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SALE V. HAITIAN CENTERS COUNCIL, INC: CLOSING THE GOLDEN DOOR

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”¹

INTRODUCTION

For decades, the United States symbolized a splendid oasis for refugees, immigrants, and political prisoners of all races, creeds, and nationalities.² In recent years, however, our “golden door” policies of the past have begun to quietly close.³ Last term, the Supreme Court reaffirmed and sanctioned this shift towards pragmatism, exclusion, and isolation.⁴

The purpose of this note is to carefully examine the Supreme Court’s reasoning in *Sale v. Haitian Centers Council, Inc.*⁵ Part II sketches the contours of our recent policies with Haiti, and highlights the relevant refugee law involved. Part III dissects the case itself and presents the facts, procedure, and reasoning of the majority and minority. Finally, Part IV probes the strength of the court’s analysis, and assesses the future implications of the decision.

BACKGROUND

History Behind the Refugee Act of 1980

Shortly after World War II, the nations of the world convened to determine standards for the treatment of refugees.⁶ This assembly promulgated a treaty known as the United Nations Convention Relating to the Status of Refugees [Convention].⁷ Article 33 of the

¹ Emma Lazarus, *The New Colossus*, in THE COLUMBIA GRANGERS DICTIONARY OF POETRY QUOTATIONS 269 (Edith P. Hazen ed., 1992).

² See generally Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325, 332 (1993) (“The early years of the United States were characterized by an open immigration policy.”).

³ See Exec. Order No. 12,324, 3 C.F.R. 180 (1982), reprinted in 8 U.S.C. § 1182 (1988) (allowing Coast Guard to interdict and repatriate Haitians). See also Exec. Order No. 12,807, 57 Fed. Reg. 23133 (1992) (continuing interdiction and repatriation, but removing refugee screening process).

⁴ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549 (1993) (upholding Executive Order 12,807, 57 Fed. Reg. 23133 (1992)).

⁵ *Id.*

⁶ See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.S.T.S. 150 [hereinafter Convention].

⁷ *Id.*

Convention protects refugees from being returned and persecuted, and grants them the privilege of “non-refoulement.”⁸

Because the United States is not a signatory member of the Convention,⁹ its obligations are not directly binding on our government. In 1968, however, the United States acceded to the United Nations Protocol Relating to the Status of Refugees [Protocol].¹⁰ By adopting the Protocol, the United States agreed to comply with Articles 2 through 34 of the Convention.¹¹

Although our existing laws were believed to mirror the Protocol,¹² weaknesses in their application were discovered.¹³ In 1980, Congress amended the Immigration and Nationalities Act of 1952 [INA].¹⁴ That amendment became known as the Refugee Act of 1980.¹⁵ Specifically, this amendment changed section 243(h) of the INA to mirror the language of the Protocol and the Convention.¹⁶

⁸ *Id.* at 176. “Non-refoulement” is derived from the French verb *refouler*, meaning “to drive back or repel.” GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 69 (1983). This principle embodies the idea that “no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom.” *Id.*

⁹ *INS v. Stevic*, 467 U.S. 407, 416 n.9 (1984) (holding that an alien seeking to avoid deportation must establish a clear probability of persecution).

¹⁰ The United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]. Over 100 states are parties to the Convention or the Protocol. See Jon L. Jacobson, *At-Sea Interception of Alien Migrants: International Law Issues*, 28 WILLIAMETTE L. REV. 811, 813 (1992) (explaining refugee law as it applies to the law of the sea).

¹¹ *Stevic*, 467 U.S. at 416. “The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees. . . .” *Id.*

¹² *Id.* at 417. “The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol.” *Id.*

¹³ See Suzanne Gluck, *Intercepting Refugees at Sea: An Analysis of the United States’ Legal and Moral Obligations*, 61 FORDHAM L. REV. 865, 866 n.5 (1993) (explaining the problems with enforcing the Protocol). Although the United States was bound to observe non-refoulement, its “adherence to the principle, however, had been inadequate.” *Id.* “[T]o ensure compliance with its international obligations, Congress amended section 243(h) to parallel the mandatory provisions of article 33.” *Id.*

¹⁴ 8 U.S.C. §§ 1101-1525 (1988 & Supp. III 1991).

¹⁵ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1253(h)) (supp. IV 1992). Section 243(h)(1) of that act states:

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

Id. For a complete discussion of this act, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981). See also David A. Martin, *The Refugee Act of 1980: Its past and Future*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91 (1982).

