clinton administration's decision to defend the Bush administration's refugee policy before the Supreme Court in the *Sale* case further eroded the patience of some members of the caucus, including its chairman.[292]

On March 4, 1993, President Aristide appeared on Capitol Hill. He refrained from attacking the Clinton administration's refugee repatriation policy directly, but acknowledged that the practice was becoming more difficult to defend.[293] President Aristide expressed greater concern for providing Haitian military and police authorities with an ultimatum for the date of his return.[294] On October 15, 1993, the United States increased pressure on the Haitian authorities and ordered naval ships to enforce the United Nations embargo.[295] However, President Aristide still did not return to Haiti on October 30, 1993, as stipulated in the Governor's Island agreement.[296] In fact, it was becoming clear to members of Congress that Haiti's de facto leaders were creating a dilemma—the de facto leaders were not going to yield, even in the face of the economic embargo, and the Clinton administration did not appear to be willing to use force if economic coercion failed.[297]

---

limitation . . . Article 33 obligation applies to actions of the United States . . . within and without the territorial boundaries of the United States").

290. *See supra* note 209 and accompanying text.

291. *See* Holly Idelson, *Black Leaders Criticize Continuation of Policy*, 51 CONG. Q. 520 (Mar. 6, 1993).

292. *Id.* Rep. Kweisi Mfume, Chairman of the Congressional Black Caucus, indicated that "the grace period" for the Clinton administration had passed. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *See supra* note 131.

297. *See* Heather M. Fleming, *Give Sanctions Time to Bite, Gray Tells Lawmakers*, 52 CONG. Q. 1540 (June 11, 1994). It was also during this time that a controversy developed when intelligence information given in a closed-door meeting branded President Aristide as mentally unbalanced. Certain Democrats countered this attempt by blaming the CIA for disseminating classified information in order to paint an unflattering

On March 23, 1994, the Congressional Black Caucus declared "war" on the Clinton administration's Haiti policy. They were joined by other Democratic lawmakers.[298] As part of their campaign, the Governor's Island Reinforcement Act of 1994, House Bill 4144, was introduced into the House of Representatives.[299] The House bill sought to provide sanctions against Haiti, and to stop the interdiction and return of Haitian refugees.[300]

In the spring of 1994, rising discontent over the inert policy toward Haiti, coupled with reports that the de facto regime was tightening its grip on Haiti through countless killings, brought tremendous pressure to the Clinton administration.[301] Through the Congressional Black Caucus and the hunger strike of Randall Robinson, Executive Director of Transafrica Forum, President Clinton reversed the forcible return

---

portrait of President Aristide. Kevin Merida, *Hill's Black Caucus Faults U.S. Policy on Haiti, Presses for Aristide Return*, WASH. POST, Mar. 24, 1994, at A7.

298. Merida, *supra* note 297, at A7.

299. H.R. 4114, 103 Cong., 2d Sess. (1994) (the bill was jointly referred to the Committee on Ways and Means, Foreign Affairs, Public Works and Transportation, the Judiciary, and Banking Finance and Urban Affairs); *see also* 140 CONG. REC. H2229 (daily ed. Apr. 14, 1994) (statement by Eleanor Holmes Norton, D-D.C., urging support of H.R. 4114 by making comparison to actions led by Randall Robinson ten years ago related to South Africa). As the bill was introduced, a letter was sent to President Clinton sharply criticizing his Haitian policy. *See Black Caucus Urges Tougher Haiti Policy*, N.Y. TIMES, Mar. 23, 1994, (special), at A11.

300. The bill covered specific activities, including: tighter sanctions on Haiti by prohibiting the importation of Haitian goods or services, the export of goods, technology or services from the United States to Haiti, other prohibitions affecting United States government contracts supporting Haitian industry and commerce, and loans or credit to the unelected military leaders of that country. The bill prohibited general transport involving Haiti and imposed sanctions against other countries who did not cooperate with the United States. The bill also called for the return of the full contingent of UN and/or OAS human rights monitors, and set up a multinational border patrol between Haiti and the Dominican Republic to prevent the economic embargo from being violated. The bill would terminate the bilateral migrant interdiction agreement, adhere to the international law requirement of *nonrefoulement* in an extraterritorial manner, grant TPS to Haitians in the United States, prevent the issuance of visas, and exclude from admission to the United States certain members of the active military as well as block the assets of certain Haitians involved in the overthrow of Aristide's government. H.R. 4114, 103d Cong., 2d Sess. §§ 2-4, 6-9 (1994).

301. *See* John M. Goshko, *Haiti Policy Impasse, Panel Told*, WASH. POST., Mar. 9, 1994, at A15 (the panel was held before the Senate Foreign Relations Subcommittee on hemispheric affairs); *see also* Steven Greenhouse, *Haiti Policy In Stalemate, U.S. Faces Possibility Aristide Won't Return*, N.Y. TIMES, Apr. 7, 1994, at A9.

policy embodied in the Kennebunkport Declaration and temporarily offered refugee hearings to Haitians interdicted at sea.[302]

Moreover, the House Judiciary Subcommittee on International Law, Immigration and Refugees held hearings on June 15, 1994, on House Resolution 3663 and House Resolution 4114. The second panel included representatives from the INS and the Department of State.[303] The INS took the position that the bills pending before the Subcommittee were unnecessary in light of the President's decision to reverse the policy on forced repatriation without refugee determination hearings.[304] More importantly, the INS objected to the legislation because it would "unduly infringe on the authority of the President in matters of foreign relations and national security" by restricting the President's ability to deal with alien smuggling and immigration emergencies.[305] The INS felt that the bills' attempts to resolve the question of economic sanctions would also interfere with the government's power to conduct foreign policy. The INS was careful to avoid stating that such interference could be unconstitutional since the foreign affairs power, like the immigration power, is extra-constitutional in nature.[306] The INS further objected to the designation of Haitian nationals for TPS.[307]

---

302. Gwen Ifill, *President Names Black Democrat As Haitian Envoy, Sets New Asylum Policy, Move Meant to Mark Reversal of Approach Clinton Now Says Is Unsustainable*, N.Y. TIMES, May 9, 1994, at A1; *see also* Karen De Witt, *Hunger Strike on Haiti: Partial Victory at Least*, N.Y. TIMES, May 9, 1994, at A7 (Mr. Robinson, a well-known and respected lobbyist, went on a 27 day hunger strike insisting that the United States provide refugees interviews before repatriating them back to Haiti).

303. The INS was represented by Chris Sale, Deputy Commissioner. The Department of State was represented by Ambassador Brunson McKinley, Acting Director, Bureau of Population, Immigration, and Refugees. H.R. 4264, which contains similar provisions to H.R. 3663 and H.R. 4114, was also discussed. *Hearings on H.R. 3663, H.R. 4114, H.R. 4264 and Other Issues Related to Haitian Asylum-Seekers Before the House Judiciary Committee, Subcommittee on International Law, Immigration and Refugees*, 103 Cong., 2d Sess. 9 (1994) (statement of Chris Sale, Deputy Commissioner, INS) [hereinafter Sale Testimony] (copy on file with author).

