RECENT DEVELOPMENTS

Sale v. Haitian Centers Council, Inc.: THE SUPREME COURT'S APPLICATION OF SECTION 243(H) OF THE INA

In September 1981, President Reagan determined that the strong and steady flow of illegal aliens into the southeastern United States posed a serious threat to the welfare of the nation.[1] As a result, he issued an executive order directing the Secretary of State to enter into "co-operative arrangements" with foreign governments to prevent illegal migration to the United States by sea.[2] On September 23, 1981, the United States

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1. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). In so declaring, President Reagan found authority in "the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act." *Id.* § 212(f) provides in pertinent part:

> Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Immigration and Nationality Act § 212(f) (codified at 8 U.S.C. § 1182(f) (1988)) [hereinafter INA].

§ 215(a)(1) states:

> Unless otherwise ordered by the President, it shall be unlawful...for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

INA § 215(a)(1).

2. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981) [hereinafter Executive Order]. The Order directed the United States Coast Guard to engage in the following actions:

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

entered into such an arrangement with Haiti. (U.S.-Haiti Agreement).[3] The agreement authorized the United States Coast Guard to interdict Haitian vessels in international waters, and to repatriate any undocumented aliens.[4] A proviso, however, required the Immigration

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arrangement authorizing such action.

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

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

Executive Order, *supra* § 2(C)(1)-(3) (emphasis added). President Reagan was particularly concerned with the rate of Haitian migration, which had reached 15,000 Haitians per year by 1980. Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People To Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993). *See* Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2341 (1991).

3. Interdiction Agreement Between the United States of America and Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter U.S.-Haiti Agreement]. A nation is permitted to interdict and board another country's ship on the high seas only when an agreement so stipulating exists between the nations. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 522 n. 8 (1986); Convention on the High Seas, April 29, 1958, art. 22, 13 U.S.T. 2313, 450 U.N.T.S. 82.

4. U.S.-Haiti Agreement, *supra* note 3, at 3559-60. The Agreement states in pertinent part:

> Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.
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> The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

and Naturalization Service (INS) to screen all Haitians aboard Coast Guard cutters prior to their return.[5] Individuals who possessed credible claims for refugee status were to be "screened in" and brought to the United States to pursue formal asylum.[6] Interdictees who failed to demonstrate refugee status were to be "screened out" and promptly returned to Haiti.[7] From 1981 to 1991, the Coast Guard intercepted approximately 25,000 Haitian immigrants through the interdiction program.[8] In September 1991, however, a military junta ousted the democratic government of Haiti, and the number of Haitians immigrating to the United States increased dramatically as thousands fled from the oppressive new government.[9] The flood of Haitian immigrants soon

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> The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.
>
> It is understood that under these arrangements *the United States Government does not intend to return to Haiti any Haitians whom the United States authorities determine to qualify for refugee status.*

Id. (emphasis added).

5. *Id. See* Brief for Petitioner at 2-3, Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993) (No. 92-344).

6. Brief for Petitioner at 3, *Sale* (No. 92-344). Once brought within United States territory, a refugee, as defined by § 1101(a)(42)(A), may apply for asylum under 8 U.S.C. § 1158. § 1158(a) states in pertinent 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 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(a). To qualify as a refugee under § 1101(a)(42)(A), an alien must demonstrate a "well-founded" fear of persecution. *See* Note, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1, 7 (1993). *See also Sale*, 113 S. Ct. at 2554 n.11. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

7. Brief for Petitioner at 3, *Sale* (No. 92-344).

8. *Sale*, 113 S. Ct. at 2553-54.