¹⁶ *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549, 2568 (1993) (Blackmun, J., dissenting). “I begin with the Convention, for it is undisputed that the Refugee Act of 1980 was passed to conform our law to Article 33” *Id.* (Footnote omitted). Article 33 of the Protocol states: “1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Protocol, *supra* note 10, at Article 33.

A History of Our Recent Policies with Haiti

In 1980, the Mariel boatlift deposited 125,000 Cubans on the coast of Florida.¹⁷ During that same year, over 15,000 Haitians also entered illegally.¹⁸ In an effort to stem this tide of illegal immigration, former President Ronald Reagan issued Executive Order 12,324.¹⁹ This Order gave the Secretary of State authority to enter into "cooperative arrangements" with foreign governments to prevent illegal migration to the U.S. by sea.²⁰

Subsequent to Executive Order 12,324, the United States entered into one such agreement with Haiti.²¹ Under the terms of this Agreement and Executive Order 12,324, the Coast Guard had the authority to stop,²² board,²³ and repatriate²⁴ Haitian vessels.

Reagan made certain, however, that the United States strictly observed its international obligations concerning refugees.²⁵ This meant the implementation of a brief screening process to determine the possibility of refugee status.²⁶ Immigrants who had

¹⁷ Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2336 (1991).

¹⁸ Helton, *supra* note 2, at 325.

¹⁹ Exec. Order No. 12,324, 3 C.F.R. 180 (1982), *reprinted in* 8 U.S.C. § 1182 (1988). The introduction to this order states:

By the authority vested in me as President by the Constitution and statutes of the United States of America including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows

Id.

²⁰ *Id.* § 1.

²¹ Agreement on Interdiction of Haitian Immigration to the U.S., Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter U.S.-Haiti Agreement]. Actually, the agreement with Haiti preceded Exec. Order No. 12,324. *See* Helton, *supra* note 2, at 326. Specifically, the Haitian government agreed to help the United States government to "stop the clandestine migration of numerous residents of Haiti to the United States." U.S.-Haiti Agreement, *supra*, at 3559. The Haitian government also gave assurances that it would not prosecute repatriated Haitians for fleeing the country. *Id.* at 3559-60.

²² Exec. Order No. 12,324, *supra* note 19, § 2(c)(1).

²³ *Id.*

²⁴ *Id.* § 2(c)(3).

²⁵ *Id.* § 3. This section states:

The Attorney General shall, 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 (including effective implementation of the Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

Id.

²⁶ *Id.* § 2(c)(3). This section states: "[N]o person who is a refugee will be returned without his consent." *Id.* The government delegated this responsibility to the Immigration and Naturalization Service. *See* Gluck, *supra* note 13, at 870.

credible refugee claims were taken to the U.S. to begin the asylum process.²⁷ Those who did not have credible claims were taken back to Haiti.²⁸ Between 1981 and 1991, only eleven out of 23,000 Haitians who were stopped and questioned, received refugee status.²⁹

The first notable challenge to former President Reagan's interdiction and repatriation program came in *Haitian Center v. Gracey*.³⁰ In *Gracey*, the plaintiffs claimed that the program violated the United States' non-refoulement obligations under section 243(h) of the INA, and Article 33 of the Convention.³¹ This case was quickly dismissed by the district court, which held section 243(h) does not apply to those interdicted on the high seas.³²

On Sept. 30, 1991, a military coup ousted Haiti's democratically elected President, Bertrand Aristide.³³ Following the coup, hundreds of Haitians were killed, tortured, detained or subjected to violence.³⁴ In the wake of these actions, the United States

²⁷ See U.S.-Haiti Agreement, *supra* note 22, at 3559-3560. "[I]t is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." *Id.* See also Helton, *supra* note 2, at 328. See also Gluck, *supra* note 13, at 870 n.30. For a thorough examination of the INS directives concerning these interviews, see *Haitian Refugee Cir., Inc. v. Baker*, 953 F.2d 1498, 1501-02 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992).

²⁸ Exec. Order No. 12,324, *supra* note 19, § 2(c)(3).

²⁹ See Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 70 n.18 (1993). See also Jacobson, *supra* note 10, at 816. Unfortunately, the INS officials who conducted the interviews were not properly trained in asylum law, and made their decisions "based on hasty interviews on board crowded vessels." Gluck, *supra* note 13, at 870.

³⁰ 600 F.Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

³¹ *Id.*

³² *Id.* at 1404.