304. *Id.*

305. *Id.* at 9-10. The INS labeled language in the legislation for conducting refugee determinations as vague and possibly subject to different interpretations, thus, "hampering" the current interdiction program without creating enforceable substantive or procedural standards to protect bona fide refugees.

306. *See supra* notes 152-53 and accompanying text.

307. Sale Testimony, *supra* note 303, at 10-13. The INS objected to TPS for Haitians because it removed the Attorney General's authority. This authority includes granting TPS after consultation with other government agencies, establishing an open-ended designation, and creating a huge magnet for Haitians to leave their country. *See also Hearings on H.R. 3663, H.R. 4114, H.R. 4264 and Other Issues Related to Haitian Asylum-Seekers Before the House Judiciary Committee, Subcommittee on International Law, Immigration and Refugees*, 103 Cong., 2d Sess. (1994) (statement of the Honorable Branson McKinley, Acting Director, Bureau of Population, Immigration, and Refugees) [hereinafter McKinley Statement] (copy on file with author).

For its part, the Department of State focused its testimony on the push for international cooperation in processing Haitians, the actual mechanics of refugee processing aboard ships, land-based processing, monitoring returnees, and the fact that in-country processing would continue as part of the Clinton administration's policy toward Haiti. With regard to the fate of returnees, the Department of State asserted that "repatriated boat people are not targeted for retribution by Haitian authorities for unauthorized departures."[308] For human rights advocates, the concern over repatriated Haitians was not a fear of mistreatment for unauthorized departures, but that bona fide refugees had been returned and often persecuted or killed.[309]

C. Senate

Concern over democracy and the flight of Haitian refugees has also been expressed on the Senate floor. On November 22, 1991, soon after the *coup d'etat*, Senate Resolution 2026 was introduced into the Senate.[310] The Senate bill contained the same provisions discussed in House Resolution 3844. Another bill was introduced in November, Senate Resolution 2091, which essentially extended TPS to Haitians.[311]

In early 1992, a staff report on Haitian democracy and refugees was issued by the Committee on the Judiciary.[312] The staff report noted increased violence by the return of Ton-Ton Macoutes as "section

---

308. *Hearings on H.R. 3663, H.R. 4114, H.R. 4264 and Other Issues Related to Haitian Asylum-Seekers Before the House Judiciary Committee, Subcommittee on International Law, Immigration and Refugees*, 103d Cong., 2d Sess. 7 (1994).

309. *See* Exhibits to Testimony of Steven David Forester, Haitian Refugee Center, House Subcommittee on International Law, Immigration, and Refugees (June 15, 1994) (copy on file with author); Exhibit E, Susan Benesch, *How U.S. Error Sent Haitian to His Death*, MIAMI HERALD, Apr. 18, 1994, at 1A (a Haitian refugee who was screened at Guantanamo Bay and who was found to be eligible for passage to the United States was erroneously returned to Haiti where he was subsequently mutilated and killed by the authorities). For a discussion of all the presentations at the hearing, see *U.S. Policy on Haitan Boat People Appears Lost at Sea*, 71 INTERPRETER RELEASES 885, 887-88 (1994) [hereinafter *U.S. Policy*].

310. S. Res. 2026, 102d Cong., 1st Sess. (1991).

311. S. Res. 2091, 102d Cong., 1st Sess. (1991); 137 CONG. REC. S18408-10 (daily ed. Nov. 26, 1991).

312. STAFF OF SENATE COMM. ON THE JUDICIARY, 102d Cong., 2d. Sess., Report on Haitian Democracy and Refugees: Problems and Prospectives, Feb. 17, 1992 (prepared for the use of the Subcommittee on Immigration and Refugee Affairs) (copy on file with author) [hereinafter STAFF REPORT].

chiefs." The Ton-Ton Macoutes represented the national government in every subdivision of the country.[313] According to the staff report, this system of using section chiefs under a government plan would establish some 80,000 officers who would have "absolute control" over the majority of Haiti's six million inhabitants.[314] The section chiefs and the "attachés," a post-coup addition, supplemented the repressive forces in Haiti bent on terrorizing the population.[315] While the staff report called for a tighter embargo, it recognized that there was an increasing risk of hunger problems.[316] With regard to the boatpeople, the staff report found that the United States' efforts to get other countries in the region to provide temporary refuge to Haitian boatpeople had failed.[317] Finally, the staff report urged that negotiations be advanced with the recognition that the commitment to democracy in Haiti is a long-term endeavor.[318]

A few days after the staff report was issued, Senate Resolution 2246 was introduced.[319] This legislative initiative suspended the involuntary repatriation of Haitians until 180 days after the enactment of the Act or five days after the submission to Congress of a State Department report on the human rights treatment of returned Haitians.[320] The bill, like House Resolution 3844, reallocated 2,000 refugee admission numbers for Haitians for fiscal year 1992. Later that same year Senate Resolution 2826 was introduced,[321] which contained a congressional statement that the United States adhere to the international law requirement of *nonrefoulement*.[322] The bill also extended United States *nonrefoulement* responsibilities extraterritorially and specifically forbade any operations in the territorial waters of another country by the federal government.[323] The Senate did not experience much activity related

313. *Id.* at 4 (there are 565 political subdivisions in Haiti).
314. *Id.*
315. *Id.* at 4-5. "[The attachés] . . . stop cars, search houses in the dead of night, and otherwise keep the civilian population on edge." *Id.* at 4. Most affected by these practices are the poor, the church, labor unions, and human rights organizations. *Id.* at 5.
316. *Id.* at 19-20.
317. The staff report found that only Honduras and Venezuela took in refugees, totaling 350. *Id.* at 23-24.
318. *Id.* 43-44.
319. S. Res. 2246, 102d Cong., 2d Sess., 138 CONG. REC. S1939-40 (daily ed. Feb. 20, 1992) (the Haitian Refugee Protection Act of 1992).
320. *Id.* § 3(b) (section 3(b) required the State Department to use resources, information, and the expertise of human rights organizations).
321. S. Res. 2826, 102d Cong., 2d Sess., 138 CONG. REC. S7717 (daily ed. June 9, 1992); *see id.* § 4.
322. *Id.* § 2(a).
323. *Id.* § 2(b),(c).

to the Haitian question in 1993. However, 1994 brought renewed efforts to legislate in this area. On April 19, 1994, Senate Resolution 2027 was introduced and referred to the Committee on Foreign Affairs.[324] Senate Resolution 2027 closely parallels the measure introduced into the House by members of the Congressional Black Caucus.[325] These congressional actions demonstrated a growing discontent over the Clinton administration's Haiti policy during the first part of 1994.[326]

On June 30, 1994, the Senate Foreign Relations Committee held hearings regarding the Haitian situation. A major concern was whether the United States was planning to invade Haiti. Top foreign policy advisers reiterated that the Clinton administration was relying on sanctions for the time being.[327] The day before the hearing, the Senate rejected a measure by a sixty-five to thirty-four vote that would have required the President to obtain authorization from Congress before taking any military action in Haiti. However, it voted ninety-three to four for a non-binding resolution that would require the President to seek approval from Congress before committing United States troops to

---

324. S. Res. 2027, 103d Cong., 2d Sess., 140 CONG. REC. S4464 (daily ed. Apr. 19, 1994).

325. John M. Goshko, *Senators Seek New Sanctions Against Haiti, Bill Would Impose Trade Ban, Cut Links*, WASH. POST, Apr. 20, 1994, at A15.