9. 138 CONG. REC. S13,095, S13,095 (daily ed. Sept. 9, 1992) quoting report issued December 31, 1991, by National Coalition for Haitian Refugees, Americas Watch, and Physicians for Human Rights stating that:

overwhelmed the Coast Guard's screening procedures.[10] In response, President Bush issued an executive order (Order) directing the Coast Guard to interdict and repatriate all Haitian aliens on the high seas without having the INS first screen for refugees.[11] The Haitian Centers Council, Inc., a Haitian public interest group, sued in federal district court seeking to enjoin the Coast Guard's activities on the grounds that the Order violated the Haitians' right to *nonrefoulement*,[12] as provided by the Immigration and Nationality Act (INA),[13] and by Article 33 of the 1967 Protocol Relating to the Status of Refugees (Article 33).[14] The

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> In the period immediately following the coup, massacre and widespread killings were the order of the day. Since then, techniques have become more refined but similarly brutal. Selected assassinations, disappearances, severe beatings and political unrest continue. Entire neighborhoods, particularly in the poor and populous shantytowns of Port-au-Prince and across the countryside that voted for Aristide almost unanimously, have been targeted for particularly brutal and concentrated attacks.

Id. In the 8 months following the September 30, 1990 overthrow of Aristide, the United States interdicted 35,000 Haitians. Brief for Petitioner at 3, *Sale* (No. 92-344).

10. *Sale*, 113 S. Ct. at 2554-55. In an attempt to safely process the Haitians, the United States established temporary housing facilities at the United States Naval Base in Guantanamo, Cuba, capable of accommodating 12,500 persons. The rate of illegal Haitian migration, however, continued to escalate. In the first 20 days in May 1992, the Coast Guard intercepted approximately 10,500 Haitians. At the end of May, the United States declared that the Guantanamo facilities could no longer house any more Haitians. Brief for Petitioner at 6, *Sale* (92-344).

11. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). President Bush addressed the United States' obligations under international law. The Order states: "(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United States Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States." *Id.*

12. Nonrefoulement is rooted in the French verb refouler, which means "to drive back or repel." LAROUSSE MODERN FRENCH-ENGLISH DICTIONARY 607 (1978). In the present context, nonrefoulement refers to the prohibition on the forced repatriation of refugees to countries where persecution awaits them. *See Aliens and the Duty of Nonrefoulement*, *supra* note 6.

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

14. *See* Haitian Centers Council, Inc. v. McNary, No. 92 CIV 1258, 1992 WL 155853 (E.D.N.Y. Apr. 6, 1992), *rev'd in part*, 969 F.2d 1350 (2nd Cir. 1992), *rev'd*, Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993); Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987), Haitian

district court denied the plaintiff's claim for relief, and held that the INA applied only within United States territory.[15] On expedited appeal, the United States Court of Appeals for the Second Circuit reversed the district court's decision.[16] Judge Pratt, writing for the court,[17] found that Section 243(h) of the INA, and Article 33, apply to all aliens regardless of their location.[18] The Second Circuit's holding conflicted with prior decisions in the Eleventh and District of Columbia Circuits.[19] The Supreme Court granted certiorari, and in an opinion by Justice Stevens[20] reversed the Second Circuit's decision, *holding* that neither Section 243(h), nor Article 33, apply to the actions of the Coast Guard on the high seas. *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993).

The Second World War precipitated an immigration crisis as millions of refugees surged across national boundaries to escape Nazi oppression.[21] In response, the United States and several European countries drafted the 1951 Convention Relating to the Status of Refugees (Convention)[22] for the protection of peoples fleeing persecution. The Convention seeks to "assure the widest possible exercise of [refugees'] fundamental rights and freedoms."[23] Article 33 of the Convention

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Refugee Center, Inc. v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd*, 949 F.2d 1109 (11th Cir. 1991); *cert. denied*, 112 S. Ct. 1245 (1992). In all, the plaintiffs claimed that the interdiction program violated the following: 1) § 243(h)(1) of the INA; 2) Art. 33 of the 1951 Convention Relating To the Status of Refugees; 3) the U.S.-Haiti Agreement; 4) the Administrative Procedure Act; and 5) the Equal Protection Component of the Fifth Amendment.

15. *Haitian Centers Council*, No. 92 CIV 1258, 1992 WL 155853 at *12.

16. Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1367 (2d Cir. 1992) [hereinafter *HCC II*].

17. Judge Newman concurred in a separate opinion, *id.* at 1368-69; Judge Walker dissented, *id.* at 1375-77.

18. *Id.* at 1367.