³³ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549, 2554 (1993). The United States did not support Aristide in the election. The U.S. supported Marc L. Bazin, a former world bank official. See Carole Cleaver, *Haiti in Limbo: Bazin, Aristide, and the Generals*, 76 NEW LEADER 7, 7 (Jan. 25, 1993). Bazin received only 12 percent of the vote to Aristide's 67%. *Id.* After the coup, Bazin became the Prime Minister, and ran Haiti with the leader of the coup, Lieutenant General Raoul Cedras. *Id.* On August 30, 1993, Haiti installed Robert Malval as its new Prime Minister. See Juan J. White, *Haiti Moves Closer to Democracy*, U.S.A. TODAY, Aug. 31 1993, at 4A. Malval took the oath of office from Aristide at Haiti's embassy in Washington D.C. *Id.*

³⁴ See Gluck, *supra* note 13, at 871 (citing report issued by Americas Watch). That report stated:

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

See *id.* (quoting 138 CONG. REC. 513,095, 513,095 (daily ed. Sept. 9, 1992)).

imposed economic sanctions on Haiti, and suspended the repatriation of illegal Haitian immigrants.³⁵

On Nov. 18, 1991, the Coast Guard reinstated the program of interdiction and forced repatriation.³⁶ By then, however, there was an explosion in the amount of immigrants fleeing Haiti.³⁷ Eventually, it became nearly impossible to conduct adequate screening interviews.³⁸

After the program was reinstated, it was once again tested in court.³⁹ The plaintiffs filed a complaint seeking a temporary restraining order to stop the repatriation.⁴⁰ The complaint alleged that the defendants failed to follow proper INS procedures, and violated the terms of Executive Order 12,324.⁴¹

The district court immediately granted a temporary restraining order,⁴² and later granted an injunction.⁴³ The government appealed to the Eleventh Circuit Court of Appeals.⁴⁴ On February 4, 1992 the Court of Appeals for the Eleventh Circuit vacated and remanded the district court's decision.⁴⁵

³⁵ *Sale*, 113 S.Ct. at 2554. Unfortunately, the embargo has failed. *See Cleaver, supra* note 33, at 8. "It is the poor who have been hit hardest by the embargo. The foreign companies that ran factories in the industrial complex have moved out, many to the Dominican Republic, leaving 100,000 people without the means of survival." *Id.* At the same time the embargo has had little effect on the wealthy. *Id.* *See also* Michael Norton, *Haiti Wary as Sanctions End*, AKRON BEACON JOURNAL, Aug. 29, 1993, at A6. "The deaths of 10,000 Haitians were linked to malnutrition and lack of medicine caused by the sanctions . . ." *Id.*

³⁶ *Sale*, 113 S.Ct. at 2554.

³⁷ *See Schoenholtz, supra* note 29, at 70 n.26. Between September of 1991 and May of 1992, over 36,600 Haitians were interdicted. *Id.* Of those stopped, approximately 10,300 were found to have plausible refugee claims. *Id.*

³⁸ *See Sale*, 113 S.Ct. at 2555. "With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing . . . the government could no longer both protect our borders and offer the Haitians even a modified screening process." *Id.*

³⁹ *Haitian Refugee Ctrs., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992).

⁴⁰ *Id.* at 1502-03. Plaintiffs filed the complaint only one day after the Coast Guard reinstated the repatriation. *Id.*

⁴¹ *Id.* at 1503. The complaint also alleged violations of the Refugee Act of 1980, Article 33 of the Protocol, and the Fifth Amendment due process clause. *Id.* Specifically, the complaint attacked the interviews themselves. *Id.* The plaintiffs alleged that interviews conducted on the Coast Guard ships were less than five minutes, were not conducted in private, and were conducted when Haitians were starving or needed medical attention. *Id.*

⁴² *Id.* "The temporary restraining order precluded the defendants from repatriating Haitians on board U.S. flagged vessels or Haitians being held on land under United States control and at Guantanamo Bay, Cuba." *Id.*

⁴³ *Id.* The injunction was granted on December 3, 1991. *Id.*

⁴⁴ *Id.* Defendants first filed a motion to vacate the temporary restraining order. *Id.* This order was denied. *Id.*

⁴⁵ *Id.* at 1515. The court found that Haitians who had been interdicted on the high seas had no rights under the Administrative Procedure Act. *Id.* The Court also found that Plaintiff Haitian Refugee Center had no First Amendment right of access to aliens lawfully interdicted and detained. *Id.* Finally, the court found that § 243(h) of the 1980 amendment only applies to Haitians within the United States. *Id.* at 1510.

