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Haitian Refugee Center, Inc. v. James Baker, III: The Dred Scott Case of Immigration Law

Thomas David Jones*

I. Introduction

"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 . . . ."*

On December 16, 1990, Jean-Bertrand Aristide, a Roman Catholic priest and populist politician, was elected president of the Haitian republic. Aristide was the first democratically elected president in Haiti's politically turbulent history. Subsequently, on September 29, 1991, less than a year later, a military junta composed of Brigadier General Raoul Cedras, Colonel Aliz Silva, and Colonel Henri Marc Charles seized political power by coup d'etat. The overthrow of the Aristide regime precipitated an internal armed conflict that culminated in the weakening of the rule of law and the suppression of fundamental human rights.4

* Visiting Professor of Law, University of Lagos, Lagos Nigeria; Associate Professor of Law, Southern University Law Center; B.A., Case Western Reserve University (1975); J.D., Howard University School of Law (1978); LL.M., Harvard Law School (1979).

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3. Id.

4. See generally UNITED NATIONS PRESS RELEASE, Department of Public Information, GA/8233 (Oct. 11, 1991); COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991.
Both the United Nations (hereinafter "UN") and the Organization of American States (hereinafter "OAS") responded to the violent political upheaval by passing resolutions in support of the restoration of democracy and condemning the coup d'état. The UN and OAS demanded the return of Aristide to power and declared the Cedras regime illegal under international law. Many of the member states of these international organizations applied economic sanctions against the Haitian military junta in an effort to force the restoration of democracy under Aristide's leadership. An embargo was instituted by the OAS and the United States against the Cedras regime. In May 1992, OAS foreign ministers agreed that it had become necessary to strictly impose sanctions against the military regime in Haiti. To date, the junta has refused to reinstate President Aristide. The foreign ministers now hope that intensification of sanctions will force the military-backed leadership to restore Aristide to power.

As a by-product of the political conflict in Haiti, thousands of Haitians have fled and continue to flee the country in search of refuge in the United States. Approximately 30,000 Haitian refugees have been intercepted by the United States Coast Guard. Since May 15, 1992, the United States Coast Guard has intercepted 2,106 Haitian refugees.
tians on the high seas. As is demonstrated in this article, the efforts of these Haitian refugees to gain admission to the United States by claiming political refugee status have been fraught with difficulty. The preceding assertion is buttressed by the Eleventh Circuit's decisions in the appeals litigated by the Haitian Refugee Center, Inc. (hereinafter "HRC") discussed herein.

A. Background of HRC Litigation

On November 19, 1991, the Haitian Refugee Center, Inc. filed a verified complaint in the United States District Court for the Southern District of Florida requesting declaratory and injunctive relief against the United States government and those agencies engaged in the interdiction of vessels carrying Haitian refugees on the high seas. The plaintiffs averred that Executive Order 12324, Interdiction of Illegal Aliens, did not permit the forcible return to Haiti of refugees aboard these vessels. Further, the plaintiffs alleged that the Immigration and Naturalization Service (hereinafter "INS") had promulgated guidelines to ensure the identification and protection of refugees. However, defendants failed to follow these

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12. OAS Ministers Tighten Squeeze on Haiti, supra, note 9; see also Douglas Farah, Aristide Denounces U.S. Moves on Haiti, WASH. POST, Feb. 13, 1992, at A33 (approximately 12,000 Haitians were intercepted by the U.S. Coast Guard); see U.S. Argues for Continued Return of Haitians, WASH. POST, Feb. 15, 1992, at A5 (more than 15,000 Haitians fled the country after the military coup); but see Howard French, Haiti's Plight — Aristide Seeks More than Moral Support, N.Y. TIMES, Sept. 27, 1992, at 5.


14. The district court described HRC as follows:

HRC is a nonprofit membership corporation located in Miami, Florida. The HRC's purpose, as set forth in its Bylaws, is to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees. It has brought lawsuits and procedures and [sic] practices of the Immigration and Naturalization Service (hereinafter "INS") in processing Haitian refugee applications and has been recognized by the INS as a source of legal counsel for indigent Haitians. The HRC's membership includes Haitian refugees seeking political asylum in the United States.


15. Haitian Refugee Center, Inc., et al. v. James Baker III, et al., No. 91-2635, at 1 (S.D. Fla. Nov. 19, 1991) (Verified Complaint for Declaratory and Injunctive Relief) [hereinafter Verified Complaint]. The named defendants in the lawsuit were James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime [sic], Commandants of the United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; the United States Department of Justice; the Immigration and Naturalization Service; and the United States.


17. Supra note 15, at 2. The guidelines entitled INS Role in and Guidelines for Interdiction (Revised: September 24, 1982) provide, inter alia:

The following directives are to be followed by INS employees assigned to Coast
guidelines designed to protect the rights of potential political asylum

Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

General:
• Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.
• The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.
• The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.
• Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

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BOARDING OF VESSELS:
All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.
• INS officers and interpreters will be members of each boarding party. INS employees will not be armed.
• All initial announcements to the master, crew and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by the United States Coast Guard personnel at the time the vessel is first boarded.

AUTHORITY:
2. Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).
3. Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.

INS OFFICER RESPONSIBILITIES:
A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:
1. Name;
2. Date of Birth;
3. Nationality;
4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
5. All Documents or Evidence Presented;
6. Why did you leave Haiti;
7. Why do you wish to go to the United States;
8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.
C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as
Moreover, HRC charged that defendants were in violation of the rules of international law against refoulement as memorialized in the United Nations Protocol Relating to the Status of Refugees (hereinafter "1967 Protocol"). Also, the plaintiffs asserted that the conduct of the defendants deprived the interdicted Haitians of the protections set forth in the Refugee Act of 1980, the Immigration and Nationality Act (hereinafter "INA"), the regulations promulgated pursuant to these Acts, and the Fifth Amendment to the United States Constitution.

HRC claimed that Haitians fleeing persecution from the Cedras junta would suffer irreparable harm because their forcible return to Haiti would jeopardize both their liberty and lives. In addition, HRC alleged the threat of irreparable harm and direct injury by the defendants because the actions of the government thwarted its organizational purpose. Because of the defendants’ recalcitrance in denying HRC access to the interdictees, HRC averred that it was unable to effectively provide assistance of counsel to those refugees who


D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a bona fide claim to refugee status may exist, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person’s claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim.)


claimed political refugee status.\textsuperscript{22} Lastly, HRC alleged that the "defendants' failure to comply with INS guidelines . . . threatens to deprive the HRC of the benefits that would inure to it from the presence of these Haitians, who are members of HRC, in the United States."\textsuperscript{23}

In its amended and second amended complaints, HRC contended that the First and Fifth Amendments were violated, due to the government's refusal to allow HRC access to refugees at Guantanamo Bay and on Coast Guard cutters.\textsuperscript{24} Consequently, the refugees were denied the effective assistance of legal counsel and HRC was denied its right to association. Finally, the plaintiffs claimed that the federal Administrative Procedure Act (hereinafter "APA") provided an enforceable legal remedy that allowed the court to review the defendants' conduct pursuant to the law of the 1967 Protocol, Executive Order 12324, the INA, the Refugee Act of 1980, the INS Guidelines, and the First and Fifth Amendments.\textsuperscript{25}

1. \textit{HRC I}.—On December 3, 1991, the district court granted preliminary injunctive relief to the plaintiffs, prohibiting the defendants from repatriating Haitians in their custody. These Haitian refugees were aboard Coast Guard vessels and detained at Guantanamo Bay, Cuba.\textsuperscript{26} In \textit{HRC I}, the defendants sought expedited review in the U.S. Court of Appeals for the Eleventh Circuit.\textsuperscript{27} On December 17, 1991, in a brief one and one-half page opinion, the court of appeals reversed the district court's order granting injunctive relief. The district court, applying the standard for granting preliminary injunctions,\textsuperscript{28} found that there was a substantial likelihood that the plaintiffs would prevail on two of their legal claims. Clyde Atkins, district court judge, ruled that there was a substantial likelihood that

\begin{itemize}
  \item The legal standard which must be met for a movant to prevail on a preliminary injunction is as follows:
    \begin{enumerate}
    \item a substantial likelihood of success on the merits;
    \item a substantial threat of suffering irreparable harm or injury;
    \item balancing the equities, the threatened injury to the moving party must outweigh the potential harm an injunction would cause to the nonmoving party; and
    \item consideration of the impact the injunction would have on the public interest.
    \end{enumerate}
\end{itemize}
HRC would prevail on its allegation that its First Amendment rights to association and counsel were violated because of the government's refusal to allow HRC access to the detained Haitians. Also, Judge Atkins held that the plaintiffs would probably prevail on their claim of a right to nonrefoulement under Article 33 of the 1967 Protocol. The court of appeals rejected both of the preceding legal rulings of the district court.

Accepting the government's argument, the court of appeals held that Article 33 of the 1967 Protocol was not self-executing. No implementing legislation had been passed by Congress to give domestic legal force to the 1967 Protocol. If the 1967 Protocol were self-executing, no congressional legislative action would be necessary. The 1967 Protocol would directly afford rights to persons seeking refugee status in the United States. Individuals such as the Haitian interdics would possess the right to redress their grievances in a domestic court of law. The court of appeals suggested that Article 33 of the 1967 Protocol did not have extraterritorial effect, so the Haitians would be without a legal remedy because they had never reached the territory of the United States.

The court of appeals further decided that the First Amendment claim of HRC, asserting a right of access to the Haitian interdics, could not serve as a proper legal basis for sustaining the injunction. The relief granted by the district court's injunctive order was not related to the First Amendment allegation. The district court's order did not require the defendants to permit HRC access to the Haitians. The order simply enjoined the government from repatriating them. Thus, the district court's order failed to address the plaintiffs' First Amendment claim and the claim could not support the preliminary injunctive relief granted HRC. The court of appeals opined that the district court's refusal to grant injunctive relief based

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1. No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever from territories where his life or freedom would be threatened on account of his 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

30. HRC 1, 949 F.2d 1109, 1110, (11th Cir. 1991).

31. *Id.*

32. *Id.*

33. *Id.* at 1110-11.

34. *Id.* at 1111.

35. HRC 1, 949 F.2d 1109, 1111 (11th Cir. 1991).
on the federal APA was not before the court because the plaintiffs did not cross-appeal. The court of appeals held that a ruling on the APA claim "would constitute a holding by this court, on appeal, that the plaintiffs are entitled to injunctive relief on the APA claim as a matter of law." Accordingly, the court of appeals dissolved the preliminary injunction and remanded the case, instructing the district court to dismiss the Article 33 claim on the merits.

In a strong dissenting opinion, Judge Hatchett categorically rejected the summary analysis of the majority. He asserted that only Haitian refugees are intercepted on the high seas and repatriated to their country of origin. The district court's order did not bar the return of refugees to Haiti. It delayed their return until the asylum claims of the refugees could be properly determined by the defendants. Judge Hatchett noted that the balance of the equities was in favor of the Haitians who might suffer persecution or death if returned to the Cedras regime. Judge Hatchett accused the defendants of operating an interdiction program for the sole purpose of keeping Haitians out of the United States. By intercepting Haitians on the high seas, in international waters, the United States circumvented its international obligations under the 1967 Protocol and domestic law.

Judge Hatchett further ruled that the APA claim alleged by

36. Id. The nature of the Administrative Procedure Act [hereinafter APA] claim is not discussed in detail by the majority. However, the district court in rejecting the APA claim held:

Fourth and finally, plaintiffs contend that the Administrative Procedures Act (APA), 5 U.S.C. §§ 551 et seq., provides a source of judicially enforceable rights. Based upon our review of the law, however, we find that HRC has failed to show a substantial likelihood that the APA would provide the relief sought, primarily because it appears that the actions in question are committed to agency discretion by law, 5 U.S.C. § 701(a)(2). The statutory provisions under which the interdiction program is principally carried out provides the following:

Wherever the President finds that the entry of any aliens or of 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 nonimmigrant, or impose upon the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). By this provision, Congress has delegated to the President extremely broad discretion to act. Moreover, exercise of this discretion is not limited to circumstances defined in the statute, but rather is geared to Executive 'find[ings]' and what is 'deem[ed]' necessary or appropriate, the statute provides no discernable standards by which this court can review the challenged actions under the APA.