19. In particular, the Second Circuit's holding conflicted with the decision in Haitian Refugee Center v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), and the holding in Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part).

20. Justice Stevens was joined by Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas. Justice Blackmun produced the sole dissent.

21. *Aliens and the Duty of Nonrefoulement*, *supra* note 6.

22. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 2545 [hereinafter Convention].

23. *Id.* pmbl..

duty of *nonrefoulement* extended to the high seas, thereby preventing the Coast Guard from repatriating the Haitian immigrants.[35]

The District of Columbia Circuit was the first federal appellate court to consider the issue. In *Haitian Refugee Center v. Gracey*, the plaintiff alleged that the interdiction program violated Section 243(h) and Article 33.[36] The court, however, found no evidence indicating Congress' intent to apply Section 243(h) extraterritorially when the Refugee Act was passed.[37] On the contrary, the court found that by placing Section 243(h) in Part V of the INA, Congress intended a domestic application, as Part V's provisions only applied to aliens within the United States.[38]

Similarly, the court determined that the negotiating history of the Convention demonstrated that Article 33 was not intended to provide any rights outside a host country's borders.[39] The court also noted that the

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35. *See supra* note 34.

36. *Gracey*, 809 F.2d at 797. In all, the plaintiffs alleged that the interdiction violated the following: (1) the Refugee Act; (2) Due Process under the Fifth Amendment; (3) the Protocol, and (4) the Extradition Treaty between the United States and Haiti; and the extradition statute 18 U.S.C. § 3181. *Id.* at 797-98.

37. *Id.* at 841. The court's analysis of § 243(h) and Article 33 appear in Judge Edwards' opinion, concurring in part and dissenting in part. Judge Bork, writing for the court, and Judge Buckley, concurring, determined that the issue of standing prevented the court from reaching the merits of the case.

38. *Id.* at 838.

39. *Id.* at 840. The court based its finding on the final reading of the draft Convention which occurred on July 25, 1951. *Gracey*, 809 F.2d at 840 n.133. The relevant discussion concerning the scope of Article 33, which occurred on July 25, 1951, was as follows:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading [CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS SUMMARY RECORD OF THE 16TH MEETING, at 6 U.N. Doc. A/CONF.2/SR.16, (July 11, 1951)] the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted to a country, whereas the word "return" ("refoulement") related to a refugee already within the territory but not yet a resident there. According to that interpretation, Article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.
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> He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in Article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

President of the United States acceded to Article 33 with the understanding that it "worked no substantive change in existing immigration law," and that at the time of accession Section 243(h) did not apply outside the United States.[40] Accordingly, the court denied the plaintiff's claim for relief and held that Section 243(h) did not apply to the high seas.[41]

In *Haitian Refugee Center, Inc. v. Baker*, another Haitian public interest group challenged the interdiction program on the grounds that it violated the INA.[42] In particular, the plaintiff argued that by deleting the words "within the United States" in Section 243(h), Congress intended the Refugee Act to expand the scope of Section 243 to include aliens outside the United States.[43] In considering the claim, the Eleventh Circuit followed the reasoning of the D.C. Circuit. The court found that the placement of Section 243(h) in Part V of the INA indicated that Section 243(h) should be applied to aliens in the United States.[44] Thus, the *Baker* court joined the *Gracey* court in narrowly construing Section 243(h).

> At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.
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> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on the record that the Conference was in agreement with the interpretation that the possibility of mass migration across frontiers or of attempted mass migrations was not covered by Article 33.
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> There being no objection, the PRESIDENT [of the Conference of Plenipotentiaries] *ruled* that the interpretation given by the Netherlands representative should be placed on the record.

CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS SUMMARY RECORD OF THE 35TH MEETING at 12, U.N. Doc. A/CONF.2/SR.35 (July 25, 1951) (emphasis in original).

40. *Id.* at 841.

41. *Id.*

42. *Baker*, 953 F.2d at 1498. In all, the plaintiffs alleged that the interdiction violated the following: (1) the Administrative Procedure Act; (2) the Haitians' rights under the Refugee Act, the executive order, the INA, and INS Guidelines; and (3) the First Amendment. *Id.* at 1505.