STATEMENT OF THE CASE

Facts

On May 24, 1992, former President George Bush issued Executive Order 12,807.⁴⁶ This order continued the interdiction and repatriation of Haitians on the high seas,⁴⁷ but completely removed the refugee screening process.⁴⁸ Following this order, the Coast Guard began to forcibly interdict and repatriate all Haitians found in international waters.⁴⁹

Procedural History

After former President Bush issued Executive Order 12,807, Respondents immediately moved for a temporary restraining order.⁵⁰ Respondents claimed the order violated section 243(h) of the INA, and Article 33 of the United Nations Protocol.⁵¹

⁴⁶ Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1993). The order states in part:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)) and whereas:

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

(2) The International legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

Id.

⁴⁷ See *id.* The order itself does not specifically authorize the interdiction and repatriation of Haitians. However, a White House Press statement issued the same day states: "President Bush has issued an Executive Order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti." White House Statement on Haitian Migrants, I George Bush PUB. PAPERS 818 (1992).

⁴⁸ See Exec. Order No. 12,807, *supra* note 46, at 23, 133. Although there is no mandate to screen for refugees, § 2(c)(3) states: "the Attorney General, in his unreviewable discretion may decide that a person who is a refugee will not be returned without his consent." *Id.* President Bush also stated: "Yes, the Statue of Liberty still stands and we still open our arms to people that are politically oppressed. We cannot, as long as the laws are on the books, open the doors to economic refugees all over the world." 138 CONG. REC. H3,911, H3,911 (daily ed. May 28, 1992).

⁴⁹ Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1353 (1992), *cert granted*, 113 S.Ct. 52 (1992), *and rev'd*, Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549 (1993).

⁵⁰ Sale v. Haitian Ctrs. Council, Inc., 113 S.Ct. 2549, 2556 (1993).

⁵¹ *McNary*, 969 F.2d at 1353. Respondents also claimed violations of: (1) the 1981 U.S.-Haiti Executive Agreement, (2) the Administrative Procedure Act, and (3) the equal protection component of the Fifth Amendment's due process clause. *Id.*

The district court denied this application, holding that section 243(h)(1) does not apply to actions on the high seas,⁵² and that the Protocol is not self-executing.⁵³ Respondents then appealed to the Second Circuit Court of Appeals.⁵⁴

The Second Circuit reversed the district court, and held that Executive Order 12,807 violates section 243(h) of the Immigration and Nationality act of 1952.⁵⁵ The Supreme Court then granted Certiorari,⁵⁶ and the case was orally argued on March 2, 1993.⁵⁷

Reasoning of the Majority

The argument before the Supreme Court focused on two issues.⁵⁸ First, does Executive Order 12,807 violate section 243(h) of the Immigration and Nationality Act of 1952.⁵⁹ Secondly, does Executive Order 12,807 violate Article 33 of the United Nations Protocol Relating to the Status of Refugees.⁶⁰

By an eight to one decision, the Supreme Court reversed the decision of the appellate court.⁶¹ The Majority held that neither section 243(h) of the INA, nor Article 33 of the Protocol apply to actions taken by the Coast Guard on the high seas.⁶²

⁵² *Id.* Although he denied the injunction, the district court judge "called the United States' actions 'unconscionable', 'particularly hypocritical', and 'a cruel hoax.'" *Id.*

⁵³ *Id.* The district court judge stated "[A]lthough '[o]n its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution', our prior decision in *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982) held that the convention's provisions are not self-executing." *See id.* (quoting *Haitian Ctrs. Council, Inc., v. McNary*, No. 92 CV 1258, 1992 WL 155853 at *11 (E.D.N.Y. Apr. 6, 1992)). The district court judge did not address the other arguments. *See id.* A non-self executing treaty requires legislative enactment to become binding. *See Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 305 (1988). A self-executing treaty goes into effect without a statute codifying it. *Id.*

⁵⁴ *McNary*, 969 F.2d at 1354.

⁵⁵ *Id.* at 1367. The appellate court stated:

The Plain language of § 243(h)(1) of the Immigration and Nationality Act clearly states that the United States may not return aliens to their persecutors, no matter where in the world those actions are taken. In view of this, plaintiffs arguments regarding the self-executing nature of Article 33.1 of the Refugee Convention are largely academic, since § 243(h)(1) provides coextensive protection.

Id.

⁵⁶ *McNary v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 52 (1993), *rev'd*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549 (1993).

⁵⁷ *See Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549 (1993).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2567.