326. *See generally* Steven Greenhouse, *Clinton Policy Toward Haiti Comes Under Growing Fire*, N.Y. TIMES, Apr. 15, 1994, at A2 (specific mention is made of David C. Obey's (D-Wis), Chairman, House Appropriations Committee, call for armed intervention in Haiti to restore democracy). *See also*, Kevin Merida, *Obey Calls for Invasion To Oust Haiti's Rulers*, WASH. POST, Apr. 15, 1994, at A7; Julie Cohen, *It's Showdown Time on Haiti*, LEGAL TIMES, Apr. 18, 1994, at 5 (discussing various efforts to influence the President's Haiti policy including the following: a letter writing campaign by the NAACP; a union demand that certain loopholes allowing United States' companies to do business in Haiti be closed; the House legislation; the hunger strike by Randall Robinson, President of Transafrica; and the fact that several lawmakers from Congress were willing to be arrested in front of the White House to protest the Clinton administration's policy).

327. *See* Ann Devroy & Barton Gellman, *Exodus From Haiti Strains U.S. Policy, Military Intervention Considered*, WASH. POST, July 2, 1994, at A1 (statements attributed to Secretary of State Warren Christopher and Secretary of Defense William J. Perry arguing that the sanction process must be allowed to work before an invasion is seriously considered); *see also* Elaine Sciolino, *Haiti Invasion Not Imminent, Envoy Says*, N.Y. TIMES, July 4, 1994, at A2 (William H. Gray, III, President Clinton's special envoy to Haiti, stated that while an invasion of Haiti was not imminent, the United States was taking actions to protect the thousands of Americans located on the island).

Haiti.[328] These Senate actions demonstrate that there was considerable apprehension at the prospect of a military intervention in Haiti for the purpose of eliminating the de facto rulers, and returning President Aristide to power.

IV. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

The Haiti dilemma has been a difficult domestic and foreign policy problem for successive White House administrations throughout the 1980s and 1990s. From the foreign policy perspective, it tests the United States' commitment to democracy in the Caribbean, a region geographically close to the United States where democracy is by no means firmly established as part of its political culture. It also tests whether human rights will continue to be a tenet of United States foreign policy in the post-Cold War period. This applies to State actions within its sovereign territories, including the territorial sea, as well as externally beyond the convenient political shield of sovereignty.

In addition, the Haitian refugee situation is an excellent opportunity to study, evaluate, and consider changes in the post-Cold War overseas refugee program, whether through in-country processing or refugee processing within the interdiction program. From the domestic perspective, the treatment of Haitian asylum seekers under immigration law and policy continues to pose considerable questions and challenges not only for the executive branch, but also for the Congress and the federal courts, given the impact on future refugee and migration flows.[329] This final section of the Article will provide certain observa-

---

328. Associated Press, *Visas Revoked for Haitians Seeking to Travel to U.S.*, WASH. POST, June 30, 1994, at A26.

329. During the June 15, 1994, congressional subcommittee hearing on Haiti, certain subcommittee members reaffirmed to revisit the need for the Cuban Adjustment Act in light of both the Haitian refugee situation and the end of the Cold War. A bill, H.R. 3854 (Kopetski, D-OR) was introduced in the 103d Congress that would repeal the Cuban Adjustment Act and it was referred to the House Committee on the Judiciary. *See Developments in the Legislative Branch*, 8 GEO. IMMIGR. L.J. 315 (1994) (the bill would grant Cubans who entered the United States before the enactment of the act a grace period of two years to apply for adjustment of status to permanent residency; once the grace period expired, Cubans would not be conferred special treatment).

Subcommittee members noted that there needed to be consistency in processing refugees under United States law. While the well-founded fear standard is the basic refugee definition, it was noted that the Cuban Adjustment Act and the Lautenberg Amendment standard deviate from the well-founded fear standard (notes of hearing on file with author). The Lautenberg Amendment is another Cold War legacy. It allows certain nationals of the former Soviet Union, Vietnam, Laos, and Cambodia who were granted parole after they were denied refugee status and who were admitted into the United States between August 15, 1988, and September 30, 1990, to adjust status to permanent residency. The benefits were extended to eligible persons who were paroled

tions and recommendations in both the domestic and foreign policy areas.

A. President Clinton Reverses Policy of Kennebunkport Declaration

As stated above, negotiations between parties in the Haitian conflict stalled during the early part of 1994. The stalemate was caused in large part by a shift in the United States policy, supported by the United Nations, that sought to delay President Aristide's return and called for Haiti's military ruler to leave office at the same time that an interim government was appointed. The new policy also granted amnesty to senior military officials.[330] Some called the plan "an unworkable and morally repugnant compromise that Aristide was right to reject."[331] To President Aristide and his supporters, the Clinton administration was not doing anything significant to either restore him to power, or to curtail the "campaign of terror" that was being unleashed against his supporters in Haiti, described by Aristide as "a house on fire."[332] Disturbing news of politically motivated killings, disappearances, and rapes continued to come from Haiti.[333] The United States was still refusing to grant Temporary Protected Status to Haitians in the United States

---

into the United States before October 1, 1994. For a discussion of the Lautenberg Amendment, see GORDON ET AL., *supra* note 36, § 34.04[9][a].

330. John M. Goshko, *U.S. Seeks Aristide's Cooperation, New Plan Would Put Greater Pressure on Haitian Military,* WASH. POST, Mar. 29, 1994, at A11. The U.S. plan would have required three simultaneous events: (1) Lt. Gen. Raoul Cedras, the military ruler, would retire; (2) President Aristide would appoint a Prime Minister from abroad; and (3) the Haitian parliament would grant amnesty to the military for actions arising out of the September 1991 *coup d'etat. Id.*

331. Editorial, *New U.S. Haiti Policy: Idealistic but Impractical,* NEWSDAY, Mar. 29, 1994, at A38; *see also* Tom Squitieri, *U.S. Policy Aids Allies of Haiti Coup,* USA Today, Mar. 30, 1994, at 1A (discussing planned extension of a loophole to circumvent the embargo created by the Bush administration that permitted the export of certain goods to the United States as a means of keeping Haitians from leaving the island).

332. *See* Steven Greenhouse, *Aristide Condemns Clinton's Haiti Policy as Racist,* N.Y. TIMES, Apr. 22, 1994, at A1.