43. *Id.* at 1509.

44. *Id.* at 1510.

The Second Circuit, however, did not follow the decisions of the *Baker* and *Gracey* courts. In *Haitian Centers Council, Inc., v. McNary* (*HCC II*), the Second Circuit reversed the district court's finding that Section 243(h) did not apply extraterritoriality.[45] The court found that the plain and unambiguous language of Section 243(h) mandated a broad reading of its scope.[46] In particular, the court determined that by including the word "return," and by deleting the phrase "within the United States," Congress intended the statute to apply to all aliens, regardless of location.[47] According to the Second Circuit, the plain meaning of Section 243(h) outweighed the Eleventh Circuit's reliance on the statute's placement in Part V of the INA.[48]

The Second Circuit found support for its "plain meaning" argument in Article 33. The court held that Article 33, like Section 243(h), was unambiguous and applied to all refugees notwithstanding location.[49] Therefore, because Section 243(h) was amended to conform with Article 33, Section 243(h) could not have a geographic limitation.[50] The court also noted that the Convention's purposes supported a broad reading of Section 243(h).[51] The court observed that the Convention

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45. *HCC II*, 969 F.2d at 1368. At the trial level, the district court denied the plaintiffs' claim for injunctive relief, finding that § 243(h) did not apply on the high seas, and that Article 33 did not bind the United States because it is not self-executing. In rendering his decision, however, Judge Johnson denounced the apparent change in immigration policy, stating that:

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

McNary, No. 92 CIV. 1258, 1992 WL 155853, at *12.

46. *HCC II*, 969 F.2d at 1361.

47. *Id.* at 1358.

48. *Id.* at 1359-60.

49. *Id.* at 1366.

50. *Id.*

51. *HCC II*, 969 F.2d at 1363.

was designed to provide refugees "with the widest possible exercise of fundamental rights and freedom."[52]

In its analysis, the Second Circuit addressed the *Gracey* court's finding that the negotiating history of the Convention indicated that Article 33 did not apply outside a contracting state's borders. Although the Second Circuit found the D.C. Circuit's interpretation to be a fair one, the court determined that a contrary interpretation existed.[53] The Second Circuit suggested that the negotiating history might have merely demonstrated a dissenting opinion of a minority of the contracting states, and that the Convention never incorporated the view.[54] The court, however, concluded that a debate over unclear testimony was pointless.[55] Ambiguous legislative history could not outweigh an unambiguous statute, as doing so would "turn statutory construction on its head."[56]

The Second Circuit also rejected the Government's claim that a presumption against the extraterritorial application of domestic laws should be applied.[57] The court found the presumption inapplicable because Congress intended to extend Section 243(h) to the high seas by deleting the phrase "within the United States."[58] Moreover, the Court noted that the purpose of the presumption is to prevent conflicts between the laws of the United States and those of other nations.[59] The application of Section 243(h) to the high seas, the court concluded, did not create a risk of conflict with Haitian law.[60]

Finally, the court rejected the Government's argument that Section 243(h) regulated only the Attorney General, and not the President's power to regulate immigration through other government officials.[61] The court determined that under Section 1103(a) of the INA, Congress intended the Attorney General to act as an agent of the President.[62] Therefore, the court doubted that the return of refugees to persecution "was forbidden

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52. *Id.*
53. *Id.* at 1365.
54. *Id.*
55. *Id.* at 1366.
56. *HCC II*, 969 F.2d at 1366.
57. *Id.* at 1358
58. *Id.*
59. *Id.*
60. *Id.*
61. *HCC II*, 969 F.2d at 1360.
62. *Id.*

if done by the attorney general but permitted if done by some other arm of the executive branch."[63]

In the noted case, the Supreme Court first looked to the overall structure of the INA to determine the appropriate scope of Section 243(h). In particular, the Court addressed Section 1103(a) which, according to the Second Circuit, indicated an agency relationship between the President and Attorney General.[64] The Supreme Court, however, held that Section 1103(a), along with other provisions of the INA, conferred particular responsibilities on the President and other executive officers.[65] Thus, the INA's reference to the Attorney General could not reasonably be construed as applying to the President.[66] Moreover, the Court found that the reference to the Attorney General suggested that Section 1103(a) only applied to her ordinary responsibilities of conducting deportation and exclusion hearings.[67] These proceedings, the court noted, fell under Part V of the INA, which contained "no reference to a possible extraterritorial application."[68]