Order Granting Preliminary Injunctive Relief, supra, note 14, at 54-55.
37. HRC I, 949 F.2d 1109, 1111 (11th Cir. 1991).
38. Id.
39. Id.
40. Id.
41. Id.
42. HRC I, 949 F.2d 1109, 1112 (11th Cir. 1991).
43. Id.
HRC was valid and should have been reviewed by the court of appeals. HRC argued that the APA created an enforceable right which allowed HRC to challenge the conduct or actions of lower executive branch officials in their administration of the interdiction program pursuant to Executive Order 12324, the Refugee Act of 1980, and the INA. Judge Hatchett contended that there was no jurisdictional impediment forbidding consideration of the APA claim, even though the plaintiffs did not cross-appeal. The denial or grant of a preliminary injunction gives the court jurisdiction on all issues ruled upon by the district court.

In addition, Judge Hatchett concluded that Article 33 of the 1967 Protocol was self-executing and applied extraterritorially. Quoting from United States v. Postal, the Judge stated that "whether a treaty is self-executing is a matter of interpretation by the courts." He stated that a court must consider the parties' intent, the legislative history, and the subject matter of the treaty. It is difficult to determine the common intent of parties to a multilateral treaty by a textual analysis of its language. Therefore, the exercise of attempting to ascertain the common intent of the parties as reflected in the treaty’s language is the least helpful process. Judge Hatchett suggested that the majority should have considered only the subject matter, legislative history, and subsequent treaty construction. He then stated that the 1967 Protocol's subject matter revealed its self-executing nature because the treaty does not expressly call for positive legislation. The legislative history surrounding the 1967 Protocol militates in favor of self-execution. The Senate committee report recommending accession indicated that the United States was automatically bound by Articles 2 through 34 of the 1967 Protocol. Subsequent judicial construction of the 1967 Protocol supports the self-executing nature of the treaty. Several domestic judicial decisions have characterized the 1967 Protocol as self-executing, including a decision by the Board of Immigration Appeals.

As to the extraterritorial effect of the 1967 Protocol, Judge Hatchett relied on the plain meaning of the language of the treaty,

44. Id. at 1112-13.
45. Id.
46. Id. at 1113.
47. HRC I, 949 F.2d 1109, 1114 (11th Cir. 1991); United States v. Postal, 589 F.2d 862 (5th Cir. 1979).
48. HRC I, 949 F.2d 1109, 1114 (11th Cir. 1991); United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).
49. HRC I, 949 F.2d 1109, 1114 (11th Cir. 1991).
50. Id. at 1114-15.
51. Id. at 1114.
52. Id.
53. Id. at 1114-15; see Matter of Dunbar, No. 2192, slip op. at 313 (Interim Decision of Board of Immigration Appeals, Apr. 17, 1973).
which states, *inter alia*: "No contracting state shall expel or return a refugee fleeing bona fide persecution, in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened." Judge Hatchett pointed to the fact that the United Nations High Commissioner for Refugees adheres to the legal interpretation that the nonrefoulement principle applies extraterritorially on the high seas.

Finally, Judge Hatchett decided that HRC had a substantial likelihood of success on its First Amendment right of access claim. Relying on *Jean v. Nelson*, he argued that HRC, as counsel, had a right to advise the Haitians of their rights. HRC would act without remuneration and as an exercise of its First Amendment right to engage in political speech. The fact that the Haitians were not within the United States should not have diminished HRC's right of access. HRC may invoke its constitutional rights which were infringed by the government outside the United States. The lone dissenter observed that Guantanamo Bay is under the control and complete jurisdiction of the United States. Judge Hatchett agreed with the majority that Guantanamo Bay was a nonpublic forum. Nevertheless, the government acted unreasonably in denying HRC access to those Haitians who needed counseling. The government might have restricted HRC's access by application of "reasonable, content-neutral, time, place and manner restrictions." Hence, Judge Hatchett was of the opinion that the preliminary injunction should not have been dismissed until the legal issues in the case had been resolved on the merits.

2. *HRC II.*—After the court of appeals rendered its decision on December 17, 1991, the district court issued a temporary restraining order to allow reconsideration of the plaintiffs' APA claim. The defendants requested a stay of the order pending appeal, but the motion for stay was denied. The temporary restraining order, which prevented the repatriation of Haitian interdictees, spawned yet another appeal. In *HRC II*, the court of appeals, in accepting jurisdiction to consider the validity of the temporary restraining order, stated that temporary restraining orders

54. HRC I, 949 F.2d 1109, 1115 (11th Cir. 1991).
55. Id.
56. *Id.* at 1116; *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984).
57. HRC I, 949 F.2d 1109, 1116 (11th Cir. 1991).
58. Id.
59. Id.
60. *Id.* at 1116-17.
61. HRC II, 950 F.2d 685 (11th Cir. 1991).
62. *Id.* at 686.
63. *Id.*
were not ordinarily appealable. However, the majority of the court ruled that the district court's order had the effect of a preliminary injunction. Therefore, the court of appeals held that its exercise of jurisdiction was not controlled by the district court's erroneous designation. Although characterized as a temporary restraining order, the district court issued the order after briefing and a full hearing on the merits. The court of appeals emphasized the fact that the APA claim had been rejected by the district court in its December 3, 1991 decision. The district court had held that there was no substantial likelihood of success by plaintiffs on the APA claim at trial. The court of appeals then concluded:

... [T]here is a strong likelihood that the defendants [emphasis added] will prevail on [the APA] claim for the reasons stated by the district court in its original Order Granting Preliminary Injunctive Relief dated December 3, 1991. We conclude that the appellants' motion seeking a stay of that order pending appeal is due to be granted.

Consequently, the court of appeals stayed and suspended the district court's temporary restraining order pending appeal.

As in HRC I, Judge Hatchett dissented. He asserted that on December 17, 1991, the majority of the court dissolved the December 3, 1991 preliminary injunction. At that time, the court of appeals stated that it could not reach the APA issue because plaintiffs had not cross-appealed. The majority opinion of December 17, 1991 suggested that the APA claim needed development in the district court. Thus, the district court properly concluded the APA claim was ripe for reconsideration. Judge Hatchett complained that the majority inappropriately reviewed the APA claim and erroneously held that the district court considered the claim in its December 3, 1991 ruling. In fact, the district court had considered a different APA claim from the one decided on December 3, 1991. Specifically, he wrote:

The district court makes clear that its previous ruling on the APA claim, which this court earlier refused to review, was based

64. Id. Again, the court of appeals opinion is approximately one page.
65. Id.
67. Id.; see district court's reasons for denying APA claim, supra note 36.
68. HRC II, 950 F.2d 685, 686 (11th Cir. 1991).
69. Id. at 687.
70. Id.
71. Id.
72. Id.
73. HRC II, 950 F.2d 685, 687 (11th Cir. 1991).
74. Id.
upon the discretion which Congress had delegated to the President; whereas, the district court is now considering the APA claim based on 'subordinates discretion or lack thereof in following program procedures and guidelines.' In 91-6060, this court refused to reach the APA claim under any theory; now, through some procedure here before unknown to the law, the majority is able not only to reach the APA claim, but to decide that the claim is without merit even though no hearing has been held and the district court has made no factual findings or legal conclusions.\(^76\)

Judge Hatchett stated that the denial of the motion for stay pending appeal was appropriate and the appeal should have been dismissed because temporary restraining orders are not appealable under the law of the circuit.\(^76\)

3. **HRC III.**—The final appeal in the HRC trilogy was resolved by the court of appeals on February 4, 1992. In **HRC III**, the court of appeals completed its disposition of the case on the merits by ordering the district court to dismiss the action for failure to state a claim upon which relief could be granted.\(^77\) Subsequent to its December 19, 1991 order staying the district court’s temporary restraining order of December 17, 1991, the district court granted “limited preliminary injunctive relief” on December 20, 1991.\(^78\) This injunctive relief was predicated upon HRC’s claim that it possessed a First Amendment right of access to the interdicted Haitians for the purpose of counseling them.\(^79\) The district court ordered the government to grant HRC meaningful access to the Haitians limited by reasonable, content-neutral, time, place and manner restrictions.\(^80\) The district court denied relief to the plaintiffs based on alleged rights enforceable under Executive Order 12324, the INA, and the Refugee Act of 1980.\(^81\) On December 23, 1991, the district court granted further preliminary injunctive relief based on plaintiffs’ APA claim of judicial review. Again, the district court ordered the defendants to refrain from repatriating Haitians pending resolution

\(^75\) Id. at 687-88. 
\(^76\) Id. at 688. 
\(^77\) HRC III, 953 F.2d 1498, 1515 (11th Cir. 1992). 
\(^78\) Id. at 1504; see Haitian Refugee Center Inc., et al. v. James Baker III, et al., No. 91-2635 (S.D. Fla. Dec. 20, 1991) (Order Granting Limited Preliminary Injunctive Relief) [hereinafter Order Granting Limited Injunctive Relief]. 
\(^79\) HRC III, 953 F.2d 1498, 1515 (11th Cir. 1992); see Order Granting Limited Injunctive Relief, supra note 78, at 8-10 (“HRC lack[s] . . . alternative means of exercising its first amendment right and . . . HRC’s interest would further government’s interest in assuring that no political refugee was wrongfully repatriated.”). 
\(^80\) HRC III, 953 F.2d 1498, 1515 (11th Cir. 1992); see Order Granting Limited Injunctive Relief, supra note 78, at 10. 
\(^81\) HRC III, 953 F.2d 1498, 1515 (11th Cir. 1992); see Order Granting Limited Injunctive Relief, supra note 78, at 10.
of all claims on the merits. The defendants appealed from all dis-
trict court rulings granting injunctive relief. The plaintiffs cross-ap-
pealed contesting the district court's denial of relief based on the
Executive Order 12324, the INA and the Refugee Act of 1980.

The court of appeals concluded that the APA did not authorize
judicial review of the defendants' action pursuant to the law re-
flected in the 1967 Protocol, Executive Order 12324, the INA as
amended by the Refugee Act of 1980, or the INS Guidelines. First,
the majority held that judicial review under the APA was precluded
by 5 U.S.C. § 702 (a) 1 because the provisions of the INA provided
the exclusive means for judicial review for plaintiffs. The plaintiffs
claimed that 8 U.S.C. § 1253(h) had been violated by the defend-
ants by its return of Haitians who were political refugees to Haiti.
The court of appeals ruled that § 1253(h) was included in Part V of
the INA, which concerns the deportation of aliens, and that the de-
portation provisions of Part V apply only to aliens within the bound-
aries of the United States. Furthermore, the majority of the court
held it logically followed that 8 U.S.C. 1252(b) of Part V, which
delineates the process or procedures for determining deportability, is

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82. HRC III, 953 F.2d 1498, 1504 (11th Cir. 1992).
83. Id.
84. Id. at 1505-06. Title 5 U.S.C. § 702 (1976) of the APA provides, in relevant part:
“A person suffering legal wrong because of agency action, or adversely affected or aggrieved
by agency action within the meaning of a relevant statute is entitled to judicial review
thereof.” However, 5 U.S.C. § 701(a)(1) and (2) (1966) create exceptions to the right of
judicial review permitted by § 702. Section 701(a)(1) and (2) (1976) state:
(a) This chapter applies, according to the provisions thereof, except to the extent
that
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.
provides, in toto:
(1) 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 Attor-
ney General determines that such alien's life or freedom would be threatened in
such country on account of race, religion, nationality, membership in a particu-
lar social group, or political opinion.
(2) Paragraph (1) shall not apply to any alien if the Attorney General determines
that:
(A) the alien ordered, incited assisted, or otherwise participated in the
persecution of any person on account of race, religion, nationality, mem-
b双眼皮手术是科技进步的一部分，是整形外科医生和患者之间的合作。双眼皮手术通常在局部麻醉下进行，手术过程包括在眼睛上方的皮肤上做切口，然后将多余的皮肤和脂肪去除。手术后，患者需要遵循医生的指示进行护理，包括使用抗生素眼药膏来预防感染。由于手术过程相对简单，且恢复时间较短，因此越来越多的患者选择进行双眼皮手术。
applicable solely to aliens in the United States. Moreover, the court explained that 8 U.S.C. §1105 (a) sets out the exclusive procedure for judicial review of all final deportation orders issued pursuant to §1252(b). Section 1105(a) states that such procedures for judicial review apply only to aliens within the United States.