333. Associated Press, *Haitian Soldiers Reportedly Kill 23,* WASH. POST, Apr. 26, 1994, at A11. "The soldiers raided a seaside neighborhood near the city of Gonaives, shooting indiscriminately at people gathering firewood on the beach." *Id.* The area attacked is a west coast slum that recently experienced a struggle between Aristide supporters and neo-Duvalierist militants, the Front for the Advancement and Progress in Haiti. *Id.*; *see also* Bradley Graham, *U.S. Holds Evacuation Exercise,* WASH. POST, July 14, 1994, at A1 (explaining that United Nations monitors have registered 340 killings, 131 disappearances, and 52 politically motivated rapes from May to June 1994).

for fear that it would foment more migration outflow in the Windward Passage.[334]

During the first part of 1994, the economic embargo appeared to be failing as a decisive form of diplomatic coercion against the de facto rulers. The embargo was being broken by activities along the Haitian/Dominican border.[335] In addition, there were reports that by controlling the activities related to smuggled gasoline supplies, Haitian military rulers were becoming rich.[336] It was against this background that the Coast Guard intercepted a sixty-five foot freighter carrying 400 Haitians within four miles of the Florida coast.[337]

On May 8, 1994, President Clinton announced that certain changes would be made regarding the United States' policy on Haitian boatpeople. The United States would continue the interdiction program while eliminating the policy of forcible repatriation without determining

---

334. The INS opposed granting TPS to Haitians in the United States. *See* Sale Testimony, *supra* note 303, at 11-13. According to the INS, the TPS proposals before Congress were inconsistent with the established TPS procedures under the INA. Further, the INS contends that the definition of Haitian nationals covered under the legislative proposals would create "a huge magnet" that would have induced even more departures. *Id.* The INS contended that the legislative TPS proposals were too open-ended and exceeded the 18 month period allowed by law. However, the legislative language could have been structured to cover the situation of Haitian nationals already in the United States. These included three groups: (1) those who fled Haiti after the *coup d'etat* and were pre-screened at Guantanamo Bay and paroled into the United States to pursue their asylum applications; (2) Haitians who entered the United States directly and were placed in exclusion proceedings without any prescreening of their asylum claims; and (3) Haitians who are in undocumented status or may be in an undocumented status should their temporary visas expire while the de facto rulers are still in control of Haiti. It would not have been unusual for Congress to direct the Attorney General to grant TPS to a specific nationality. When the TPS provisions were enacted under the Immigration Act of 1990, Congress directed the Attorney General to grant TPS to Salvadorans. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, 5036 (1990). The nonprotection of Haitians in the United States probably sent the wrong message to the Haitian de facto rulers that the United States was not sufficiently serious about the human rights conditions in Haiti. In fact, the United States has not deported any Haitians since the *coup d'etat*. Granting Haitians in the United States TPS would have been an appropriate manner to protect these individuals until conditions in Haiti became safe enough for their return.

335. Howard W. French, *Embargo Creates 'Oil Boom' Near Haitian Border,* N.Y. TIMES (International), Mar. 13, 1994, at A3.

336. Douglas Farah, *U.S. Fills Up in Haiti With Smuggled Gas, Generals Reap Profits From Embargo Intended to Oust Them,* WASH. POST, Apr. 19, 1994, at A1.

337. Booth, *supra* note 98, at A3. The Haitians were to be taken to the Krome Detention Center and allowed to assert political asylum claims. Those with relatives in the area could be "paroled" while the asylum adjudication was pending, and could be assisted through certain programs operated by nonprofit organizations which provided basic resettlement needs and legal representation.

refugee status.[338] In this regard, the United States was upholding, in theory, the principle of *nonrefoulement*. This new policy relied on international cooperation in processing the Haitian boatpeople. Agreements with both Jamaica and the United Kingdom were reached.[339] For example, on June 2, 1994, the United States and Jamaica signed a memorandum of understanding under which a hospital ship, the USNS *Comfort*, was to be used for on-board processing. The arrangement with the United Kingdom would permit the United States to conduct on-shore processing at the islands of Turks and Caicos located south of the Bahamas.[340] The first group of boatpeople were processed on the USNS *Comfort* on June 17, 1994, and six of the thirty-five interviewed were granted refugee status.[341] By the end of June more than 5,000 Haitians were pulled from the sea. The tremendous numbers overwhelmed the USNS *Comfort* and the United States was forced to reopen Guantanamo Bay to process refugees.[342]

One of the more significant improvements advanced by the new policy was that refugee status was now granted to those who qualified. Previously, during the post-*coup d'etat* period, and before the Kennebunkport Declaration, the same individuals would probably have received parole status as a result of being screened-in to the United States.[343] The difference is considerable. Refugee status permits the Haitians to file for permanent residency in the United States after one year, thereby avoiding the requirement of filing an affirmative asylum application before the INS and, if the application is denied, confronting exclusion proceedings as a prelude to deportation. However, in order to qualify as refugees, the boatpoeple still had to meet the well-founded

338. *See generally* Transcript, *MacNeil/Lehrer Newshour*: Show # 4923 (WNET television broadcast, May 9, 1994), at 3-7 (featuring background and discussion on Haitian policy change) (copy on file with author).
339. *See* Sale Testimony, *supra* note 303, at 2.
340. *Id.*
341. *See* William Booth, *6 Haitian Boat People Clear U.S. Screening*, WASH. POST, June 18, 1994, at A12. Haitians granted refugee status were taken to Guantanamo Bay naval station where further processing was to occur, including medical examinations, before they were allowed to enter the United States. *See id.*
342. John F. Harris, *Exodus from Haiti Strain U.S. Policy*, WASH. POST, July 2, 1994, at A1.
343. *See supra* notes 116-19 and accompanying text.

fear of persecution standard embodied in the definition of refugee under domestic and international law.[344]

The "well-founded fear" standard is a tougher standard than the "credible fear" standard used in the earlier processing. Some commentators expressed concern that the higher standard would be used as a justification to support the Clinton administration's assertion that only five percent of Haitian boatpeople were truly refugees.[345] In fact, just the opposite was true. While this refugee processing policy was briefly in-place, thirty percent of Haitian boatpeople qualified for refugee status.[346] As a result, more Haitians took to the sea. Soon the processing centers were overloaded. Therefore, the policy was altered during the month of July. While the United States did not forcibly repatriate Haitian boatpeople, it did not process them as refugees, or parolees for that matter, for entry into the United States. Instead, the United States offered a safe haven outside United States territory to almost all Haitian boatpeople interdicted at sea. Haitians were offered the opportunity to stay in temporary refugee camps, or to return voluntarily to their home country. The only way that Haitians could qualify for actual refugee status was to participate in the ICP program.[347]

B. In-Country Processing Should Be Evaluated

The United States should evaluate in-country processing (ICP) in light of its Haiti experience. Haitian ICP had a very low approval rate of around seven percent.[348] Changes were made to the ICP during the first part of 1994. While some changes were minor, such as replacing the vetting system, others were more fundamental.[349] Under the 1994 system, interviews were granted to persons who met one of five

---

344. *See supra* note 32.