⁶² *Id.* at 2550.

a. Section 243(h) of The INA

The Majority begins its analysis with an examination of the text and structure of the INA.⁶³ First, the Majority claims that a President's actions are not bound by section 243(h)(1) of the INA.⁶⁴ This reasoning relies heavily on § 1103(a) and other sections of the INA, which confer specific responsibilities on cabinet members.⁶⁵ The Majority concludes that section 243(h)'s directives apply only to the Attorney General.⁶⁶

Secondly, the Majority determines that the INA only binds the Attorney General in her "normal responsibilities."⁶⁷ Because the INA does not specifically cover interdiction and repatriation on the high seas, the Majority believes the Attorney General is not bound in the situation at hand.⁶⁸

Thirdly, the Majority relies on the principle that Acts of Congress do not ordinarily apply outside our borders.⁶⁹ Because the INA does not explicitly elucidate an extraterritorial effect, the Majority believes there is a strong presumption that Congress intended only a domestic effect.⁷⁰

Lastly, the Majority relies on the changes in the INA that were made by the 1980 amendment.⁷¹ These changes indicate that section 243(h) protects only two types of refugees: Those physically within the United States ("deportable"), and those within the United States territory, but not physically within the United States ("excludable").⁷² Because the Haitians were in international waters and not U.S. territory, the Majority would exclude them from these two protected classes.⁷³

⁶³ *Id.* at 2558.

⁶⁴ *See id.* at 2558-59. "We cannot say that the interdiction program created by the President, which the Coast Guard was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone." *Id.* at 2559.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 2559. "The reference to the Attorney General in the statutory text is significant not only because that term cannot reasonably be construed to describe either the President or the Coast Guard, but also because it suggests that it applies only to the Attorney General's normal responsibilities under the INA." *Id.*

⁶⁸ *See id.* at 2560.

⁶⁹ *See id.* "Even if Part V of the Act were not limited to strictly domestic procedures, the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory." *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 2560-62.

⁷² *Id.* at 2561. "The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of § 243(h)." *Id.*

⁷³ *See generally id.* at 2560-62.

Thus, the Majority concludes that section 243(h) applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.⁷⁴

b. The Convention

After concluding that section 243(h) of the INA does not apply extraterritorially, the Majority examines the 1951 Convention.⁷⁵ First, the Majority examines the text of Article 33, and finds ample support for its conclusions.⁷⁶

Specifically, the Majority believes that the words “expel or return” from Article 33 mirror the words “deport and return” from section 243(h).⁷⁷ Thus, once again, the Majority concludes that the INA’s protections are only afforded to those aliens who are within the country or within the country’s territory.⁷⁸

Finally, the Majority traces the specific negotiating history of the 1951 Convention.⁷⁹ The Majority relies on statements made by a delegate from the Netherlands who believed that article 33 did not apply extraterritorially.⁸⁰ Thus, the Majority concludes that Article 33 does not apply to aliens interdicted on the high seas.⁸¹

Reasoning of the Minority

Justice Blackmun is the lone dissenter.⁸² He criticizes the Majority’s reasoning, and openly questions their humanitarian compassion.⁸³ Justice Blackmun believes

⁷⁴ *Id.* at 2562.

⁷⁵ *See id.* at 2562.

⁷⁶ *See id.* at 2562-63. “Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article’s possible application to actions taken by a country outside its own borders.” *Id.*

⁷⁷ *Id.* at 2563. “Article 33.1 uses the words ‘expel or return (‘refouler’)’ as an obvious parallel to the words ‘deport or return’ in section 243(h)(1).” *Id.*

⁷⁸ *See id.* at 2565. “Because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions.” *Id.* (footnote omitted).

⁷⁹ *Id.*

⁸⁰ *Id.* at 2566. “‘In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.’” *Id.* (quoting Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting*, U.N.Doc. A/Conf.2/SR.35, at 21-22 (July 25, 1951)).

⁸¹ *Id.* at 2567. “We do not read that text to apply to aliens interdicted on the high seas.” *Id.*

⁸² *See id.* at 2567.

⁸³ *See id.* at 2577 (Blackmun, J., dissenting). Blackmun states:

The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the Treaty and the statute. We should not close our ears to it.