The court of appeals ruled that the judicial review procedures that applied to aliens within the United States could be contrasted with the requirements of 8 U.S.C. § 1157, which is applicable to refugees seeking admission to the United States. Section 1157 gives the Attorney General limited discretion to admit refugees. However, there is no right to judicial review provided for those who are denied admission. The substantive legal requirements of §

86. HRC III, 953 F.2d 1498, 1506 (11th Cir. 1992). Title 8 U.S.C. § 1252(b) (1954) provides, inter alia:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.


The procedure prescribed by, and all provisions of Chapter 158 of title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of the title or comparable provisions of any prior Act.


Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible except as otherwise provided under paragraph (3) as an immigrant under this chapter.

89. HRC III, 953 F.2d 1498, 1506 (11th Cir. 1992).
1252(b) and the procedures for judicial review in § 1105(a), as compared with the total absence of a right to judicial review under § 1157, reveals the congressional intent to preclude judicial review of agency decisions denying admission to aliens who are not within the United States.

The court of appeals buttressed its textual interpretation of the INA, as amended by the Refugee Act of 1980, by discussing the decisional law, which it suggested supported both its statutory construction and the legal proposition that refugees or aliens who are not within the country or at its borders have no right to judicial review of administrative decisions excluding them.

The majority of the court noted that an alternative reason the plaintiffs had no right to judicial review pursuant to the APA was because § 701(a)(2) precludes review “where agency action is committed to agency discretion by law,” except where the agency failed to follow its own binding regulations. This principle is applicable where a statute granting discretion to the agency is so broad and expansive that there is “no law for courts to apply when reviewing the agency action.” The court held that 8 U.S.C. § 1182(f) granted the President broad discretion or plenary power to control the entrance of aliens into the United States. The statute allows the President to exclude aliens “as he deems necessary.” The President promulgated Executive Order 12324 to implement his authority under § 1182(f). HRC readily admitted that Executive Order 12324 of the President was nonreviewable; but it contended that the President’s subordinates failed to comply with the guidelines issued to enforce the executive order. Consequently, the subordinates’ actions are subject to judicial review. The court of appeals decided that the “logical extension of this argument would make all of the President’s discretionary decisions subject to review, except in matters he could personally execute without the assistance of subordinates.” The majority of the court concluded that neither § 1182 (f) nor 1253(h), nor any other act of Congress provided any guidelines regarding the procedure to be used in making decisions concerning the repatriation of aliens who have not reached the shores of the United States. It would be inappropriate for the court to exercise

90. Id.
91. Id. at 1506-07.
92. Id. at 1507.
93. Id. (citing Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402 (1971)).
94. HRC III, 953 F.2d 1498, 1507 (11th Cir. 1992).
95. Id.
96. Id.
97. Id.
98. Id. at n. 5.
99. HRC III, 953 F.2d 1498, 1508 (11th Cir. 1992).
judicial review over the operation of the executive branch.\textsuperscript{100} The majority of the court held that Executive Order 12324 did not identify specific facts to be considered when determining refugee status. Nor did Executive Order 12324 suggest how competing interests are to be balanced by INS officials.\textsuperscript{101} The determination of refugee status was left to the INS officials. Official discretion was unconstrained by binding agency regulations.\textsuperscript{102} Consequently, Executive Order 12324 did not provide meaningful standards for ascertaining the scope of agency discretion.\textsuperscript{103}

Similarly, the court of appeals ruled that the INS Guidelines provided no constraint or limitation on INS official discretion to exclude aliens or determine refugee status.\textsuperscript{104} The INS Guidelines contained no meaningful standards for judicial review of agency action where discretion has been exercised to exclude an alien who is outside the boundaries of the United States.\textsuperscript{105} The majority reiterated its conclusion that the INA is inapplicable to aliens who have not reached the United States and provided no standards for review of INS official discretion in this particular case. Also, the court of appeals held that Article 33 of the 1967 Protocol failed to provide standards against which to judge the defendants’ procedures.\textsuperscript{106} Thus, there were no binding agency regulations limiting the agency’s discretion. The agency did not breach any such regulations. The agency’s action was committed to the agency’s discretion under 701(a)(2) and unreviewable pursuant to the APA.\textsuperscript{107} The majority supported its position by noting that the Supplemental Appropriation Act of 1951 contained a rider providing that expulsion and exclusion proceedings involving aliens are not governed by sections 5, 7, and 8 of the APA.\textsuperscript{108}

Next, the court of appeals ruled that the plaintiffs had no independently enforceable claims under the INA, as amended by the Refugee Act of 1980, Executive Order 12324, the INS Guidelines, or customary international law. The court of appeals held that INA’s asylum provision at 8 U.S.C. § 1158(a), which was added by the Refugee Act of 1980, by its terms, limits the application of the provision to “an alien physically present in the United States or at a land border or port of entry.”\textsuperscript{109} The plain and clear meaning of the

\begin{footnotes}
\item[100.] Id. at 1508.
\item[101.] Id.
\item[102.] Id.
\item[103.] Id.
\item[104.] HRC III, 953 F.2d 1498, 1508 (11th Cir. 1992).
\item[105.] Id.
\item[106.] Id.
\item[107.] Id.
\item[108.] Id. at 1509.
\item[109.] HRC III, 953 F.2d 1498, 1510 (11th Cir. 1992).
\end{footnotes}
unambiguous language of § 1158(a) indicates that those outside the country on the high seas are not protected by the statute. Additionally, HRC claimed that the amendment of 8 U.S.C. § 1253(h) supported its view that the INA applied to refugees outside the United States. The Refugee Act of 1980 amended the provision to provide that the Attorney General shall not “deport or return” any alien to any country where he or she might be persecuted. The words “or return” were added to the statute and the language “within the United States” was deleted.

The HRC argued that the changes were evidence of congressional intent to broaden the scope of the statute, so as to protect those beyond the borders of the United States. The majority rejected the argument by restating its earlier conclusion that § 1253(h) is in Part V of INA. The deportation provisions of Part V apply to aliens in the United States. Further, the language of § 1253(h) was changed to conform with Article 33 of the 1967 Protocol.

The court of appeals rejected the plaintiffs' argument that Executive Order 12324 gave rise to a private cause of action. The Executive Order's purpose was to establish a process for interdicting Haitians in international waters. Executive Order 12324 established the interdiction enforcement process on the high seas. The procedure contemplated by the order was an expeditious screening of interdicipees with the goal of determining whether any interdicipees aboard vessels had legitimate political refugee claims. Since this process was to occur on the high seas, the appellate court asserted that it could not have been the intent of the President to allow these aliens access to United States judicial system. No private civil action in the district court was intended.

The court of appeals decided that the INS Guidelines created no enforceable substantive rights for the Haitians. The majority of the court characterized these guidelines as similar to internal operating instructions. The INS Guidelines are not regulations. They are

110. Id. Title 8 U.S.C. § 1158(a) (1990) provides, in toto:

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.

111. HRC III, 953 F.2d 1498, 1509 (11th Cir. 1992).

112. Id. at 1509-10.

113. Id. at 1510.

114. Id.

115. Id. at 1510-11.


117. Id.

118. Id.
"interpretive rules" or "general statements of policy." Therefore, the guidelines do not have the force and effect of law. The guidelines were intended only to give "guidance to those INS employees involved in the interdiction program." In concluding its discussion of the second issue in the case, the court of appeals, in one paragraph, stated that the plaintiffs' claim of rights under customary international law or international common law was "meritless" and did not "warrant discussion."

In deciding the third and final issue, the court of appeals decided that HRC had no First Amendment right of access to the Haitian interdics. The district court erred in granting injunctive relief based on the First Amendment claim. In HRC I, the court of appeals stated that it did not rule on the First Amendment issue because the district court's order did not address the First Amendment claim. The district court order barred repatriation, but did not grant HRC access to the interdics. However, the district court, on remand, ordered the defendants to grant HRC meaningful access to the Haitian interdics limited by reasonable, content-neutral, time, place and manner restrictions. The court of appeals ruled that the plaintiffs had failed to state a claim upon which relief might be granted. Since Haitians outside the United States have no cognizable legal rights under the law or Constitution, it would be "nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights." The court explained that even though NAACP v. Button and In re Primus recognized the narrow right of counsel to associate for the purpose of litigation in the exercise of political speech, the right was based on underlying legal claims that could be asserted by the potential plaintiffs.

In addition, the court of appeals stated that even if HRC had a right to association, no right to access is created thereby. The court decided that HRC actually was claiming a right to associate with the interdics, coupled with a right to require the government to assist it in the exercise of the right. There is no affirmative duty,
constitutionally imposed, on the government to facilitate the realiza-
tion of a right.\textsuperscript{130} The majority of the court noted that neither \textit{NAACP v. Button} nor \textit{In Re Primus} held that the right to associa-
tion is infringed when the government denies access to individuals
who are lawfully in the government's custody.\textsuperscript{131} Since the district
court's order applied to interdicted class members on Coast Guard
cutters, the government would be required to incur the substantial
burden of removing the ships from their theater of operation, causing
interference with the interdiction process or allowing private individ-
uals to board ships during their operation at sea. The government
would be forced to subsidize and assist the plaintiffs.\textsuperscript{132} Furthermore,
the majority of the court submitted that the government already was
required to hold the Haitians at Guantanamo Bay at tremendous ex-
pense to the taxpayers. The court of appeals suggested that this ex-
pense would be increased if the government were required to provide
HRC representatives with transportation, lodging, and other neces-
sities in order that they might exercise an alleged First Amendment
right of access.\textsuperscript{133} Finally, the court of appeals cites \textit{Ukrainian-American Bar Ass'n v. Baker} (hereinafter "UABA")\textsuperscript{134} in support of its
position. In UABA, the United States Court of Appeals for the Dis-
trict of Columbia Court held:

\begin{quote}
[W]hen an unadmitted alien is taken into custody for interroga-
tion and 'immediate action,' his entrance into custody does not
infringe the right of any third party — whether a lawyer or an-
other with an interest in getting a message through to the alien
— to engage in constitutionally protected political expression
\ldots . Furthermore, the Government does not infringe a third
party's first amendment right to associate with an alien by hold-
ing the alien for a period of time during which the third party is
unable to contact him. The loss of the right of association while
the alien is held incommunicado by the Government is not of
constitutional significance; it is but an indirect consequence of
the Government's pursuit of an important task, \textit{viz.} resolving
'immediate action' cases.\textsuperscript{135}
\end{quote}

Thus, the majority laid to rest HRC's First Amendment claim of
access to the interdicted Haitians.