345. John Kifner, *Haitian Refugee Interviews Begin Aboard U.S. Navy Ship*, N.Y. TIMES, June 17, 1994, at A3.

346. *U.S. Policy, supra* note 309, at 886.

347. *See* Robert Suro, *Clinton's Gamble With Haiti Hinges On Refugee Response*, WASH. POST, July 11, 1994, at A10.

348. *See Changing U.S.-Haitian Refugee Policy: New In-Country Processing System; Shipboard Adjudications Resume*, REFUGEE REPORTS (U.S. Committee for Refugees, Washington, D.C.), May 31, 1994, at 1, 2.

349. *Id.* The changes included requiring a photograph and identification document for all persons completing the preliminary questionnaire. In Port-au-Prince, preliminary questionnaires were not filled out in the downtown offices of the International Organization for Migration. Instead, they were to be completed at the Rex Theater. Processing placed emphasis on cases referred by private agencies operating in Haiti. *Id.*

criteria.[350] Once an individual met one of the criterion, he or she was sent to one of the refugee processing centers operated by joint voluntary agencies in order to prepare the alien for the INS interviews.[351] These changes resulted in an increased approval rate of thirty percent. Consequently, more than 60,000 Haitians have applied for refugee status since the ICP began in 1992. Fifteen hundred have been granted refugee status.[352] Much of the ICP decisionmaking has come down to the question of credibility. In most cases, the INS simply does not consider documents produced by applicants to be reliable.[353] Because the United States uses ICP as the exception rather than the rule in overseas processing, ICP in Haiti is an excellent opportunity to evaluate the entire overseas refugee program in the post-Cold War era. There is a general consensus that ICP has a positive role to play, but that it should not be considered as a viable substitute for the right to seek asylum and *nonrefoulement* for refugees outside their countries of origin. The concern is that since ICP is discretionary, the regulations and case law governing refugee adjudications within the United States do not necessarily apply. Therefore, ICP has the potential of reducing refugee protections offered under United States domestic law.[354]

---

350. *Id.* The five criteria are as follows: (1) senior and mid-level government officials from the Aristide regime, (2) close associates of President Aristide, (3) educational and journalist activists who have a credible fear of persecution on account of their activities from the de facto authorities, (4) members of social/political development organizations who are high profile and have been threatened or harassed by the de facto authorities, and (5) persons who are of compelling concern to the United States and are in immediate danger on account of their actual or perceived political beliefs or activities. *Id.*

351. *See supra* note 257-58 (describing refugee processing centers).

352. *Haitian Numbers Drop, But Crisis Continues*, 71 INTERPRETER RELEASES 966 (1994) (citing a report prepared by the National Immigration Forum).

353. *See* REFUGEE REPORTS, *supra* note 348, at 6.

354. *See* Written Statement on Haitian Refugee Processing, for the House Subcommittee on International Law, Immigration, and Refugees, Bill Frelick, Senior Policy Analyst, U.S. Committee for Refugees 8-10 (June 15, 1994) (copy on file with author). This written statement compared Haiti ICP with the Orderly Departure Program in Vietnam:

> A similar in-country procedure for processing refugees was created at the height of the Vietnamese boat exodus. However, those who decided to flee by boat were never turned back because such a program existed. At the same time, it would have been unthinkable for the United States to have said that the existence of an Orderly Departure Program would mean that Vietnamese boat people could be summarily returned without a hearing.

Id. at 9.

C. *Establish Comprehensive Safe Haven Mechanisms in the Caribbean Basin For Refugee Emergencies*

The United States should establish comprehensive safe haven mechanisms for refugee emergencies in collaboration with the Organization of American States in collaboration with the UNHCR in the Caribbean region. The establishment of a safe haven at Guantanamo Bay for Haitians was a first in United States history. Human rights organizations had been calling for such safe havens for several years.[355] Safe haven camps attend to the humanitarian needs of refugees, but they do not necessarily create any right or expectation of admission to any country. For example, Haitians knew that a safe haven for them would only be a temporary measure until the political situation in Haiti was stabilized.[356] Further, the UNHCR can participate in voluntary repatriation. On the other hand, safe haven camps run the risk of deteriorating into detention and holding centers for refugees.[357] The U.S. must be careful to avoid such a pitfall. Additionally, the U.S. cannot afford to carry the entire cost of such safe havens. Other

---

355. In December 1992 a number of organizations recommended a safe haven. These organizations included the National Coalition for Haitian Refugees, the AFL-CIO, The American Friends Service Committee, American Immigration Lawyers Association, Church World Service, Human Rights Watch, Florida Rural Legal Services, International Rescue Committee, Lawyers Committee for Human Rights, Lutheran Immigration and Refugee Services, National Association for the Advancement of Colored People, National Council of La Raza, Transafrica, and the U.S. Committee for Refugees. *See Safe Haven*, HAITI INSIGHT, June 4, 1994, at 3.

In addition, the Committee on Migration, United States Catholic Conference, has stated:

> We understand that the Administration plans screening that applies strict refugee criteria. While this will allow some refugees to be resettled in the United States, the majority will be sent back. Reports of current conditions of violence in Haiti are such that we fear that many persons not meeting the refugee criteria could still be at serious risk if returned to Haiti. These persons should not be returned. We urge the Administration to seek a land-based site where Haitians can wait in safety until the political situation improves in Haiti.

Testimony of Rev. Richard Ryscavage, S.J., Executive Director, United States Catholic Conference, Office of Migration and Refugee Services, On H.R. 3663, H.R. 4114, and H.R. 4264, Judiciary Subcommittee for International Law, Immigration and Refugees, U.S. House of Representatives, June 15, 1994, at 11 (copy on file with author).

356. *See Safe Haven*, *supra* note 355, at 3.

357. Refugee advocates who have worked at Guantanamo Bay contend that it functions more like a detention center than a safe haven site. While food and shelter are provided, living conditions are generally poor and there is a serious need for proper medical attention, clothing, educational, and recreational activities. *See After Months on Guantanamo, Refugees Still Await Much Needed Relief*, MONDAY (National Council of Churches, Church World Service Immigration and Refugee Program), Sept. 12, 1994, at 2 [hereinafter MONDAY I].

countries in the Caribbean basin, especially countries that produce refugees themselves, should shoulder a greater share of the burden in dealing with refugee flows.[358]

D. Exclusion Proceedings Should be Extended to the Territorial Sea

The United States should also extend procedural protections of exclusion proceedings to refugees apprehended in its territorial sea. Any vessel that crosses into the territorial waters of the United States that is suspected of violating the laws of the United States can be intercepted by the Coast Guard.[359] Individuals who lack proper documents to be in the territory of the United States should be brought to land and placed in exclusion proceedings before an immigration court. The United States has already done this in the past, thereby establishing a justification based on custom.[360]