Id.

that the word "return" as used in Article 33 and section 243(h) applies to all aliens, including the Haitians.⁸⁴

Justice Blackmun looks to the ordinary meaning of "return" and finds it unambiguous.⁸⁵ He also believes that a President's actions must comply with section 243(h)'s mandatory directives. Furthermore, Justice Blackmun finds the presumption against extraterritoriality irrelevant.⁸⁷ Finally, Blackmun believes that the changes in 1980 to the INA illustrate expanded protection for refugees beyond the scope of the Majority's interpretation.⁸⁸

ANALYSIS

Textual Arguments From Section 243(h)

The Majority begins its analysis by examining the text of Section 243(h)(1) of the INA.⁸⁹ That provision reads:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁰

Generally, when a court is interpreting undefined statutory terms, the court must look first at the "ordinary meaning" of the words themselves.⁹¹ In section 243(h)(1), the word "return" is undefined by the rest of the INA provisions.⁹² Therefore, a determination of the "ordinary meaning" of "return" should be the first interpretive norm used.

⁸⁴ See *id.* at 2568. "Vulnerable refugees shall not be returned." *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2574. "Accordingly, there is no merit to the argument that the concomitant legal restrictions placed on the Attorney General by Congress do not apply with full force in this case." *Id.*

⁸⁷ *Id.* at 2576. "The judicially created canon of statutory construction against extraterritorial application of the United States law has no role here" *Id.*

⁸⁸ *Id.* at 2574. "The import of these changes is clear. Whether 'within the United States' or not, a refugee may not be returned to his persecutors." *Id.*

⁸⁹ *Id.* at 2558.

⁹⁰ 8 U.S.C. § 1253(h)(1) (Supp. IV 1992).

⁹¹ *Richards v. United States*, 369 U.S. 1, 9 (1962). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (emphasizing the courts' duty to examine ordinary meaning).

⁹² *Haitian Ctrs. Council, Inc., v. McNary*, 969 F.2d 1350, 1360 (2d Cir. 1992) ("Not until the executive's recent actions in 'reaching out' to repatriate Haitians has litigation attention shifted to the term 'return,' which is nowhere defined in the INA."), *cert. granted*, 113 S.Ct. 52 (1992), *rev'd*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549 (1993).

The Majority's analysis, however, does not follow this logic. Instead of examining the ordinary meaning of "return," the Majority's opinion begins with other interpretive norms.⁹³ By not following the understood method of statutory construction, Stevens begins the opinion in an unfocused manner that weakens the overall legal analysis.

The Majority's first textual argument deduces that a President's Executive Orders are immune from section 243(h)(1)'s directives because they bind only the Attorney General.⁹⁴ This overly literal conclusion is confusing. Congress understands that the President's agent for dealing with immigration matters is the Attorney General.⁹⁵ Executive Order 12,807 even includes the Attorney General in the chain of command, and gives her the authority to return aliens.⁹⁶ More importantly, immigration policies are "entrusted exclusively to Congress," and not to the Executive branch.⁹⁷ By semantically skirting this duty, the Majority is sanctioning an expansion of executive powers that is not in accord with previous decisions.⁹⁸

The Majority believes that the 1980 amendment expanded section 243(h)'s protections to include only "excludable" aliens.⁹⁹ Unfortunately, the Majority relies not on the legislative history of the amendment, but on one 1958 case as support for its position.¹⁰⁰ In other sections of the INA, Congress clearly delineated this exact geographical restric-

⁹³ *Sale*, 113 S.Ct. at 2559. The court begins by claiming a President's actions are not controlled by § 243(h)(1). *Id.* The court then looks to the presumption against extraterritoriality. *Id.* at 2560.

⁹⁴ *Id.*

⁹⁵ *McNary*, 969 F.2d at 1360 (interpreting 8 U.S.C. § 1103(a)).

⁹⁶ Exec. Order No. 12,807, *supra* note 46, at 23133.

⁹⁷ See *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972). "But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government" *Id.* (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)).

⁹⁸ See *e.g.*, *id.* at 766. "The court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens . . .'" *Id.* (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Id.* (quoting *Oceanic Navigation Co. v. Strahan*, 214 U.S. 320, 339 (1904)). See also *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895). Justice Harlan states:

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous decisions.

Id.

⁹⁹ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549, 2561 (1993) ("The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for the purposes of § 243(h).").

¹⁰⁰ See *id.* at 2560-61. But see also *id.* at 2561 n.33 (quoting H.R.REP. NO. 96-608, 96th Cong., 1st Sess. 30 (1979)). The majority relies on *Leng May Ma v. Barber*, 357 U.S. 185 (1958). *Id.*

tion.¹⁰¹ Clearly, Congress could have stipulated the same geographical limitation in section 243(h) if that were its intent.