As was the case in \textit{HRC I} and \textit{HRC II}, Judge Hatchett was the
sole dissenter. Judge Hatchett summarizes what he considered to be

\begin{itemize}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 1514.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} HRC III, 953 F.2d 1498, 1514 (11th Cir. 1992).
\item \textsuperscript{134} HRC III, 953 F.2d 1498, 1514 (11th Cir. 1992); Ukrainian-American Bar Ass'n,
\item \textsuperscript{135} HRC III, 953 F.2d 1498, 1514 (11th Cir. 1992); Ukrainian-American Bar Ass'n,
\end{itemize}
the essence of the majority's opinion:

The majority cites many cases for many legal propositions, but when all is said and done, the majority simply accepts the government's contention that these refugees have no enforceable rights in an American court because they have not reached the continental United States . . . [a]lthough everyone in the case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. Moreover, the majority accepts this argument although everyone in the case agrees that the refugees are being prevented from reaching the shores of the continental United States.138

Judge Hatchett stated that the principal issues before the Court were (1) whether the interdictees had enforceable rights of review under the APA, and (2) whether HRC possessed a valid First Amendment claim of access to the interdictees for the purpose of advising and counseling them. He contended that both issues were resolved correctly by the district court in favor of the plaintiffs.137

Prior to addressing the preceding issues, Judge Hatchett criticized the court of appeals because rather than considering the appropriateness of the district court's entry of injunctive relief, the majority proceeded as if they were required to decide the issues on the merits.138 He accused the majority of determining the issues on appeal as if they were “purely matters of law,” and for failing to adequately evaluate the district court's factual findings.139

Judge Hatchett argued that HRC had demonstrated a valid First Amendment right of access claim to the Haitian refugees. He agreed with the majority's position that HRC's right of access did not require the government to allow HRC aboard U.S. Coast Guard cutters. Nevertheless, he believed that the teachings of Jean v. Nelson140 supported HRC's First Amendment right as counsel to inform clients of their legal rights where counsel does so as an act of political expression without compensation.141 Judge Hatchett further contended that the holding of Jean does not predicate HRC's right of access on the existence of specific underlying rights possessed by the Haitians.142 The district court found that Guantanamo Bay was replete with civilian activities, though it is was a nonpublic forum.143 Restrictions may be applied by the government; but these restric-
tions must be reasonable in light of the purpose that the forum serves.\textsuperscript{144} The government's mere opposition to the speaker's point of view is not adequate justification for restricting access to a nonpublic forum.\textsuperscript{145}

Judge Hatchett stated that the record revealed the government was engaging in content-based discrimination against HRC. The government had allowed television reporters, congressmen, political activists, church officials, representatives of the United Nations High Commissioner on Refugees, and other individuals and groups to visit the Haitians. Yet, the government refused access to HRC lawyers who desired to counsel the refugees as to their legal rights.\textsuperscript{146} The section of the base where the Haitians were being held was not used for military purposes. Therefore, the district court did not abuse its discretion by granting access to HRC, subject to "appropriate time, place, and manner of restrictions."\textsuperscript{147}

Contrary to the majority's suggestion, Judge Hatchett observed that there was no evidence in the record that the government would be forced to provide HRC transportation, shelter, and necessities to actualize its right of access to Haitians at Guantanamo Bay. The majority could not make new findings of fact. The majority was limited to those factual findings reflected in the record created below.\textsuperscript{148} Judge Hatchett stated that lawyers must have access to their clients to advise them of their potential rights, even if the clients have no rights or causes of action. The lawyer has the right to advise such a client of all of his options.\textsuperscript{149} The majority of the court deprived the French-speaking Haitians of lawyers in a circumstance "affecting their most fundamental interests" because the court made the determination that the Haitians had no rights that might justify the advice of counsel.\textsuperscript{150}

Judge Hatchett also asserted that the Haitians had a right to judicial review of the President's subordinates' actions in failing to follow INS Guidelines and procedures. He was critical of the majority's conclusion that the requirements of the APA did not apply to aliens outside the borders of the United States.\textsuperscript{151} Judge Hatchett initially focused on 5 U.S.C. § 702. Title 5 of U.S.C. § 702 provides, in relevant part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action

\textsuperscript{144.} Id. (citing Perry Education Ass'n v. Perry Local Education Ass'n, 460 U.S. 37, 49 (1984)).
\textsuperscript{145.} Id.
\textsuperscript{146.} HRC III, 953 F.2d 1498, 1517 (11th Cir. 1992).
\textsuperscript{147.} Id.
\textsuperscript{148.} Id.
\textsuperscript{149.} Id.
\textsuperscript{150.} Id.
\textsuperscript{151.} HRC III, 953 F.2d 1498, 1519 (11th Cir. 1992).
within the meaning of a relevant statute, is entitled to judicial review thereof." Judge Hatchett suggested that the language of the statute does not require that a "person be a citizen of the United States." The plaintiffs should not be precluded from bringing suit, since the language of the provision does not require that the "person" be a citizen. He then points to the decisional law to support his interpretation of 5 U.S.C. § 702. The requirements of § 702 had been met by the plaintiffs because they had "suffered legal wrong" because of the actions of low-ranking governmental officials who failed to properly interview them. This failure to comply with Executive Order 12324 with its implementing INS guidelines resulted in the return of Haitians to their homeland when they might well have qualified as political refugees. Accepting the 1967 Protocol as self-executing, Judge Hatchett contended that these low-ranking, governmental officials had violated the 1967 Protocol, which is applicable on the high seas to Haitians, by returning refugees to Haiti. He argued that because the refugees were forcibly returned to Haiti by INS low-ranking officials, final agency action had occurred within the meaning of 5 U.S.C. § 704. The Haitians had no other adequate remedy in a domestic court. Consequently, the agency action was reviewable pursuant to §§ 702 and 704 of the APA.

Judge Hatchett rejected the majority's position that agency action was not reviewable pursuant to 5 U.S.C. § 701(a)(1) and § 701(a)(2). Citing several cases, Judge Hatchett reasserted his position that the conduct of low-ranking, governmental officials with the duty of screening interdictees may be reviewed pursuant to the APA. Judicial review is not barred unless the legislative intent is clear. Nothing in the 1967 Protocol, Executive Order 12324, or INS Guidelines preclude judicial review. Again, Judge Hatchett reiterated his position that Article 33 of the Protocol is not only self-executing, but also applies extraterritorially.

The majority opinion concluded that the refugees had no private right of action. Judge Hatchett contended that the majority's position failed because the refugees did not seek judicial review of the

154. Id.
155. Id. at 1519-20.
156. Id. at 1520.
157. Id.
158. HRC III, 953 F.2d 1498, 1520 (11th Cir. 1992).
159. Id. at 1520-21.
160. Id.
161. Id.
162. Id.
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denial of particular asylum claims. The refugees challenged the conduct of low-level, executive officials who failed to follow INS Guidelines promulgated pursuant to Executive Order 12324. Judge Hatchett stated that the preceding contention is supported by the holding of Jean v. Nelson where the court of appeals decided that although it had no power to evaluate individual deportation orders, it had the authority to determine whether the conduct of low-level, governmental officials comported with the requirements of executive policy.

Judge Hatchett found that no presidential or congressional intent to bar judicial review of the conduct of subordinate, governmental officials was discernible in any of the laws relating to the interdiction of Haitians on the high seas. The President, through Executive Order 12324, required that the immigration laws of the United States be applied and enforced on the high seas against Haitians. “This exportation of laws also constitutes an exportation of rights and duties. These rights and duties are detailed in the Protocol and the Executive Order.” Accordingly, Judge Hatchett submitted that § 701(a)(1) of the APA was not applicable to the case; no relevant statute or law precluded judicial review.

Judge Hatchett concluded his opinion by rejecting the majority’s view that judicial review was precluded by § 701(a)(2) of the APA. Section 701(a)(2) denies a plaintiff review of agency action where a decision is committed to agency discretion. The majority of the court held that it had no meaningful guidelines that provided a standard for evaluating the action of subordinate INS officials’ discretion. The majority admitted that a court might review agency action committed to its discretion, if the agency failed to follow its own regulations. Judge Hatchett argued that the INS Guidelines provided a standard for judicial review. The INS Guidelines state that they are based on Article 33 of the 1967 Protocol and Executive Order No. 12324. The majority ruled that the INS Guidelines provided no meaningful standards for judicial review and that the decisions of low-level INS, officials were committed to agency discretion by the APA. Hence, the complete disposition of the HRC trilogy was effected by the U.S. Court of Appeals for the Eleventh Circuit.

163. HRC III, 953 F.2d 1498, 1522 (11th Cir. 1992).
164. Id.
165. Id.
166. Id. at 1522.
167. Id.
168. HRC III, 953 F.2d 1498, 1523 (11th Cir. 1992).
169. Id.
170. Id. at 1523-24.
II. Analysis of HRC I, HRC II, and HRC III

The case of Haitian Refugee Center, Inc. v. James Baker, III, might best be characterized as the Dred Scott case of immigration law. In Dred Scott v. Sandford, the United States Supreme Court (hereinafter “Supreme Court”), through Chief Justice Taney, decided that the temporary residence of a slave, Dred Scott, in free territory did not free him under the common law doctrine articulated in Somerset v. Stewart. Lord Mansfield in Somerset held that a slave was sui juris, a free man, once he entered a jurisdiction that did not acknowledge slavery, even though the slave escaped and was recaptured by the master. The Supreme Court decided that the federal courts which heard Dred Scott’s claim did not have jurisdiction to determine his claim. Slaves were not citizens within the meaning of the Constitution and therefore did not enjoy the rights, privileges and immunities guaranteed those who were citizens of the United States. Slaves were property owned by their masters. The most famous passage from the decision states:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit . . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of the opinion.

The Court of Appeals for the Eleventh Circuit essentially held that Haitian refugees, though seized by the United States on the high seas, have no substantive legal rights under the Constitution which a domestic court is bound to accept. Like fugitive slaves, these refugees have been returned to their symbolically political masters with a clear and probable consequence of punishment, persecution, or death. There is probative evidence that such persecution and death has occurred.

173. Id. at 510.
175. Id. at 451-52.
176. Id. at 407.
177. See H.W. French, Some Haitians Say Continuing Abuses Forced a 2D Flight,
Unlike the Supreme Court’s opinion in *Dred Scott v. Sandford*, the court of appeals opinions in *HRC I* and *HRC II* provide legal conclusions supported by scant analysis. In *HRC I*, the court of appeals devotes two paragraphs to its discussion of Article 33 of the 1967 Protocol. The court summarily concluded, without analysis, that the provision was not self-executing. The plaintiffs had no cognizable legal rights pursuant to Article 33. It is impossible for one to know why the court of appeals decided that Article 33 was not self-executing because the majority of the Court fails to supply a principled or reasoned basis for its decision-making. Judge Hatchett in his dissenting opinion argued that Article 33 of the 1967 Protocol is self-executing and applies extraterritorially. His position is the better viewpoint. Judge Hatchett’s position relies on the law as set forth in *United States v. Postal*. The Court of Appeals for the Fifth Circuit there held:

> The question whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation . . . and, as in the case of all matters of treaty interpretation, the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose . . . .
> The self-executing question is perhaps one of the most confounding in treaty law.

It is the general consensus that it is necessary to consider to several

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N.Y. Times, Feb. 10, 1992, at A1 (Forty-two refugees forcibly returned to Haiti told United Nations officials of "beatings, imprisonment, death threats and other abuses that prompted them to flee their country a second time."); see H.W. French, *U.N. Finds Haitians Who Fleed Anew*, N.Y. Times, Feb. 16, 1992, at A3; *Court Lets Haitian Repatriation Go On*, Wash. Post, Feb. 12, 1992, at A9 (Lawyers’ Committee for Human Rights released transcripts of interviews with 10 Haitian refugees who had returned to Guantanamo Bay after repatriation. These refugees related stories of beatings, shootings, persecution of family members causing them to flee again.). *But see U.S. Argues for Continued Return of Haitians*, Wash. Post, Feb. 15, 1992, at A5 (U.S. denies refugees who returned to Haiti were persecuted; lawyers of repatriated refugees stated, “U.S. officials knew, but did not tell [sic] Supreme Court that some returnees had been 'tortured, killed or persecuted' for fleeing the country . . . .”).

178. It is interesting to note that although the court of appeals’ decisions in *HRC I* and *HRC II* are devoid of legal analysis or reasoning, appellate courts have consistently required reasoned explanations of decision-making from governmental agencies. The underlying bases for a requirement of reasoned decisions are self-evident. The appellate court must be presented with sufficient explanations or analysis so that it may properly review the agency’s exercise of authority or discretion. The requirement of reasoned decisions also informs both the appellate court and the aggrieved party of the grounds upon which the governmental action was taken. The aggrieved party to the suit may then better plan a potential legal response. See Matlovich v. Secretary of Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978) and cases cited therein; see, e.g., United States v. Chicago, M., St. P & P.R.R., 294 U.S. 499, 510-11 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is a right or wrong."); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1944) ("It will not do for a court to be compelled to guess at the theory underlying the agency’s action . . . ."); see also Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92 (1968); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); Dunlop v. Backowski, 421 U.S. 560, 571-74 (1975); Kleppe v. Delta Mining, Inc., 423 U.S. 403, 409 (1976).

179. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).
factors in determining whether a treaty is self-executing or directly applicable in domestic law. In determining self-execution, courts consider the intent of the parties, the treaty's legislative history, negotiations, and the subsequent judicial construction of the parties.\footnote{180}

In the instant case, the weight of the evidence is clearly in favor of self-execution or direct applicability as suggested by Judge Hatchett. The strongest evidence in favor of the self-executing nature of the 1967 Protocol is its legislative history and its subsequent domestic construction. During the Senate deliberations on the 1967 Protocol, the State Department stated that no domestic legislation was required to implement the 1967 Protocol.\footnote{181} Congress adhered to the belief that no amendment to the Immigration and Nationality Act was necessary to comply with the Protocol's provisions.\footnote{182} In addition, the Senate committee report which recommended accession to the 1967 Protocol suggested that the United States would be automatically bound to apply articles 2 through 34 of the convention.\footnote{183} The subsequent judicial constructions of the 1967 Protocol also mitigate in favor of a conclusion that the 1967 Protocol is self-executing.\footnote{184} The Board of Immigration Appeals in \textit{Matter of Dunbar} described the 1967 Protocol as self-executing.\footnote{185} Also, it is worth noting that the INS Guidelines specifically refer to Article 33 of the


\footnote{182} King, \textit{supra} note 181, at 786.


\footnote{184} \textit{See} cases cited in HRC I, 949 F.2d 1109, 1114-15 (11th Cir. 1991).

\footnote{185} \textit{Matter of Dunbar}, No. 2192, at 310, 313-14 (Bd. of Immigration App.) Apr. 17, 1973 [hereinafter BIA]. The BIA stated, \textit{inter alia}:

\begin{quote}
Since it supplements and incorporates the substantive provisions of the Convention, the Protocol must be regarded as a treaty, which is part of the Supreme law of the land . . . . Such a treaty, being self-executing, has the force and effect of an act of Congress . . . .
\end{quote}

\footnote{186} Our examination of the legislative materials satisfies us that the United States Senate, in giving its advice and consent to accession to the Protocol, did not contemplate that radical changes in existing immigration laws would be effected. Quite to the contrary, the general representations made to induce affirmative senate action indicated that our immigration laws already embodied the humane provisions for refugees fostered by the Convention and Protocol. Accession by the United States it was asserted, would lend the weight of our moral support to the measure and would influence other nations with less liberal refugee legislation to adhere to it.
1967 Protocol and the 1951 Refugee Convention. The INS Guidelines state, in relevant part:

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol. 186

Under the heading "AUTHORITY," the INS Guidelines provide:


Moreover, Executive Order 12324 states that in actions taken beyond the territorial waters of the United States "no person who is a refugee will be returned without his consent." 188 Executive Order 12324 admonishes the Attorney General to strictly observe "our international obligations concerning those who genuinely flee persecution . . . ." 189 Both the INS Guidelines and Executive Order 12324 support the position that compliance with Article 33 is mandatory.

186. See INS Guidelines, supra note 17.

The term "refugee" means (A) any 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 and 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 special 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.

Compare art. 1, 1967 Protocol, supra note 18. It has been asserted that the 1980 Refugee Act "conforms asylum and section 243(h) procedures to the definition of refugee" as it is memorialized in the 1967 Protocol. A. Stepick, Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy, 45 Law and Contemporary Problems 163, 173 (1982); see 1 C. Gordon & H. Rosenfeld, Immigration Law & Procedure § 2-188.17 (rev. ed. 1982). The fact that the 1980 Refugee Act has provisions which reflect standards found in the 1967 Protocol is evidence that the drafters of the 1980 Refugee Act were attempting to implement the international obligations of the United States under the 1967 Protocol by promulgating the 1980 Refugee Act.

188. Executive Order 12,324, § 2(c)3, supra at note 16.
189. Id. Section 3 of Executive Order 12,324 provides, in toto:

The Attorney General shall be in consultation with the Secretary of State and the Secretary of The Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration. . . . and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.
Thus, it is reasonable to conclude that Article 33 is self-executing. There is a view which holds that those treaties which create individuals rights and duties are self-executing.\(^{190}\) Apparently, the United States Court for the Eleventh Circuit shares this view.\(^{191}\) In United States v. Bent-Santana,\(^ {192}\) the court of appeals stated:

> It is settled principle of both public international and American constitutional law that unless a treaty or intergovernmental agreement is self-executing — that is, unless it expressly creates privately enforceable rights — an individual citizen does not have standing to protest where one nation does not follow the terms of such agreement.\(^ {193}\)

Article 33 of the 1967 Protocol creates the individual right of nonrefoulement. The court of appeals overlooked its own decision. However, it must be reiterated that the court of appeals, in its brevity, failed to disclose the underlying basis for its decision that Article 33 was not self-executing. It is, therefore, difficult to criticize its conclusion. Nonetheless, whether one considers the 1967 Protocol self-executing or denies that it is self-executing, one should not allow the "tyranny of terminology" to annul international treaty obligations. The United States is no less bound by those norms articulated in the 1967 Protocol. As a party to the 1967 Protocol, the United States has agreed to comply with the provisions stated therein. As a matter of fundamental fairness, justice, and good faith, the government should not now be heard to argue that it is not bound to comply with a provision of a treaty because there is no implementing legislation. If implementing legislation was necessary to give domestic, legal effect to the 1967 Protocol, the United States should have passed such legislation within a reasonable time of its adherence to the treaty in 1968. The Reporter's Notes to § 111 of Restatement 3rd of Foreign Relations Law of the United States suggests that the United States is obliged to comply with the provisions of a treaty at the moment it comes into force.\(^ {194}\) A failure or delay on the part of the United States to take the appropriate action to implement a treaty may constitute a breach of the government's international obligation.\(^ {195}\) The Restatement Third specifically provides that,

> if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-exe-

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190. Y. Iwasawa, supra note 173, at 646-49.
191. Id.
193. Id. at 1550.
195. Id.
cutting by the political branch, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force. In that event, a finding that a treaty is not self-executing is a finding that the United States has been and continues to be in default [of its international obligation] and should be avoided.\textsuperscript{196}

The 1967 Protocol has been an international obligation of the United States for the past 24 years. The government's dilatory behavior has resulted in a failure to promulgate implementing legislation. To condone such state conduct vitiates the sanctity of the treaty negotiation process and the value of international law.

Article 26 of the Vienna Convention on the Law of Treaties\textsuperscript{197} provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."\textsuperscript{198} The preceding legal norm codifies the fundamental principle of international law governing the observance and sanctity of treaties, \textit{pacta sunt servanda}.\textsuperscript{199} Judge Lauterpacht of the International Court of Justice stated in the \textit{Norwegian Loans} case: "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."\textsuperscript{200} Article 27 of the Vienna Convention states that "[a] party may not invoke the provisions of its internal law as justification of its failure to perform a treaty."\textsuperscript{201} Also, the Vienna Convention provides that a state is obligated to refrain from behavior which would defeat the object and purpose of a

\textsuperscript{196} Id. at 53-54. It is interesting to note that in the case of the North American Free Trade Agreement, the president will submit enabling or implementing legislation after congressional hearings and negotiations have been concluded. The Congress will be given 90 days to pass the legislation. E.J. Dionne, \textit{Clinton to Support NAFTA but Wants Aid for Displaced Workers}, \textit{WASH. POST}, Oct. 3, 1992, 10A. This "fast track" approach could have been used to promulgate legislation to implement the 1967 Protocol.


\textsuperscript{198} Vienna Convention, \textit{supra} note 197, at art. 26.


\textsuperscript{200} I.C.J. Reports 9, 53 (1957).

\textsuperscript{201} Vienna Convention, \textit{supra} note 197, at art. 27(1).
treaty, if the state has either signed the treaty or has exchanged instruments of ratification, acceptance, or approval. The Permanent Court of International Justice held that "a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." Thus, the United States cannot invoke the internal or domestic rule of non-self-execution to justify the failure to enforce Article 33 of the 1967 Protocol, a treaty it has ratified. The government's argument that it is not bound to enforce the treaty obligation because the 1967 Protocol is not self-executing constitutes a failure of the United States government to act in good faith and violates the international norm of *pacta sunt servanda*. Article VI, clause 2, of the United States Constitution provides that treaties are a part of the supreme law of the land. The judiciary is legally required to enforce these international obligations. It is not textually demonstrable that the self-execution rule is an exception to the preceding constitutionally mandated, legal principle.

The court of appeals, in its effort to "expedite disposition of the appeal," disregarded the well-reasoned amicus curiae brief filed by the Office of the United Nations High Commissioner for Refugees (hereinafter "the High Commissioner"). The High Commissioner argued that Article 33 of the 1967 Protocol memorializes an independent fundamental right, exclusive of any question of admission to the United States territory or the grant of asylum. The High Commissioner further argued that Article 33 guarantees that no refugees will be returned to the frontiers of a country where they may be persecuted or murdered and its prohibition applies extraterritorially on the high seas. Where the refugees are intercepted is...
an irrelevant consideration.\textsuperscript{208}

Article 33 identifies the place to which no refugee may be sent, no exception is provided that conditions the obligation on the place from which a refugee is returned. The obligation arises wherever the government acts.\textsuperscript{208}

The High Commissioner began its discussion by demonstrating that international law is a part of the law of the United States.\textsuperscript{210} The domestic courts of the United States are bound by international common law or customary international law.\textsuperscript{211} The principle of nonrefoulement is embodied in the 1951 Refugee Convention, and the 1967 Protocol and is a customary rule of international law.\textsuperscript{212} Consequently, the United States is legally obligated to observe these international legal norms. The High Commissioner noted that none of the parties to the 1967 Protocol have made reservations thereto.\textsuperscript{213} The High Commissioner observed that reservations to Article 33 are prohibited by Article 42 of the 1951 Refugee Convention and Article 7 of the 1967 Protocol.\textsuperscript{214} The High Commissioner revealed that the United States has supported the universal application of the principle of nonrefoulement by stating:

\begin{quote}
On November 25, 1974, U.S. Representative Clarence Clyde Ferguson, Jr. made a statement to the Third Committee of the U.N. General Assembly concerning the subject of refoulement. Ambassador Ferguson stated:

'Once again my government wishes to stress, in this forum, the overriding importance among the High Commissioner's manifold activities of his function of providing international protection for refugees. It is difficult to overemphasize the significance to refugees of ensuring liberal asylum policies and practices, and above all in making certain that no refugee is required to return to any country where he would face persecution. It is the High Commissioner's task to work unceasingly toward affording such guarantee. His chief tools in so doing are the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. As the Committee knows, Article 33 of the Convention contains an unequivocal prohibition upon contracting states against the refoulement of refugees \textit{in any manner whatsoever} to
\end{quote}

\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id. at 5.}
\textsuperscript{211} \textit{Id. at 6.}
\textsuperscript{212} \textit{Id. at 7.}
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id. at 10.}
territories where their life or freedom would be threatened on grounds of race, religion, nationality, membership of [in] a particular social group or political opinion.

My government joins with the High Commissioner in condemning the inhumane practice of refoulement. The principle that refugees must not be repatriated against their will; and the right of a refugee to seek and secure asylum, have become even more firmly embedded international law.'

Additionally, the High Commissioner concluded that the principle of non-refoulement is an absolute obligation with no territorial limitations. No limitation appears in the text of Article 33. Again, the High Commissioner stated:

It is significant that the principle of non-refoulement — perhaps the foremost principle of international law protecting refugees — is stated in mandatory terms as an absolute obligation, and that no territorial limitation appears in the language of Article 33. When the drafters of the 1951 Convention as a whole wished to condition the rights of refugees on their physical location or residence, they did so expressly in the language of the treaty. Thus, in the article on the separate matter of 'expulsion' immediately preceding Article 33, the 1951 Convention expressly limits the scope of the right to 'a refugee' 'lawfully in the territory . . . .' Article 4 on freedom of religion and 27 on the issuance of travel documents state, also expressly, that States' obligations under these articles are limited to refugees who are present in the territory of the State. Article 18 on rights to self-employment and 26 on freedom of movement clearly state that their scope is limited to refugees lawfully on the territory of the Contracting State. Similarly, Articles 15, 17(1), 19, 21, 23, 24, and 28 (regarding, respectively, rights related to association, employment, exercise of the liberal professions, housing, public relief, labor conditions, and travel documents) all are expressly conditioned on the refugee's legal status on [sic] the territory of the State. In stark contrast to all of these provisions, Article 33 contains no such restriction. To the contrary, Article 33 prohibits the return of refugees 'in any manner whatsoever.'