---

358. *See* John M. Goshko, *U.S. Officials Defend Policy on 'Safe Havens,'* WASH. POST, July 11, 1994, at A10 (Panama finally agreed to accept 5,000 Haitians after the new President takes office). In addition to Panama, Dominica, Antigua, and the Turks and Caicos Islands offered to set up temporary refugee camps. The United States has not received very much support in establishing safe havens throughout the Caribbean. Commentators have stated that this situation is a result of Haiti's historic isolation. *See generally* MONDAY I, *supra* note 357. For example, when Spanish-speaking countries gained their independence from Spain in the early 19th century, they excluded Haiti from any type of regional community, and the United States itself did not formally recognize Haiti until 1862 (Haiti became independent in 1804). According to Randall Robinson, Executive Director of Transafrica Forum, the Panamanian government backed out of their pledge to accept 10,000 refugees because "[p]eople were very afraid of having Haitians in the country and justifiably so . . . they were afraid of competing for scarce resources, afraid of people whose culture is different in many ways, afraid of the AIDS problem . . . . That is why the governments backed out and everything else is excuses." Roberto Suro, *Haiti's History of Isolation Makes U.S. Task Harder*, WASH. POST, July 25, 1994, at A1, A14.

The same could be said of other governments in the region. *See* Suro, *supra*, at A1; *see also ICVA Finds Haitians Unwelcome in a Number of Carribean Countries*, MONDAY, Aug. 1, 1994, at 1-3. A special team of the International Council of Voluntary Agencies travelling through the Caribbean found that Haitians are unwelcome in a number of Caribbean countries. The mission concluded that Haitians are generally not welcome because of existing problems with illegal immigrants. The countries visited have their own problems and fear that they would become magnets for future flows. Haitian refugees are seen as a United States problem and procedures for determining refugee status were flawed or nonexistent, hence a regional solution was seen as desirable.

359. 14 U.S.C. § 89(a) (1988) (law enforcement provisions for boarding vessels to prevent, detect, and supress violations of the laws of the United States).

360. *See supra* notes 99-100 and accompanying text.

Further, in the *Sale* decision, the Supreme Court held that exclusion proceedings and the obligation to provide *nonrefoulement* do not apply extraterritorially. Therefore, the Court could conceivably apply the procedural protections of exclusion proceedings and the obligation to provide *nonrefoulement* within the territorial waters of the United States.[361] This is an issue the federal courts may be forced to decide in the future.

E. The Caribbean Challenge

Throughout the 1980s and 1990s, the United States has confronted difficult policy choices regarding the treatment of Haitian asylum-seekers and efforts to establish democracy in Haiti, one of only two non-democracies in the Americas.[362] Geography has not given the United States a choice in the matter and history may create a similar situation in the greater Caribbean basin.[363] During the summer of 1994, the Haitian de facto authorities expelled the UN-OAS team of human rights observers and the United Nations Security Council issued a United States-initiated resolution labeling such actions as "provocative behavior [which] directly affects the peace and security of the region."[364] A subsequent resolution gave greater authority for the United States to assemble an invasion force.[365] Such language and Security Council actions moved the question of a United Nations sanctioned intervention forward, although most diplomats preferred to give economic sanctions more time to work; meanwhile Congress was very uneasy about a United

---

361. *See supra* notes 92-97 and accompanying text.

362. The other remaining non-democracy is Cuba. *See American Survey; Beached*, THE ECONOMIST, June 11, 1994, at 22.

363. As far as the greater Caribbean basin is concerned, Mexico is undergoing a delicate and slow move toward multiparty democracy, El Salvador and Nicaragua are emerging from civil wars and are experimenting with post-civil war democracy, and Guatemala has an active guerilla movement. Cuba and the Dominican Republic are clearly potential refugee-producing countries. The other larger Caribbean islands of Jamaica and Puerto Rico appear to have embraced a democratic political culture for the foreseeable future.

364. *See* Douglas Farah, *Rights Observers to Quit Haiti Today, Director of U.N.-OAS Team Expresses 'Indignation and Sadness,'* WASH. POST, July 13, 1994, at A24.

365. In language similar to that used preceding the Persian Gulf invasion, the United Nations Security Council acting under Chapter VII of the Charter of the United Nations adopted Resolution 940 which authorized the formation of a multinational force with the goal: "[T]o use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governor's Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti . . . ." *U.N. Resolution for Invasion of Haiti*, N.Y. TIMES, Aug. 1, 1994, at A6. The vote was 12-0 with Brazil and China abstaining, and Rwanda absent. *Id.*

States initiated invasion.[366] It was abundantly clear toward the end of August 1994 that the economic embargo had forced the collapse of Haiti's economy, but not the demise of the de facto rulers.[367]

A new refugee crisis originating in Cuba, moreover, diverted United States' political and military intentions from Haiti.[368] During August 1994 the Cuban government announced that it would not prevent its citizens from leaving their homeland. Some thirty-thousand Cubans, also known as *balseros*, took to the Florida Straits for the United States.[369] The possibility of a mass refugee influx similar to the Mariel boatlift[370] prompted a radical change in United States immigration policy toward Cuban refugees.[371] The twenty-eight-year-old immigration policy that allowed Cubans paroled or admitted into the United States and physically present for one year to become permanent residents was terminated.[372] Cuban *balseros* are now treated like the

---

366. It has been noted that there is a particularly sensitive reason for other countries, especially those in Latin America and the Caribbean, to resist military intervention in Haiti. Latin American countries have a traditional distaste for United States military intervention. A recent example of that distaste was an OAS resolution which condemned the invasion of Panama in 1989. This was the first time in the OAS's history that the United States was formally criticized. *See* Suro, *supra* note 358, at A1. The United States is sentient enough to obtain United Nations supported authority to invade, but this may not allay the traditional suspicion of countries who have experienced United States military intervention or direct United States political influence during the past century. A list of these countries includes Mexico, Guatemala, Honduras, Nicaragua, Panama, Cuba, Haiti, Dominican Republic, Puerto Rico, and Grenada. *See generally* Larry Rohter, *Remembering The Past; Repeating It Anyway*, N.Y. TIMES, July 24, 1994, § 4, at 1, 4. For a view of pre-invasion concerns, see Helen Dewar, *Senate Defeats GOP Bid to Force Vote Prior to Haiti Invasion*, WASH. POST, Aug. 6, 1994, at A5 ("in votes in both houses . . . lawmakers have expressed strong reservations about U.S. military involvement in Haiti"); Kevin Fedarko, *Policy at Sea*, TIME, July 18, 1994, at 20; *see also* Fleming, *supra* note 297, at 1540 (Special Haiti Envoy, William H. Gray III, appearing before the House Foreign Affairs Committee).

367. *See* Douglas Farah, *Embargo Has Haiti's Economy Near Collapse, but Rulers Stand Firm*, WASH. POST, Aug. 26, 1994, at A20.

368. *See Slow-Motion Mariel*, supra note 134, at 1091-93.

369. *See U.S., Cuba Reach Important Migration Agreement*, 71 INTERPRETER RELEASES 1213 (1994).

370. *See supra* text accompanying notes 36-37.