Presumption Against Extraterritoriality

The Majority also relies on a canon of construction known as the “presumption against extraterritoriality.”¹⁰² This canon embodies the idea that Acts of Congress do not ordinarily apply outside our borders.¹⁰³ The presumption, however, only applies when congressional intent is unexpressed.¹⁰⁴

The Majority’s reliance on this presumption is debatable. The Refugee Act of 1980 specifically deleted a territorial restriction, expanded the scope of protection for refugees, and made it’s duties mandatory.¹⁰⁵ Moreover, matters of immigration, repatriation, and refugees overtly implicate international matters. In this context, Congress’ intent to apply the statute extraterritorially is clearly expressed. Therefore, the relevancy of this presumption is questionable at best.

Convention and Protocol

In 1969, the Vienna Convention on the Law of Treaties [Vienna Convention]¹⁰⁶ established rules to govern the enforcement of all other treaties.¹⁰⁷ Article 31 of that Convention specifically dictates methods of treaty interpretation for domestic courts.¹⁰⁸ Because the United States has never ratified the Vienna Convention, however, Article 31’s directives are not specifically binding on our court system.¹⁰⁹

¹⁰¹ See e.g., 8 U.S.C. § 1159 (1988 & Supp. IV 1992) (adjustment of refugee status); 8 U.S.C. § 1101(a)(27)(I) (1988 & Supp. IV 1992) (defining “special immigrant” for visa purposes); 8 U.S.C. § 1254(a)(1)-(2) (1988 & Supp. IV 1992) (eligibility for suspension of deportation).

¹⁰² See *Sale*, 113 S.Ct. at 2560.

¹⁰³ See *EEOC v. Arabian Am. Oil Co.*, 111 S.Ct. 1227 (1991).

It is a long-standing principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” . . . It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

Id. at 1227 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). The presumption is also rooted in the belief that Congress generally delegates with domestic concerns in mind. See *Smith v. United States*, 113 S.Ct. 1178, 1183 n.5 (1993).

¹⁰⁴ See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

¹⁰⁵ See *Sale*, 113 S.Ct. at 2574 (Blackmun, J., dissenting) (discussing the changes made by the Refugee Act of 1980).

¹⁰⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. Article 31 states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” *Id.*

¹⁰⁷ Frankowska, *supra* note 53, at 285.

¹⁰⁸ See Frankowska, *supra* note 53, at 299.

¹⁰⁹ See *id.*

Because Article 31 does not apply to our system, the Supreme Court looks elsewhere for guidance. Currently, our Supreme Court looks to a variety of interpretive norms when interpreting a treaty.¹¹⁰ These norms are derived from prior cases, the Restatements, and customary international law.¹¹¹

Prior cases indicate that the Court should follow a patterned hierarchy of interpretive norms. First, the court should consider the “ordinary meaning” of the words used.¹¹² If a passage is ambiguous or hard to discern, the court should then look to other methods of interpretation.¹¹³

In *Sale*, the Majority first considers the text of Article 33 of the Convention.¹¹⁴ Again, instead of first addressing the “ordinary meaning” of the words, however, the Majority first looks to other methods of interpretation.¹¹⁵

When the Majority does address the “ordinary meaning” of the words “expel or return,” it finds that they mirror “deport or return” from section 243(h)(1) of the INA.¹¹⁶ This reasoning is suspect because the words from the treaty were written twenty-eight years before the words from the INA.

¹¹⁰ See James C. Wolf, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1024 (1988).

¹¹¹ See *id.*

¹¹² See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). “The clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’” *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)). See also *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). “The analysis must begin, however, with the text of the treaty and the context in which the written words are used.” *Id.*

¹¹³ See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). “Other general rules of construction may be brought to bear on difficult or ambiguous passages. ‘Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” *Id.* (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985), in turn quoting *Choctaw Nations of Indians v. United States*, 318 U.S. 423, 431-32 (1973)).

¹¹⁴ *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549, 2563 (1993) (examining Article 33). Article 33 states:

1. No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

See Convention, *supra* note 6, at 19 U.S.T.S. 6276; See also *Sale*, 113 S.Ct. at 2563.

¹¹⁵ *Sale*, 113 S.Ct. at 2563 (comparing article 33.1 to article 33.2).