In supporting its interpretation that the 1967 Protocol applies extra-territorially, the High Commissioner relied on the statement of United States delegate, Louis Henkin, who stated:

216. Id. at 15.
217. Id.
The Committee had, it was true, decided to delete the chapter on admittance, considering that the convention should not deal with the right of asylum and that it should merely provide for a certain number of improvements in the position of refugees. It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.218

Finally, the High Commissioner stated that the United States responded to the Indochinese “boat people” by granting political asylum and resettling them, with few exceptions.219 In its report to Congress for Fiscal Year 1984, the Office of the U.S. Coordinator of Refugees’ Affairs of the State Department advised that

“[d]espite the heavy burden often imposed by enormous numbers of refugees, asylum countries generally have not forcibly repatriated refugees against their will to countries [from] which they have fled.”220

Accordingly, as suggested by Judge Hatchett, only Haitian refugees are intercepted at sea and forced to return to their country of origin where they may suffer persecution or death. The United States government might attempt to justify its interdiction procedure pursuant to the bilateral treaty which permits interdiction. This treaty was concluded between the United States and the notorious Duvalier regime.221 In light of the presence of an illegal military junta which has overthrown the democratic Aristide government, the United States government should not use this bilateral agreement as justification for returning refugees to a regime that the United States has condemned and is now subjecting to economic sanctions. Such a bi-

218. **Id.** at 18.
219. **Id.** at 20.
lateral treaty conflicts with the customary international norm of nonrefoulement. The norm of nonrefoulement is a human rights norm and is *jus cogens*.\(^2\)\(^2\)\(^2\) There can be no derogation from such a norm unless it is supplanted by a peremptory norm\(^2\)\(^2\)\(^2\) of equal importance on the international normative hierarchy. Thus, the court of appeals inadequately justified its ruling that Article 33 of the 1967 Protocol is not self-executing or directly applicable.

In *HRC I*, the court of appeals further decided that the plaintiffs' First Amendment claim of access to the interdictees could not support injunctive relief granted by the district court, since the district court did not predicate its decision on this claim or require the defendants to allow HRC access to the detained Haitians. The court of appeals did not reach the First Amendment issue. Perhaps, the failure of the district court to order the defendants to allow the HRC access to the interdicted Haitians was a simple matter of oversight. The district court did hold that there was a substantial likelihood that the plaintiffs would succeed on the First Amendment claim at trial. The court of appeals analysis is sound on this issue. The error was that of the district court.

Furthermore, the district court failed to grant the plaintiffs relief on its claim that the APA provided judicially enforceable rights. The court of appeals held that because the plaintiffs did not cross-appeal on the denial of the APA claim, it could not properly uphold injunctive relief based on the claim. Judge Hatchett argued that the court of appeals had jurisdiction to resolve all issues raised and decided by the district court. The decision of the court of appeals to not rule on the APA claim due to plaintiffs' failure to cross-appeal is a valid procedural practice. Counsel for plaintiffs had the opportu-

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> A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general, international law having the same character.


nity to cross-appeal on this issue and did not do so. It is impossible to know whether counsel for plaintiffs failed to cross-appeal because of a view that its position on the APA claim was not strong or whether the failure to cross-appeal was due to neglect. Nevertheless, it was plaintiffs' counsel's duty to cross-appeal. Having not cross-appealed, the plaintiffs cannot be heard to complain of the court of appeals' refusal to consider the issue, *sua sponte*.

In *HRC II*, the court of appeals was again faced with the APA claim when the district court issued a temporary restraining order based on the APA claim, enjoining repatriation of Haitian interdictees. The court of appeals invoked the district courts' prior denial of the APA claim and adopted the district courts' reasoning for denying injunctive relief based on the claim. The court of appeals characterized the district court's order as a preliminary injunction and decided to review the order. The district court's order was stayed pending appeal. Here, the court of appeals was in error because the district court considered an APA claim that was different from the APA claim decided in *HRC I*. The district court in its Order Memorializing Oral Rulings explains:

> The court recognizes its previous determination that plaintiffs had not shown a likelihood of prevailing under the APA [Dec. 3, 1991]. That determination was based on Congress' broad grant of discretion to the President in establishing the interdiction program. However, the court now has the benefit of the thorough briefing of the APA issue before the Eleventh Circuit Court of Appeals, as well as the Court of Appeals' December 17, 1991 per curiam opinion. In this new light, the court now finds a substantial likelihood of success, based in part on the distinction between the President's discretion in establishing the program and subordinates' discretion or lack thereof in following program procedures and guidelines.  

Clearly, the opinion of the court of appeals indicates that it believed the APA claim ruled upon in *HRC II* already had been ruled upon in *HRC I*. Hence, the court of appeals was in error.

After issuing two brief, analytically deficient opinions, the court of appeals in *HRC III* produced a substantial judicial decision with sustained legal analysis. First, the court of appeals concluded that 5 U.S.C. § 701(a)(1) of the APA did not authorize judicial review of an agency decision where relevant statutes precluded review. The court of appeals gave a restrictive reading of the relevant provisions of INA. Applying a plain meaning approach to the construction of 8 U.S.C. §§ 1253(h), 1252(b), 1105(a) and 1158(a) would lead to the

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conclusion that these provisions apply only to aliens within the borders of the United States. Unfortunately, the drafters of these provisions could not have foreseen the circumstances of the case, *sub judice.* Though, technically outside of the borders of the United States, the Haitian interdictees were seized or "captured" and detained on property leased by the United States at Guantanamo Bay. Other Haitian interdictees were held on United States Coast Guard cutters. These interdictees were physically prevented from reaching the shores of the United States. Since the interdictees were on United States property, leased or owned, they should have been viewed as constructively within or at the borders of the United States. It is the opinion of this writer that although the court of appeals strictly construed the relevant provisions of the INA, as amended by the Refugee Act of 1980, its construction has some analytical merit. Judge Hatchett's dissent does not refute the Court's construction of 8 U.S.C. §§ 1253(h), 1252(b), 1105(a), and 1158(a).

The court of appeals' opinion that judicial review was not permissible pursuant to § 701(a)(2) because the action was committed to agency discretion is weakly reasoned. The plaintiffs argued that the President's subordinates failed to properly carry out the procedures mandated by the INS Guidelines. Consequently, the conduct of these low-level subordinates would be subject to review. As argued by Judge Hatchett, the case of *Jean v. Nelson* supports the plaintiffs' position. In *Jean v. Nelson,* plaintiffs were Haitian refugees who were detained in various facilities in southern Florida until the INS could determine their asylum claims. The majority of the court remanded the case to the district court with instructions to reconsider the issue of whether low-level officials had abused their discretion in implementing the Executive branches parole policy for Haitians. The majority of the court ruled:

> The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from superiors.

Further, the court of appeals continued:

> Nevertheless, since the discretion of lower-level immigration offi-

225. *Jean v. Nelson,* 727 F.2d at 961 (11th Cir. 1984) (*en banc*).
226. *Id.* at 963.
227. *Id.*
cials is circumscribed not only by legislative enactments but also by the instructions of their superiors in the executive branch, our conclusion that the Executive's policy is consistent with the power delegated by Congress does not end the process of judicial inquiry here. The district court must still determine whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington.228

Oddly, there is absolutely no discussion of Jean v. Nelson by the majority of the court in HRC III.

The court of appeals also decided that the exception to 701(a)(2), which permits a court to review agency action where the agency violated its own rules, was not applicable. The court of appeals characterized the INA Guidelines as mere internal operating instructions. There was evidence that government officials were not complying with the INS Guidelines promulgated pursuant to Executive Order 12324.229 These guidelines were adequate binding regulations to which the agency was required to adhere. They are extraordinarily detailed and specific in nature.230 They refer to both the 1951 Refugee Convention and the 1967 Protocol as authority. The majority's opinion that there was no law or binding regulations limiting agency discretion and against which agency discretion could be reviewed is a clearly erroneous legal conclusion.

The court of appeals further held that HRC had no First Amendment right of access to the Haitians. Again, the court of appeals ignored the teachings of Jean v. Nelson in which the majority of the court ruled:

The Supreme Court has repeatedly emphasized that counsel have [sic] a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of renuneration.231

As asserted by Judge Hatchett, Jean v. Nelson does not base counsel's First Amendment right of access on the underlying rights possessed by clients. Additionally, it is uncontestable that the government allowed others access to the Haitian interdictees while denying the same right to HRC.232 The conduct of the government was inherently unfair, unjust, and discriminatory. The majority's speculation that the government would have to assist HRC in its exercise of its right of access finds no support in the record. There was no evi-

228. Id. at 978.
229. See Order Granting Preliminary Injunctive Relief, supra note 13, at 55-60 (summaries of deposition testimony of individual Haitian interdictees).
230. See generally INS Guidelines, supra note 16.
232. HRC III, 953 F.2d at 1517.
dence that the government would have to go to great expense in actualizing HRC's right of access. The suggestions of the court that the contrary would be true is a view sown out of the gossamer seeds of speculation and conjecture.

Perhaps, the most extraordinary ruling of HRC III was the majority's pronouncement that

The plaintiffs also claim that customary international law, or international common law, creates enforceable rights. This claim is meritless and does not warrant discussion.233

Again, the majority of the court reached a legal conclusion without any supportive analysis. It is impossible, therefore, for one to adequately criticize such a ruling, since the majority has failed to apprise the parties or readers of a rational basis for its legal decision. The majority ignored the Supreme Court's holding in the Parquete Habana,234 declaring international law or the law of nations an integral part of the law of the United States.235 The United States is bound by customary norms of international law. It is beyond dispute that the principle of nonrefoulement is considered a customary norm of international law by most of the countries of the world.236 The

233. Id. at 1511.
234. The Paquete Habana, 175 U.S. 677 (1900).
235. The U.S. Supreme Court ruled:
   International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and, as evidence of these, to the works of jurists and commentators, who by years of labor research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
   Id. at 700.
236. King, supra note 180, at 788; see Brief of High Commissioner for Refugees, supra note 206, at 7-14. The eminent international law jurist, Louis Henkin, has suggested that international law is incorporated into the domestic law of the United States and is self-executing. He states that many scholars view international law as "federal common law." Henkin writes:
   International law is not merely law binding on the United States internationally but is also incorporated into United States law. It is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress. Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, But customary law has often been characterized as federal common law" . . . .
   But customary law is self-executing and like a self-executing treaty it is equal in authority to an act of Congress for domestic purposes . . . .
   L. Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1561, 1566 (1984); see Filartiga v. Pena-Irala, 630 F.2d 876, 877-878 (2nd Cir. 1980) ("Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, of one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations. Under the Articles of Confederation, the several states had interpreted and applied the body of doctrine as a part of their common law, but with the founding of the 'more perfect Union' of 1789, the law of nations
principle is so important that both the 1951 Refugee Convention and
the 1967 Protocol prohibit reservations to Article 33. The court of
appeals' dismissal of the importance of international law in the HRC
litigation case reveals a lack of respect for the law of nations.

Finally, it is surprising that plaintiffs' counsel did not raise the
issue of discrimination based on race or national origin in its argu-
ments before the court of appeals. The issue was raised in Jean v.
Nelson where the court of appeals remanded the case for considera-
tion of whether low-ranking, subordinate, executive officials were
properly executing the immigration policy of the President without
discrimination based on national origin. Judge Hatchett, without
alleging discrimination based on race or nationality, suggests the
possibility of disparate treatment in his dissenting opinions. In HRC
I Judge Hatchett wrote:

... Under existing law, any refugee may reach the shores of
the United States and thereby acquire the right to enforce the
United States immigration laws in the United States courts, ex-
cept Haitian refugees. Only Haitian refugees are interrupted in
international waters and repatriated to their country of origin.

The government seeks to convince this court that its inter-
diction program was instituted as an effort to save the lives of
Haitian refugees travelling in unseaworthy vessels. But the gov-
ernment's own brief shows that the program was instituted in
1981, long before the current immigration wave. ... The pri-
mary purpose of the program was, and has continued to be, to
keep Haitians out of the United States.

In HRC III, Judge Hatchett stated:

237. Brief of High Commissioner for Refugees, supra note 206, at 10. Article 7, para-
graph 1 of the 1967 Protocol, supra note 19, states:
1. At the time of accession, any state may make reservations in respect of article
iv of the present Protocol and in respect of any provisions of the Convention
other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, ...