371. *Slow-Motion Mariel*, *supra* note 134, at 1091.

372. The policy was a result of the Cuban Refugee Adjustment Act. *See supra* note 38; *see also* Ann Devroy, *U.S. Raises Barriers To Cuban Refugees, Clinton Plans to Tighten Isolation of Castro*, WASH. POST, Aug. 20, 1994, at A1 (the formal policy reversal was made by Janet Reno, United States Attorney General, to the INS); Carroll J. Doherty, *Influx of Cubans Forces Clinton To Halt Automatic Asylum*, 52 CONG. Q. 2464 (Aug. 20, 1994); Bob Benson, *Dissonant Voices Urge Clinton To Revise Policy on*

Haitian boat people before them. They are rescued from the Florida Straits by the Coast Guard and sent to Guantanamo Bay.[373] Any Cuban refugee who actually makes it to the United States is either detained or placed in a "safe haven."[374] Since the United States does not have a repatriation agreement with Cuba, the *balseros* are not forcibly repatriated to their homeland. However, Cubans at Guantanamo Bay may avail themselves of voluntary repatriation.[375]

In order to stem the refugee flow, the United States and Cuba entered into negotiations.[376] On September 9, 1994, they signed an agreement in which the United States promised to accept at least twenty-thousand legal immigrants per year.[377] The would-be immigrants will be

---

Cuba, 52 CONG. Q. 2498 (Aug. 27, 1994).

373. As of this date, 32,051 Cubans have been picked up by the Coast Guard, and there are approximately 30,000 refugees on Guantanamo Bay, 600 at the Krome Detention Center in Florida, and 1,000 in Texas and Panama. *See* Vernon Silver, *Some Cubans Are Released From Detention in Florida,* N.Y. TIMES, Sept. 14, 1994, at A6.

374. *See* Jon Nordheimer, *Some Cubans Wait in Detention Center*, N.Y. TIMES, Aug. 21, 1994, at A28.

375. The Cuban refugee crisis and the United States' efforts to move forward with voluntary repatriation triggered legal action on behalf of the refugees in the 11th Circuit. Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995). A federal district court ordered the United States not to engage in voluntary repatriation of Cubans located at Guantanamo Bay until lawyers for Cuban Refugee Service Organizations had an opportunity to meet with the refugees for the purpose of ascertaining if their repatriation decision was truly voluntary. The scope of the order was limited to the issues of voluntary repatriation and right to access under the First Amendment. *Id.* at 1413. The preliminary injunction was overturned a few days later by an appeals panel. While the court of appeals allowed the government to continue with voluntary repatriation, it did allow attorneys who had written retainers "reasonable access" to refugees. For a discussion of the Cuban refugee litigation, see *Judge Bars Cuban Repatriations, but Court of Appeals Disagrees*, 71 INTERPRETER RELEASES 1474-76 (1994); *As Litigation Continues, U.S. Considers Policy Shift on Guantanamo Cubans, INS Kicks Off Cuban Lottery*, 71 INTERPRETER RELEASES 1548-49 (1994); *Litigation Continues over Parole for Haitian and Cuban Children at Guantanomo*, 71 INTERPRETER RELEASES 1593-94 (1994). It is worthwhile to note that both plaintiffs and defendants rely on the Interdiction Cases to support their legal theories.

376. President Castro agreed to negotiate because he also wanted to discuss an end to the trade embargo that the United States had maintained against Cuba for over thirty years. *See* Larry Rohter, *Castro, The Man With Few Cards, Always Winds Up the Dealer*, N.Y. TIMES, Aug. 28, 1994, § 4, at 1, 4.

377. The agreement was issued as a joint communique. The first section deals with safety of life at sea and stipulates that the United States will take Cubans rescued at sea to safe havens. Parole will not be given to Cubans who actually reach the shores of the United States. Cuba will take preventive measures to ensure that there will be no unsafe departures.

The second section pledges cooperation on the question of alien smuggling.

The third section covers the question of legal migration, with the United States ensuring Cuba that total legal migration to the U.S. from Cuba will be a minimum of 20,000 Cubans each year, not including immediate relatives of U.S. citizens.

The fourth section states that voluntary return of Cubans arriving in the United States or in safe havens will be accomplished through diplomatic channels on or after August

processed through the United States Interests Section in Havana.[378] There is every indication that the migration accord will be implemented by both sides.[379] Having averted a Cuban refugee crisis, Haiti once again became the primary focus of United States foreign policy in the Caribbean.

The Clinton administration patiently enlisted the support of other nations to either pledge troops to participate in an invasion of Haiti, or to partake in peacekeeping efforts in the aftermath of the military incursion.[380] A military invasion seemed the inevitable endgame to diminish the refugee crisis, to limit human rights abuses, to return President Aristide and assist the Haitians in their efforts to establish democracy, as well as to revive the United States' credibility after repeated public threats of intervention.[381] Last minute diplomacy averted an invasion, but not a military intervention.[382] On September

---

19, 1994.

The fifth section stipulates that both countries will continue to discuss excludable Cuban nationals from the United States.

The final section of the agreement schedules a future meeting to review the joint communique and that future meetings will be scheduled by mutual agreement. The Joint Communique, *reprinted in* Appendix I, 71 INTERPRETER RELEASES 1236 (1994).

378. *See State Dept. Implements Cuban Migration Agreement*, 71 INTERPRETER RELEASES 1409-10 (1994). The U.S. will process immigrants and will "identify new facilities to accommodate the expanded processing." *Id.*

379. The United States will use a combination of the regular immigrant visa issuance, parole, an expanded use of the definition of refugee that will allocate 6,000 of the 8,000 refugee admissions set aside for Latin America, and a new lottery system consisting of 6,000 admissions to implement the migration agreement. According to the State Department, "Havana will become one of the largest immigrant visa-issuing posts it . . . has anywhere in the world." *Id.* at 1410.

380. *See* John F. Harris, *Force Grows For Invasion of Haiti*, WASH. POST, Aug. 31, 1994, at A1 (most nations declined the invitation to provide troops for the actual invasion, but were willing to provide troops for peacekeeping purposes which after several months would replace the invasion force).

381. *See* Ann Devroy, *White House Steps Up Invasion Talk*, WASH. POST, Sept. 15, 1994, at A1, A36.

382. For a comprehensive discussion on the United States occupation of Haiti, see Special Report, *Here We Go Again, Grenada, Panama, Somalia. . . Now as an Invasion Force or a Peacekeeping One, U.S. Troops Head for Uncertain Occupation of Haiti*, NEWSWEEK, at 22-36 (Sept. 26, 1994).