The Court reasoned, however, that even if Part V of the Act did not confine the Attorney General's conduct to the borders of the United States, a presumption against the extraterritorial application of United States' laws prevented the extension of Section 243(h) to the high seas.[69] The Supreme Court held that the Second Circuit had incorrectly relied on international conflict of laws as the sole basis for deciding not to invoke the presumption.[70] Relying on *Smith v. United States*,[71] the Court found that "the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations."[72]

The Supreme Court then examined the language of Section 243(h). In particular, the Court analyzed the phrase, "[t]he Attorney General shall not deport or return any alien."[73] In so doing, the Court reasoned that

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63. *Id.*

64. *Id.*

65. *Sale*, 113 S. Ct. at 2559.

66. *Id.*

67. *Id.* at 2560.

68. *Id.*

69. *Id.*

70. *Sale*, 113 S. Ct. at 2560.

71. Smith v. United States, 113 S. Ct. 1178, 1183 n.5 (1993).

72. *Sale*, 113 S. Ct. at 2560.

73. *Id.*

if the word return had its ordinary meaning, and therefore applied to every alien regardless of location, the word "deport" would be redundant.[74] Return would encompass the act of deporting by definition.[75] Therefore, rather than find the phrase to be redundant, the Court concluded that Congress merely intended both words to reflect the traditional distinction between two separate immigration proceedings: deportation and exclusion.[76] According to the Court, Section 243(h) prohibits the deportation of refugees within the United States, and prevents the return of refugees excluded at the border.[77] Both proceedings, the court noted, were domestic and had no extraterritorial application.[78]

The Court found textual support for its interpretation of Section 243(h) in the history of the Refugee Act. The Supreme Court observed that prior to 1980, Section 243(h) applied to aliens "within the United States."[79] The Court further explained that in *Leng May Ma v. Barber*,[80] it had interpreted the phrase had been interpreted as including only aliens that had physically entered the United States.[81] Thus, aliens that had not crossed the border were not protected by Section 243(h).[82] The *Sale* Court concluded that *Leng May Ma* had created two distinct classes of domestic aliens: those physically present in the United States, and those detained at the border.[83]

Against this historical backdrop, the Supreme Court found that the 1980 Refugee Act eliminated *Leng May Ma's* distinction between these

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74. *Id.*

75. *Id.*

76. *Id.* Illegal aliens that have crossed the United States border are subject to deportation proceedings. 8 U.S.C. § 1252. Aliens that have been detained at the border, or those who have been temporarily paroled into the United States, are subject to exclusion proceedings. 8 U.S.C. § 1226. *See Sale*, 113 S. Ct. at 2553 n.5. Under each process, an alien may be removed from the United States. *Sale*, 113 S. Ct. 2552-53. Accordingly, aliens within the United States are deported, whereas aliens at the border are excluded. *Id.*

77. *Sale*, 113 S. Ct. at 2560.

78. *Id.*

79. *Id.* at 2561.

80. Leng May Ma v. Barber, 357 U.S. 185, 186 (1958).

81. *Sale*, 113 S. Ct. at 2560-61.

82. *Id.* at 2561.