238. Jean v. Nelson, 727 F.2d at 963, 978-79 (11th Cir. 1984) (en banc). The court of
appeals in Jean v. Nelson quoted Bertrand v. Sava, et al., 684 F.2d 204, 212 n.12, where the
Second Circuit held:

[T]he constitutional authority of the political branches of the federal govern-
ment to adopt immigration policies based on criteria that are not acceptable
elsewhere in our daily life would not permit an immigration official, in the ab-
sence of such policies, to "apply neutral regulations to discriminate on [the basis
of race and national origin]."

239. HRC I, 949 F.2d 1109, 1111 (11th Cir. 1991).
240. Id. at 1112.
The capture of Haitian refugees in international waters is authorized under a 1981 agreement between the Reagan administration and the totalitarian government of Jean-Claude "Baby Doc" Duvalier. The record does not disclose such an agreement with any other country.\textsuperscript{241} Haitians, unlike other aliens from anywhere in the world, are prevented from freely reaching the continental United States . . . \textsuperscript{242}

There is extant other evidence of discrimination against Haitian refugees by the United States government. The interdiction process began in 1981. From 1981 to August 1986, only two Haitian refugees were permitted entrance to the United States. More than 9,000 were repatriated during the same period.\textsuperscript{243} The following Tables, prepared by Amnesty International USA, reflect the disparity of treatment accorded Haitian refugees who have applied for political asylum in this country between June 1982 and September 1989.\textsuperscript{244}

\begin{footnotesize}
\begin{itemize}
\item[241.] HRC III, 953 F.2d 1515, 1516, n.2 (11th Cir. 1992).
\item[242.] Id. at 1516.
\item[243.] King, supra note 180, at 778 (citing U.S. Committee for Refugees, World Refugee Survey 1986, at 72 (1986)). Jocelyn McCalla, Executive Director of the National Coalition for Haitians, has stated that from 1981 to 1990 over 20,000 Haitians have been interdicted at sea. Only 6 interdictees were granted political asylum. Tape of interview of Jocelyn McCalla, Executive Director, National Coalition for Haitian Refugees, by John Hockenberry on Talk of the Nation (National Public Radio, June 3, 1992).
\item[244.] See Reasonable Fear: Human Rights and United States Refugee Policy, Amnesty Int'l USA, Mar. 1990, at 17-18.
\end{itemize}
\end{footnotesize}
## TABLE I

**ASYLUM CASES FILED WITH U.S. IMMIGRATION AND NATURALIZATION SERVICE DISTRICT DIRECTORS**

June 1983 to September 1989
Cumulative Approval Rates for Cases

<table>
<thead>
<tr>
<th>Country</th>
<th>Cases Decided</th>
<th>Granted</th>
<th>Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>USSR</td>
<td>306</td>
<td>75.6%</td>
<td>115</td>
</tr>
<tr>
<td>Romania</td>
<td>1,470</td>
<td>70.3%</td>
<td>619</td>
</tr>
<tr>
<td>Iran</td>
<td>13,061</td>
<td>61.5%</td>
<td>8,173</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>170</td>
<td>47.4%</td>
<td>188</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1,796</td>
<td>43.5%</td>
<td>2,325</td>
</tr>
<tr>
<td>China</td>
<td>265</td>
<td>41.8%</td>
<td>368</td>
</tr>
<tr>
<td>Syria</td>
<td>207</td>
<td>40.8%</td>
<td>300</td>
</tr>
<tr>
<td>South Africa</td>
<td>57</td>
<td>40.1%</td>
<td>85</td>
</tr>
<tr>
<td>Poland</td>
<td>2,971</td>
<td>37.0%</td>
<td>5,053</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>421</td>
<td>36.6%</td>
<td>729</td>
</tr>
<tr>
<td>Somalia</td>
<td>262</td>
<td>33.8%</td>
<td>512</td>
</tr>
<tr>
<td>Vietnam</td>
<td>75</td>
<td>32.8%</td>
<td>153</td>
</tr>
<tr>
<td>Hungary</td>
<td>206</td>
<td>29.8%</td>
<td>485</td>
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<tr>
<td>Nicaragua</td>
<td>10,872</td>
<td>27.1%</td>
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<tr>
<td>Uganda</td>
<td>98</td>
<td>26.2%</td>
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<tr>
<td>Philippines</td>
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<td>16.6%</td>
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<td>Pakistan</td>
<td>77</td>
<td>15.0%</td>
<td>433</td>
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<tr>
<td>Cuba</td>
<td>397</td>
<td>14.9%</td>
<td>2,266</td>
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<tr>
<td>Yugoslavia</td>
<td>57</td>
<td>11.9%</td>
<td>421</td>
</tr>
<tr>
<td>Lebanon</td>
<td>171</td>
<td>9.5%</td>
<td>1,623</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1,004</td>
<td>2.5%</td>
<td>37,666</td>
</tr>
<tr>
<td>Honduras</td>
<td>32</td>
<td>2.2%</td>
<td>1,407</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>3</td>
<td>2.1%</td>
<td>141</td>
</tr>
<tr>
<td>Haiti</td>
<td>39</td>
<td>2.1%</td>
<td>1,795</td>
</tr>
<tr>
<td>Guatemala</td>
<td>112</td>
<td>2.0%</td>
<td>5,411</td>
</tr>
</tbody>
</table>
TABLE II
ASYLUM CASES FILED WITH U.S. IMMIGRATION AND
NATURALIZATION SERVICE DISTRICT DIRECTORS
Fiscal 1989

<table>
<thead>
<tr>
<th>Country</th>
<th>Approval Rate for Decided</th>
<th>Case Granted</th>
<th>Case Decided</th>
<th>Currently Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>USSR</td>
<td>81.6%</td>
<td>10</td>
<td>11</td>
<td>74</td>
</tr>
<tr>
<td>Romania</td>
<td>90.9%</td>
<td>575</td>
<td>57</td>
<td>382</td>
</tr>
<tr>
<td>Iran</td>
<td>57.4%</td>
<td>602</td>
<td>446</td>
<td>987</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>56.6%</td>
<td>47</td>
<td>36</td>
<td>119</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>65.8%</td>
<td>456</td>
<td>236</td>
<td>691</td>
</tr>
<tr>
<td>China</td>
<td>80.9%</td>
<td>98</td>
<td>23</td>
<td>526</td>
</tr>
<tr>
<td>Syria</td>
<td>58.3%</td>
<td>21</td>
<td>15</td>
<td>171</td>
</tr>
<tr>
<td>South Africa</td>
<td>42.4%</td>
<td>14</td>
<td>19</td>
<td>51</td>
</tr>
<tr>
<td>Poland</td>
<td>29.2%</td>
<td>285</td>
<td>688</td>
<td>2,740</td>
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<tr>
<td>Afghanistan</td>
<td>29.6%</td>
<td>19</td>
<td>45</td>
<td>143</td>
</tr>
<tr>
<td>Somalia</td>
<td>65.3%</td>
<td>119</td>
<td>63</td>
<td>266</td>
</tr>
<tr>
<td>Vietnam</td>
<td>63.6%</td>
<td>7</td>
<td>4</td>
<td>23</td>
</tr>
<tr>
<td>Hungary</td>
<td>28.4%</td>
<td>31</td>
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<td>260</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>25.6%</td>
<td>3,617</td>
<td>10,486</td>
<td>21,693</td>
</tr>
<tr>
<td>Uganda</td>
<td>28.0%</td>
<td>7</td>
<td>18</td>
<td>28</td>
</tr>
<tr>
<td>Philippine</td>
<td>7.3%</td>
<td>5</td>
<td>63</td>
<td>138</td>
</tr>
<tr>
<td>Pakistan</td>
<td>51.8%</td>
<td>14</td>
<td>13</td>
<td>105</td>
</tr>
<tr>
<td>Cuba</td>
<td>29.0%</td>
<td>76</td>
<td>186</td>
<td>13,744</td>
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<tr>
<td>Yugoslavia</td>
<td>4.9%</td>
<td>4</td>
<td>77</td>
<td>311</td>
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<tr>
<td>Lebanon</td>
<td>31.8%</td>
<td>58</td>
<td>124</td>
<td>453</td>
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<tr>
<td>El Salvador</td>
<td>2.3%</td>
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<td>13,861</td>
<td>19,929</td>
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<tr>
<td>Honduras</td>
<td>1.3%</td>
<td>14</td>
<td>1,009</td>
<td>388</td>
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<tr>
<td>Sri Lanka</td>
<td>4.3%</td>
<td>1</td>
<td>22</td>
<td>41</td>
</tr>
<tr>
<td>Haiti</td>
<td>3.5%</td>
<td>3</td>
<td>82</td>
<td>707</td>
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<tr>
<td>Guatemala</td>
<td>1.9%</td>
<td>67</td>
<td>3,325</td>
<td>6,287</td>
</tr>
</tbody>
</table>

*The totals includes all nationalities, not just those listed on the tables. Of the total 101,679 asylum applications filed in Fiscal 1989, 85 percent were filed by nationals of El Salvador, Guatemala, Honduras, and Nicaragua.

Amnesty International USA has concluded that the INS is biased against asylum seekers of certain nationalities. In Reasonable Fear: Human Rights and United States Refugee Policy, Amnesty International USA charges that “the most compelling evidence of bias . . . appears in cases of Salvadoreans, Guatemalans, and Haitians.” The norm of nondiscrimination is irrefutably an accepted norm of customary international law which binds all states in the international community. It would be morally repugnant and hypocritical if discrimination on the basis of race, color or nationality were permitted by the United States on the international level when it is has been outlawed on the domestic level.

III. Conclusion

Recent studies and reports, including a report published by the State Department, ineluctably demonstrate that political persecution and human rights violations continue to be a severe problem in Haiti. The State Department found that “[t]he military’s human rights record improved under the Aristide government, but that trend was reversed following the September coup . . .” Another report reveals that the infamous Tonton Macoutes of the Duvalier regime have become operative and have mobilized “against all supporters of ousted president Aristide.” Thus, the claim that the Haitian refugees are merely economic refugees and not political refugees is not supported by the evidence.

The HRC plaintiffs exhausted all judicial remedies. They were unsuccessful in a petition to the United States Supreme Court that requested a ban on repatriation. However, as a direct result of the
HRC litigation, several bills have been introduced by various members of Congress to give Haitians who are in the United States or "in the custody or control of the United States (including on Coast Guard vessels on the high seas)" protected status and to halt the repatriation process.253

denial of certiorari by the Supreme Court. He stated that the Supreme Court should have granted certiorari and ruled on the merits "after a full and careful consideration .... " Further, Justice Blackman stated that the issues involved in the case were "at least as significant as any we have chosen to review today." Id.; see Haitian Refugee Center, Inc., et al v. James Baker, III, et al., 112 S. Ct. 1072 (1992) (government's application for stay of limited injunctive relief granted by Judge Atkins on Dec. 20, 1991, granted pending disposition of appeal by the Eleventh Circuit).


253. Id. On May 23, 1992, President George Bush issued Executive Order 12,807 [hereinafter "Kennebunkport Order"]; 57 Fed. Reg. 23,133, 23,133-34 (1992). The Kennebunkport Order permits the Coast Guard to interdict Haitians on the high seas and to immediately return them to Haiti without making a determination as to their political refugee status. Specifically, the Kennebunkport Order provides, inter alia:

... Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Id. at § 3, 23,134; see Haitian Migrants, 28 Weekly Compilation of Presidential Documents 938 (1992) (President Bush explains purpose of Executive Order 12,807 and characterizes Haitians as economic refugees). The legality of this executive order was challenged in Haitian Centers Council, et al v. McNary, 92-CV-1258 (E.D.N.Y 1992). The case was filed on behalf of the plaintiffs by the Center for Constitutional Rights. The lawsuit raises all of the issues litigated in the HRC litigation.

The Kennebunkport Order was upheld by federal district court judge, Sterling Johnson. Judge Johnson ruled that Article 33 of the 1967 Protocol was not self-executing. However, he further concluded:

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. The 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 unless Congress enacts legislation implementing its provisions or a higher court reconsiders Bertrand."
Though President Bill Clinton promised to reverse former Presi-

The plaintiffs appealed the district court's denial of their request for injunctive relief. On July 29, 1992, the United States Court of Appeals for the Second Circuit reversed the district court's ruling. Though technically a ruling on a preliminary injunction is not a decision on the merits, the court of appeals held that § 243(h)(1) of the INA, as amended by the Refugee Act of 1980, was applicable to aliens intercepted in international waters. Thus, the court of appeals expressed its opinion that the Kennebunkport Order which allowed the Coast Guard to summarily return Haitians to "their persecutors" in Haiti was illegal. Haitian Centers Council, Inc., et al. v McNary, No. 92-6144, — F.2d — (2nd Cir.) 1992 WL 179508, at *1.