¹¹⁶ *Id.*

The Majority also looks at the negotiating history of the treaty, and relies on oral statements that were neither voted on nor ratified.¹¹⁷ This reliance is questionable. Under United States law, an oral statement not embodied in writing and not expressed to the government is not applicable to determine intent.¹¹⁸ Here the statements made were placed “on the record.”¹¹⁹ Clearly, there is room to debate whether or not these statements should be admissible to determine intent.

Precedential Value

The precedential value of this case is unclear. Prior decisions concerning treaty interpretation made greater use and applied greater importance to ordinary meaning.¹²⁰ However, this Court seems very willing to go beyond “ordinary meaning,” and investigate other methods of interpretive norms.¹²¹

By going beyond the “ordinary meaning” of a treaty, this decision moves our law further away from the Vienna Convention’s strict standards of interpretation.¹²² This more liberal approach seems to reflect the Supreme Court’s willingness to interpret treaties on a case-by-case basis.

Finally, by allowing the executive branch to escape section 243(h)’s directives, the Court is severely weakening the INA. If the reasoning used in this case is expanded into other areas of law, the executive branch could enjoy an expansion of powers far beyond that which Congress intended.

Policy Implications

Perhaps policy considerations played a major factor in the Court’s decision. The Majority seems to feel strongly that most Haitians are fleeing to the United States just to escape poverty.¹²³ Only Justice Blackmun believes that most Haitians are fleeing oppression and persecution.¹²⁴

¹¹⁷ *Id.* at 2565-66 (relying on remarks made by the representative from the Netherlands).

¹¹⁸ See *Arizona v. California*, 292 U.S. 341, 360 (1934). Limited use of negotiating history to determine intent “has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.” *Id.*

¹¹⁹ *Sale*, 113 S.Ct. at 2569-71.

¹²⁰ See *supra* note 91 and supporting text.

¹²¹ See *supra* note 93 and supporting text.

¹²² See *supra* note 106.

¹²³ See *Sale*, 113 S. Ct. at 2567. In closing, Justice John Paul Stevens states: “This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy.” *Id.*

¹²⁴ See *id.* at 2577 (Blackmun, J., dissenting).

¹²⁵ See *supra* note 17.

Although it is not mentioned in the opinion, the Court could be remembering the effects that the 1980 Cuban migration has had on Southern Florida.¹²⁵ Another large migration of refugees could cause racial tension, discord, and further economic problems for Miami and southern Florida.

This case could also have a significant effect on the Presidency of Bill Clinton. During his candidacy, Clinton criticized former President George Bush for his policies on Haiti.¹²⁶ After inauguration, however, Clinton changed his mind dramatically, and upheld Bush's policies.¹²⁷ If human rights violations continue in Haiti, Clinton will be harshly criticized for breaking his campaign promise.

This decision may also increase racial tension in this country. Traditionally, United States refugee policies have favored Europeans and Asians.¹²⁸ By excluding black Haitians, this decision could be used by black leaders as another example of racial prejudice.

Perhaps a lasting effect of this case will be the lost prestige America may now feel around the globe. In a world where there are more than eighteen million refugees,¹²⁹ we have calmly and quietly sanctioned exclusion and repatriation. Our image as the "melting pot" of freedom will surely suffer.

CONCLUSION

Ultimately, Executive Order 12,807 is still the law of the land. The Coast Guard continues to interdict and repatriate all Haitians. Stevens' majority opinion could signal an expanded theory of treaty interpretation that moves away from the constraints of the Vienna Convention. The size of the majority indicates that the Court is in unison in this area, and is willing to defer to the executive branch.

¹²⁵ Anthony Lewis, *Abroad at Home; The Two Clintons*, N.Y. TIMES, Feb. 22, 1993, at A17. During his campaign, Clinton stated: "I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. This process must not stand." *Id.*

¹²⁷ Gluck, *supra* note 13, at 867.

¹²⁸ See Helton, *supra* note 2, at 333.

¹²⁹ See Helton, *supra* note 2, at 329.

As this paper goes to press, problems in Haiti continue.¹³⁰ An embargo is scheduled to be initiated, and the United States appears willing to use force to reinstall democracy.¹³¹ Only time will tell if *Sale v. Haitian Centers Council, Inc.* is a just decision based on pragmatic and societal concerns, or simply a “cruel hoax”¹³² implemented against the Haitian people.

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¹³⁰ See Bill Nichols, *Haiti Embargo to Begin; U.S. Talks Tough*, U.S.A. TODAY, Oct. 18, 1993, at 1A (discussing the implementation of sanctions against Haiti and using force to protect Americans there).

¹³¹ See *id.*

¹³² See *supra* note 52.