83. *Id.*

classes of aliens.[84] The Court held that by adding the word return, and by deleting the phrase "within the United States," Congress expanded the protection of Section 243(h) to include aliens at the border.[85] The Court, however, found that Section 243(h)'s protection did not extend past the border region and, therefore, did not include Haitians on the high seas.[86] Furthermore, the legislative history of the Refugee Act did not contradict this interpretation, leading the Court to conclude that "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect."[87]

Similarly, the Supreme Court found nothing in either the text or history of Article 33 indicating extraterritorial application.[88] In fact, the Court found affirmative evidence to the contrary in Article 33's second paragraph (Article 33.2), which permits a country to repatriate any alien who poses a dangerous threat to "the country in which he is."[89] According to the Court, if the first paragraph of Article 33 (Article 33.1) applied extraterritorially, the application of Article 33.2 would give rise to a strange anomaly: a country would not be able to repatriate a dangerous alien on the high seas, and would have to wait for the alien to reach its borders.[90] Thus, rather than hold Article 33.1 inconsistent with Article 33.2, the Supreme Court found it more likely that because Article 33.2 applies to aliens in the country in which he is, Congress intended Article 33.1 to apply domestically as well.[91]

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84. *Id.*

85. *Id.*

86. *Sale*, 113 S. Ct. at 2561.

87. *Id.*

88. *Id.* at 2562.

89. *Id.* at 2563. The full text of Article 33, ¶ 2, reads as follows:

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

Convention, *supra* note 22, art. 33., ¶ 2.

90. *Sale*, 113 S. Ct. at 2563.

91. *Id.*

The Court found further support for its interpretation of Article 33 by the inclusion of the word *refouler*.[92] The Court found that the French word *refouler* means to repulse, repel, or drive back, and does not equate to the English word return.[93] Therefore, the Court reasoned that the parenthetical placement of *refouler* next to return implied that return did not possess its ordinarily broad definition.[94] Instead, *refouler* caused return to assume a narrow meaning that the Court described as "a defensive act of resistance or exclusion at the border rather than an act of transporting someone to a particular place."[95] Thus, the Court held that within the context of Article 33, return had a distinct legal construction that carried no extraterritorial connotations.[96]

Finally, the Supreme Court observed that the history of the Convention also mandated a narrow reading of Article 33.[97] The Court noted that at a negotiation conference of plenipotentiaries, the Swiss delegate stated that he understood "expel" and return to apply only to refugees who had actually crossed a country's borders.[98] No delegate disagreed with his view, and the remarks were placed on the record to "dispel any possible ambiguity, and to reassure his Government."[99] As such, the Supreme Court found that a consensus had been reached between those nations in attendance at the conference.[100] Therefore, the Court concluded that the Convention's history also demonstrated that Article 33 should not apply to aliens located outside a country's borders.[101]

The Supreme Court's opinion in the noted case appears flawed in two respects. First, several of the Court's conclusions are not grounded in reasoned legal analysis. For example, when the Court examined the text of Section 243(h), it found that return could not assume its ordinary

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92. *Id.*

93. *Id.* at 2564.

94. *Id.* at 2563-64.

95. *Sale*, 113 S. Ct. at 2564.

96. *Id.*

97. *Id.*

98. *Id.* (citing CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS SUMMARY RECORD OF THE 35TH MEETING at 12, U.N. Doc. A/CONF.2/SR.35 (July 25, 1951)).

99. *Id.* at 2566.

100. *Sale*, 113 S. Ct. at 2566.

101. *Id.*

meaning because it would render the word deport redundant.[102] Without further explanation, the Court concluded that the inclusion of both return and deport reflected the traditional distinction between deportation and exclusion proceedings.[103]

Although it may be safely assumed that deport refers to the process of deportation, it cannot be assumed with certainty that return refers solely to exclusion proceedings. If Congress intended Section 243(h) to apply to no proceedings other than deportations and exclusions, it is likely that Congress would have included the word "exclude," rather than the broader word: return. Therefore, the omission of the word exclude implies a Congressional intent to give return a broader meaning than exclude. Although the Court noted that the ordinary meaning of return is too expansive, and makes deport redundant, it adopted a narrow interpretation without adequately considering that Congress may have intended a construction of return narrower than its ordinary meaning, yet a broader definition than exclude. That is, Congress may have included deport in reference to deportation proceedings, while including return to encompass exclusion proceedings as well as other immigration processes.