In reaching its decision that the request for preliminary injunctive relief should have been granted, the court of appeals applied the plain meaning doctrine in its construction of the language found in § 243(h)(1). Prior to 1980, § 243(h)(1) (8 U.S.C. 1253 (h)(1)) read:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.

Id. After amendment by the Refugee Act of 1980, the provision read:

The Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such aliens'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. at *5.

First, the court of appeals reasoned that the new statute prohibited the Attorney General from returning "any alien" to a place of persecution rather than "any alien in the United States." Id. at *5. Section 243(h)(1) applies to any alien without regard to the alien's location with or without the United States. Id. at *6. Since the language of the statute is unambiguous, the judicial inquiry or construction of the statute is complete. Haitian Centers Council, Inc., et al. v McNary, No. 92-6144, — F.2d — (2nd Cir.) 1992 WL 179508, at *6. The court of appeals ruled that prior to 1980, § 243(h)(1) created a distinction between those aliens "within the United States" contradistinguished from others not within the country's borders. Id. at *7. Congress removed the words "within the United States." Id. It discarded the language. "... Congress does not intend, sub silentio, to enact statutory language that it has earlier discarded." Id. Second, the court of appeals held that the government's conduct constituted a return of aliens to their persecutors within the meaning of the statute. Id. at *9. Therefore, the government's action violated § 243(h)(1) of the INA. Haitian Centers Council, Inc., et al. v McNary, No. 92-6144, — F.2d — (2nd Cir.) 1992 WL 179508, at *9.

The court of appeals rejected the government's argument that Articles 33 of the 1967 Protocol and the 1951 Convention on Refugees did not apply extraterritorially on the high seas. Id. at *11-23. The majority of the court further noted that the practical effects of the government's action is to prevent Haitians from not only entering the United States, but to prevent them for gaining entrance into the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven. Id. at *16. The government's assertion "that returning ... Haitians to their persecutors is somehow 'in regard for their safety' is itself absurd." Id. Unfortunately, the court of appeals refused to reach the issue as to whether Article 33 was self-executing. The majority characterized any discussion of the self-executing nature of Article 33 as "academic" because the plain language of § 243(h)(1) of the INA prohibited the United States from returning aliens to their persecutors "no matter where in the world those actions are taken." Id. at *17.

Subsequent to the court of appeals' decision, the government filed an application for a stay of the decision in the United States Supreme Court [hereinafter "Supreme Court"] July 29, 1992. The Supreme Court of the United States on August 1, 1992, granted the request for a stay pending the filing of a writ of certiorari by the applicants. The Supreme Court ordered: [J]t is ordered that the judgment of the United States Court of Appeals for the Second Circuit, Case No. 92-6144, filed July 29, 1992 . . . [is] stayed pending the filing of a petition for a writ of certiorari on or before August 24, 1992. Should the petition for a writ be filed on or before that date this order is to remain in effect pending the Court's action on the petition. If the petition for a writ of certiorari is denied, the order is to terminate automatically. In event the petition is granted, this order is to remain in effect pending the sending down of the judgement of the Court.

dent Bush's policy of returning Haitian immigrants to Haiti after intercepting them at sea, President Clinton has now retreated from his campaign pledge. President Clinton has stated: "For the time being this [policy of forced repatriation] is the right policy. . . . Those who leave Haiti by boat for the United States will be intercepted and returned to Haiti by the U.S. Coast Guard." 254 President Clinton has suggested that more consular officials may be dispatched to Haiti to facilitate the processing of asylum applications. President Clinton may also ask Carribean countries to give Haitians temporary refuge. 255

Recently, Haitian detainees have protested the disimilarity of treatment accorded them as compared to Cuban refugees. Cuban refugees who arrive in the U.S. are released to relatives without applying for asylum. These Cubans qualify for permanent residency after one year of residency. This process is sanctioned and established under the Cuban Adjustment Act of 1966. 256

An appeal to the legislative branch of government is the forum of last resort. This author submits that such an appeal should include legislation that redefines and broadens the definition of politi-

the plaintiffs in the case faced the real and immediate prospect of persecution, terror and possible death at the hands of those to whom they were being forcibly returned. Id. The government did not make a strong showing that a balancing of the equities would be in its favor. The government simply presented the Court with "a vague invocation of harm to foreign policy, immigration policy, and the federal treasury. . . ." Id. On October 5, 1992, the United States Supreme Court granted the government's petition for a writ of certiorari. See McNary, et al. v. Haitian Centers Council, et al., ___ S. Ct. ___, 1992 WL 228363 (U.S.), 61 U.S.L.W. 3156 (1992).

Perhaps it is the appropriate historical time to modify the definition of political refugee. Panjabi has written that "generalized persecution and random violence can be as life threatening as individual persecution and specific targeting by terrorist or government assassins." R. Panjabi, International Politics in 1990's: Some Implications for Human Rights and the Refugee Crisis, 10 DICK. J. INT'L L. 1, 11 (1991). Panjabi quotes Barry Stein who has commented:

Rather than fleeing because of individual fear of persecution they have fled generalized violence, internal turmoil, situations involving gross and systematic violations of human rights. . . .

Most contemporary refugees are externally displaced persons rather than "classic" refugees. They are not fleeing a political controversy that involves them personally. Often they are getting out of harm's way rather than fleeing persecution.

B.N. Stein, The Nature of the Refugee Problem, in HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 52 (A.E. Nash ed. 1988), quoted in Panjabi, id. at 12. Panjabi argues that the classical definition of refugee has outlived its purpose or uselessness. Id.; see also 1984 Cartenga Declaration on Refugees (Central American definition of refugee includes individuals who have fled "generalized violence" or "serious disturbances of public peace"). V. NANDA, REFUGEE LAW AND POLICY 7 (1989).


IMMIGRATION LAW

The poignant and perspicacious observations of the editor of the *Washington Post* are noteworthy:

The test for admission to this country is whether the refugees have reason to fear political persecution if they return home. For people from communist countries that used to be taken for granted.

For increasing numbers of refugees worldwide, as for the Haitians, the fear of political persecution is no longer a useful test. Haiti isn’t a communist despotism. It’s in a state of anarchy in which armed men roam the streets knowing that there is neither an independent police force nor a judiciary capable of calling them to account. They fear robbery and murder. They fear starvation in a country that was desperately poor to begin with and is now under international sanctions that have cut off the meager trade on which it lived—except perhaps for the drug trade.

The United States ought not try to repatriate any Haitians by force until the Organization of American States has gone farther in its efforts to reestablish a legitimate government there and reduce the level of violence. It’s understandable that the Bush administration does not want to incite a further migration of Haitians to this country. But it is ludicrous to tell Haitians that they aren’t real refugees because they aren’t fleeing the right kind of tyranny.

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257. *Who’s a Genuine Refugee, Wash. Post*, Dec. 30, 1991, at A12. But see *Haiti’s Future Appears Cloudy*, *Advocate* (Baton Rouge, LA), 8B (U.S. cannot accept all Haitian refugees; OAS should continue to search for a solution); see also *What’s the Rush to Send Helpless Haitians Home?*, USA Today, Feb. 3, 1992, at 10A (“Bush administration... won a hollow victory over... helpless Haitians.”) There is “growing political violence in Haiti.” “Amnesty International reports Haitians are living in ‘a climate of fear and repression’...” “Closing our doors to needy Haitians is bad enough; sending them to their death would be shameful.”

The Bush administration announced that the Coast Guard would no longer stop all Haitian boats attempting to reach the U.S. If the Coast Guard determined the refugees on the boat were not in “imminent danger,” that the vessel was strong enough to proceed and had enough food and water, the vessel would not be stopped. The Coast Guard will encourage the Haitians to return to Haiti. This new policy is the result of an overflow of refugees at Guantanamo Bay, Cuba. Coast Guard now estimate that approximately 10,404 refugees were interdicted in May 1992 and a total of 34,090 refugees have been interdicted since October 1991. Clifford Krauss, *To Stem Exodus U.S. Won't Pick Up All Haiti Refugees*, N.Y. Times, May 22, 1992, at A1, A12.

However, the new policy has been denounced as “let them sail, let them sink” by human rights activists. Rep. John Conyers, D-Mich., called for a reversal of the policy. He stated: “We are telling these desperate refugees that if the water doesn’t kill them, the (Haitian) military might.” Jean-Claude Bajeaux described the change in policy as “a desperate, revolting decision.” He further stated that “[t]he root of the problem is political repression.” “Can the U.S. get away with the hypocrisy of saying, “Let them sail, let them sink?” Michael Norton, *Coast Guard Lets Haitian Boats Sail*, Advocate (Baton Rouge, LA), May 25, 1992, at 2A; *U.S. Halts Haitian Boat Rescue; New Orleans Lawyer Calls it Genocide*, Times-Picayune (New Orleans, LA), May 23, 1992, at A22.

After the institution of the Coast Guard’s new policy, President Bush by Executive Order, citing “a dangerous and unmanageable situation” authorized the Coast Guard to return directly to Haiti those Haitian refugees interdicted at sea. U.S. officials believed that picking up
and detaining the interdictees at Guantanamo Bay encouraged more refugees to flee Haiti. The Coast Guard would escort the boats back to Haiti or carry the interdictees who were on unseaworthy vessels back to Haiti. Arthur Helton of the Lawyers Committee for Human Rights has described Mr. Bush's order as a "gross violation of international law." "This is as wrong as it gets in terms of international refugee law. Congress must intervene to provide recourse to the boat people." Attorneys with HRC also have suggested that the Executive Order violates international law. The 1967 Refugee Protocol prohibits the U.S. from returning refugees to a country where they might be persecuted. The practical effect of the policy is to return interdictees without determining whether they have a right to political asylum in the United States. Michael Wines, Switching Policy, U.S. Will Return Refugees to Haiti, N.Y. TIMES, May 25, 1992, at A1, A4; see Bush Strongly Defends Policy of Returning Haitians, WASH. POST, May 28, 1992, at A8 ("I will not open the doors to economic refugees from all over the world."); Bush Authorizes Return of Haitians Found at Sea, TIMES-PICAYUNE (New Orleans, LA), May 25, 1992, at A3; Bush Orders Return of Haitians, ADVOCATE (Baton Rouge, LA), May 25, 1992, at 1A, 4A; William Raspberry, Haiti (1) Dilemma, WASH. POST, May 29, 1992, at A23 ("We're faced with a diplomatic and moral emergency. [T]he problem is significantly complicated by the fact that, apart from the refugees-spawning embargo, America and its hemispheric neighbors are doing precious little to force out the junta and restore Aristide to power."); William Raspberry, Haiti (2) Dilemma, WASH. POST, June 1, 1992, at A19 ("And the way out of the mess? Fauntroy . . . Walter Fauntroy, the District of Columbia's retired Congressman . . . has no doubt." "'Lift the embargo, and the refugee flood will cease.'"). See also Ending the Haitian Embargo, WASH. POST, June 3, 1992, at A18; see Fair Haven for Haitian Refugees, N.Y. TIMES, July 31, 1992, at A26; see also For Haitians, Justice Denied, N.Y. TIMES, August 30, 1992, at 14; Refugee Policy Protested, WASH. POST, Sept. 10, 1992, at A9 (protesters argued that the Bush Administration is turning away Haitians solely because of race. Bush policy is "clearly and blatantly racist.").

With the recent election of Bill Clinton as president of the United States, hope is kept alive for the possible nullification of the Bush Kennebunkport Order. During his campaign, President-elect Clinton criticized the Bush administration's policy of returning Haitians to Haiti without due process. President-elect Clinton promised to provide hearings on refugee status for every interdictee. When the Second Circuit declared the Bush executive order illegal, President-elect Clinton stated that the decision was "the right decision" and that Bush was "wrong to deny Haitian refugees the right to make their case for political asylum." Al Kamen, Haitian Exodus Could Pose Early Clinton Test, WASH. POST, Nov. 12, 1992, at A1, A8.