The military intervention of Haiti triggered a long-standing constitutional dispute between the executive and legislative branches of government over the need to obtain congressional approval before military action. Under the United States Constitution, the president serves as the "commander-in-chief," and the legislature has the authority "to declare war." *See* U.S. CONST. art. I, § 8, cl. 11 (the Congress has the power "[t]o declare war . . ."); U.S. CONST. art. 2, § 2, cl. 1 ("The President shall be Commander-

15, 1994, President Clinton announced that a special team of negotiators had reached an agreement with the de facto rulers and that United States troops would start landing in Haiti the following day, which they did.[383]

Disarming and rebuilding the Haitian military and police forces, ending the economic embargoes, obtaining international development aid, and assisting in the democratic process are tasks that the international community, led by the United States, is in the process of developing and completing. In a country with almost no social, penal, political, or strong economic structures presently in place, some of these tasks are quite formidable. For example, legislative and municipal elections that were envisioned as crucial steps toward resuming the democratic process

---

in-Chief . . .").

The administration claims that Haiti is a "police-action" which does not rise to the level of war, and compares Haiti to the Caribbean invasions of Grenada in 1983 and Panama in 1989. In addition, it alleges that the invasion is "fully consistent with . . . practice and well within the president's constitutional authority." *See* Marcus, *supra* note 28, at A18 (statement by Assistant Attorney General Walter E. Dellinger, Office of Legal Counsel, Department of Justice). Some commentators have stated that because the U.N. Security Council authorized the invasion, United States military intervention in Haiti is not a unilateral offensive action contemplated by the War Powers Clause. *Id.* (statement by Robert F. Turner, Associate Director, Center for National Security Law, University of Virginia). Regardless of the War Powers Clause, the Clinton administration has stated that it expects to comply with the 1973 War Powers Resolution, which requires the President to inform Congress when troops are exposed to hostilities and further imposes a 60-day limit on the deployment of troops abroad without congressional authorization. *Id.* (statement by Mr. Dellinger); *see also* WILLIAM B. LOCKHART, ET AL., CONSTITUTIONAL LAW 309-13 (1975) (providing discussion and text of War Powers Resolution). After much debating, Congress essentially gave President Clinton *carte blanche* to proceed with the military mission and did not impose any troop withdrawal deadlines. *See* Carroll J. Doherty, *Hill Wary of Putting Strings on Military Mission*, 52 CONG. Q. 2816 (Oct. 1, 1994); Carroll J. Doherty, *Congress, After Sharp Debate, Gives Clinton a Free Hand*, 52 CONG. Q. 2895 (Oct. 8, 1994).

383. Negotiators for the United States were President Jimmy Carter, General Colin Powell, and Senator Sam Nunn. For the text of both the President Clinton's address and the United States-Haiti agreement, see WASH. POST, Sept. 19, 1994, at A17. *See also* Douglas Jehl, *Multinational Force of 15,000 to Pave Way for Aristide Return*, N.Y. TIMES, Sept. 19, 1994, at A1. Under the terms of the agreement, the Haitian military and police will cooperate with the United States military mission, the military rulers will leave office either when the Haitian Parliament votes for a general amnesty or October, 15, 1994, (whichever is earlier), the economic embargoes will be lifted, and the forthcoming legislative elections will "be held in a free and democratic manner." *Id.* at A8.

slated for December 1994 were postponed.[384] Three rounds of elections were finally held during the latter part of 1995.[385]

With the military intervention, in country processing has been discontinued in Haiti.[386] According to both the UNHCR and refugee advocates, over 4,000 Haitian refugees who remained at Guantanamo Bay by the end of December 1994 and who refused repatriation were coerced into returning to Haiti at a time when Haiti was clearly experiencing uncertain political transition.[387] These Haitians contend that paramilitary gangs still function in places that are not frequented by U.S. troops. Critics of this policy feel that INS interviews were performed in "cursory" fashion and did not use the "well-founded fear of persecution standard" embodied in the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. The United States, however, claims that neither domestic law nor international refugee standards apply under the circumstances because Haitians at Guantanamo Bay are not being considered for resettlement in the United States.[388] Commentators question where the United States derives the authority, under either domestic law or international law, to repatriate foreign nationals, without a repatriation agreement with the government of Haiti, directly from a third country—Cuba.[389]

---

384. Reuter, *Haiti Planning April Election For Parliament*, WASH. POST, Feb. 2, 1995, at A17 (according to Haitian Prime Minister Smarck Michel, the latest plans call for elections in April, but he also stated that "many opponents of President Jean-Bertrand Aristide are still armed and the security situation remains 'fragile'").

385. *See* Julia Preston, *Age of Aristide: Haiti Calmed After a Year*, N.Y. TIMES, Sept. 20, 1995, at A14. The first round of elections was held in June, 1995, during which many irregularities were reported. *Id.* The other two rounds were boycotted by the opposing parties, which gave Mr. Aristide's Lavalas party plenary control of both parliament and local governments. *Id.*

386. Statement by Eric Schwartz, Director for Human Rights, Refugees & Humanitarian Affairs, National Security Council (Jan. 27, 1995) (the statement was made at a migration briefing held in Washington, D.C. at the Carnegie Endowment for International Peace) (on file with author).

387. *See* Roberto Suro, *U.N. Refugee Agency Says U.S. Violates Standards in Repatriating Haitians*, WASH. POST, Jan. 11, 1995, at A18.

388. *Id.*; *see also U.S. Government Begins Forced Repatriation of Haitians from Guantanamo*, MONDAY, Jan. 16, 1995, at 1-2 (discussing forced repatriation, the UNHCR withdrawal from the screening process at Guantanamo Bay, and the dangerous conditions that remain in Haiti).

389. *See U.S. Now Repatriating Haitians at Guantanamo*, 72 INTERPRETER RELEASES 129 (1995) (statement from Arthur C. Helton, of the Open Society Institute in New York).

As a final thought, the United States withdrew its troops from Haiti by the end of March 1995.[390] United Nations peacekeeping troops replaced them and will remain in Haiti until early 1996.[391] The United States is in the process of re-evaluating its international commitments, foreign policy, and human rights goals in the aftermath of the Cold War. The Caribbean, however, remains its immediate regional challenge.[392]

---

390. *See* Douglas Farah, *To Clinton, Mission Accomplished; to Haitians, Hopes Dashed*, WASH. POST, Mar. 30, 1995, at A1. While many Haitians would have liked a more complete disarmament, they appear content that the dismantling of the army "gives civilian society a chance at creating a democracy." *Id.* at A20.

391. *See* Larry Rohter, *U.N. Force Takes Up Duties in Haiti*, N.Y. TIMES (International), Apr. 2, 1995, at 14. The U.N. peacekeeping force consists of approximately 6,000 military troops and personnel, and 900 civilian police. Countries contributing troops to the peacekeeping efforts include Argentina, Bangladesh, Canada, the Caribbean community, Guatemala, Honduras, India, Nepal, The Netherlands, Pakistan, and Saurian. *Id.*

392. The Haitian situation is being revisited by Cuban boatpeople who have been "offered" safe haven at Guantanamo Bay. Refugee advocates and government officials have begun to compare this situation with that of the Haitians. For a discussion of the "parallels and differences" between Cuba and Haiti, see Bill Frelick, *Needed: A Comprehensive Solution for Cuban Refugees*, 72 INTERPRETER RELEASES 121-23 (1995).