Similarly, the Supreme Court failed to support its conclusion that the history of the Refugee Act reflects a domestic application of Section 243(h). Although the Court grounded its analysis in *Leng May Ma v. Barber*, its reliance on the case is misplaced. In *Leng May Ma*, the Court considered the 1952 version of Section 243(h), and held that the phrase "within the United States" did not apply to aliens detained at the border.[104] The *Sale* Court, however, used this holding as a basis for concluding that by removing the words "within the United States," the 1980 Refugee Act necessarily eliminated the distinction between aliens residing in the United States, and aliens at border. The Court's conclusion, standing alone, does not logically follow from the *Leng May Ma* holding. The mere removal of "within the United States" in no way necessitates a finding that Congress may have intended Section 243(h) to extend no farther than the border region. The Court should have considered that by deleting this phrase, Congress intended to remove the distinction between all types of aliens: those within the country, those at the border, and those on the high seas.

The Supreme Court's analysis of Article 33's text is also unconvincing. The Court found that since Article 33.2 contained a

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102. *Id.*

103. *Id.*

104. *Id.*

geographic limitation, Article 33.1 must as well.[105] Without such a reading, the Court argued, a strange anomaly would arise: a dangerous alien on the high seas would receive the protection of Article 33.1, whereas one residing within a country would not.[106] That result is not anomalous. An alien floating on international waters cannot threaten a country in a manner consistent with practical immigration concerns. Although the drafters could have expanded Article 33.2 to include aliens on the high seas, nothing is strange about requiring a country to wait for an alien to reach its borders before deciding whether he or she is dangerous. If anything, the temporary delay in repatriation follows the design of Article 33: to provide refugees with the "widest possible exercise of freedom."[107]

The second major flaw in the Court's opinion rests in its failure to follow basic principles of statutory construction. When interpreting a statute, words are to be given their ordinary meaning.[108] If the words are unambiguous, then no further judicial inquiry is required.[109] A court may only stray from the plain meaning of a statute, and engage in other canons of statutory construction, to determine whether a clearly expressed legislative intent to the contrary exists.[110]

In the noted case, the Court failed to abide by the fundamental principles of statutory interpretation. Without considering whether the language in Section 243(h) was ambiguous, the Court immediately turned to an alternate canon of statutory construction. The Court applied a presumption against the extraterritorial application of domestic laws, and required the Haitians to produce affirmative evidence demonstrating that Congress intended to expand Section 243(h) to include the high seas.[111]

The Court's invocation of the presumption against extraterritoriality is erroneous for two reasons. First, the presumption is inapplicable because it constitutes a canon of statutory construction "whereby unexpressed congressional intent may be ascertained."[112] Congress' intent in its enacting Section 243(h) is clear. The Refugee Act

105. *Sale*, 113 S. Ct. at 2563.

106. *Id.*

107. Convention, *supra* note 22, pmbl..

108. *HCC II*, 969 F.2d at 1360.

109. *Id.* at 1358.

110. *Id.*

111. *Sale*, 113 S. Ct. at 2561, 2563, 2567.

112. *HCC II*, 969 F.2d at 1358.

> rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States's responsibility for the consequences of its inaction would have been any less if the United States had stopped the refugee ships before they reached our territorial waters....Such a contention makes a sham of our international treaty obligation and domestic laws for the protection of refugees.[125]

By holding that Section 243(h) and Article 33 do not apply to the high seas, the Supreme Court released the United States from its international obligation to protect refugees. Section 243(h) is now a meaningless statute, and provides no guarantee that refugees will not be delivered back into the hands of their persecutors. In light of the United States's historic commitment to the rights of refugees, Congress should amend Section 243(h) to conform with the core purpose of the Convention: to provide refugees with the greatest possible rights and freedoms.[126] Moreover, by interpreting Article 33 narrowly, the Supreme Court has blazed a trail for other nations that may, in the future, question their obligations under the Convention. Congress should amend Section 243(h) quickly to demonstrate that the United States' international commitment to the protection of refugees does not depend on an alien's location. Rather, Congress should remember the *St. Louis*, and state affirmatively that the duty of *nonrefoulement* is grounded in a concern for fundamental human rights, and not geographical line-drawing.

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125. *Baker*, 949 F.2d at 1112 (Hatchett, J., dissenting).

126. Convention, *supra* note 22, pmbl..