

1-1-1993

The Human Face of the Haitian Interdiction Program

Harold Hongju Koh
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Koh, Harold Hongju, "The Human Face of the Haitian Interdiction Program" (1993). *Faculty Scholarship Series*. Paper 2083.
http://digitalcommons.law.yale.edu/fss_papers/2083

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

The Human Face of the Haitian Interdiction Program

HAROLD HONGJU KOH*

Much has been written about the Haitian interdiction program: its origins, its illegality, and its moral failings.¹ Since my co-counsel, my students, and I first brought the *Haitian Centers Council* case in March 1992, I have learned more about that program than I ever wanted to know and said more about it than some have been willing to hear.

Today, let me tell two stories. The first is a fascinating legal story about our case, which has been to the United States Court of Appeals for the Second Circuit five times and to the Supreme Court five times in the last 8 months. The second and more important story is the human story of our clients. It is a story of human suffering on a tragic scale. These are people caught up in a political and legal battle they do not fully understand. They are people of great dignity, political commitment, and courage whose lives have been utterly shattered. Many of them are captured in the grip of the HIV virus, a disease over which they have no control. They find that they have become an issue, forgotten in the presidential debates, but now a "problem" facing the new administration.

Let me start with the legal story. Our case is in two parts: the "right-to-counsel" case ("HCC I") and the "non-return" case ("HCC II"). Some feel these cases are tremendously complex, but our legal

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School. The author was lead counsel in *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), vacated as moot sub nom *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) [hereinafter *HCC I*] and in *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), rev'd sub nom *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) [hereinafter *HCC II*]. These remarks were made on November 6, 1992, at a meeting of the American Branch of the International Law Association in New York.

1. See, e.g., The Lowenstein Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 Harv. Hum. Rts. J. 1 (1993); Christina Carole de Matteis, *Forced Return of Haitian Migrants Under Executive Order 12,807: A Violation of Domestic and International Law*, 18 N.C. J. Int'l L. & Com. Reg. 431 (1993); Symposium, *The Haitian Refugee Crisis: A Closer Look*, 7 Geo. Immigr. L.J. (1993).

position in both is quite simple. We believe in two unremarkable propositions: first, that lawyers and clients have a right to talk to each other, and second, that our government should not return political refugees directly to their persecutors. By so saying, we do not suggest that our government has an obligation to take in all Haitian refugees, or that such refugees have a legal right of entry. We merely say our governmental officials have a legal obligation *not to return* refugees to the very people who persecute them. These are the legal propositions that we have now established before the Second Circuit in two separate decisions, but which our government seeks to overturn at the Supreme Court.

Some history is in order. For more than ten years the Reagan and Bush administrations maintained a policy with regard to fleeing Haitian refugees of interdicting their boats in the Windward Passage and "screening" them, which meant interviewing them individually to determine whether they had a credible fear of political persecution at home. Refugees who passed this test—i.e., who were found to have a credible fear of persecution—were "screened-in" and brought to the United States where they could file asylum claims. Those who failed, and were "screened-out," were sent back to Haiti. Following the overthrow of the Aristide government in November 1991, when the exodus from Haiti reached unprecedented levels, the Bush administration changed this policy in two significant respects. First, instead of allowing "screened-in" Haitians to enter and remain in the United States for asylum hearings, the Immigration and Naturalization Service started to hold those Haitians at Guantanamo Naval Base, Cuba, where they were kept incommunicado behind barbed wire. There the refugees endured inadequate medical care and squalid living conditions for months on end. In February 1992, the government announced that the Haitians would be subjected to a second interview on Guantanamo, without lawyers, to determine whether or not they were *bona fide* refugees entitled to political asylum in the United States.

In March 1992, our clinic brought a lawsuit in the United States District Court for the Eastern District of New York to challenge this practice.² We argued that these "screened-in" aliens, who had estab-

2. Haitian Ctrs. Council, Inc. v. McNary, 789 F. Supp. 541 (E.D.N.Y. 1992). Our clinic, the Lowenstein International Human Rights Clinic, was organized as a Yale Law School course in 1991 under the auspices of the Allard K. Lowenstein International Human Rights Project, a student-run human rights organization at the law school. Attorney Michael Ratner of New York's Center for Constitutional Rights co-teaches the Lowenstein Clinic with me. We brought suit along with the American Civil Liberties Union Immigrants' Rights Project

lished credible fears of persecution, were being held in custody on an American enclave subject exclusively to U.S. jurisdiction. As such, we argued, they were entitled to due process, in the form of representation by counsel, before they could be sent back to conditions of persecution or death, the equivalent of a capital case for persons who are not criminals. Shortly after we filed suit, the government moved against us for Rule 11 sanctions³ for filing a "frivolous" lawsuit, and demanded that we post a \$10,000,000 bond to proceed with the case.⁴ Rule 11 sanctions run against both the clients and the lawyers personally, which gave us considerable concern. In the end, however, we concluded that the only way to defeat the sanctions motion was to prevail on the merits.⁵

In short order, we won both a temporary restraining order (TRO) and a preliminary injunction from Judge Sterling Johnson, Jr. In response, the government then brought five successive applications for stays and finally won, by a vote of 5 to 4, a stay from the Supreme Court pending the outcome of the government's appeal in the Second Circuit.⁶ However, we then prevailed on appeal before the Second Circuit, establishing serious questions whether "screened-in" Haitians on Guantanamo who are about to undergo a second interview have a right to counsel. The Solicitor General subsequently petitioned the Supreme Court and asked that the Second Circuit's ruling be summarily reversed, even though that decision affects, at this point, fewer than 300 Haitians who remain on Guantanamo.⁷

(Lucas Guttentag, lead counsel), the National Refugee Rights Project of the San Francisco Lawyers' Committee for Urban Affairs (Robert Rubin, lead counsel), and the New York law firm of Simpson, Thacher & Bartlett (Joseph Tringali, lead counsel). In time, well over one hundred law students and attorneys worked or cooperated with us on the lawsuit.

3. Fed. R. Civ. P. 11.

4. We later learned that this was the largest bond ever requested on a temporary restraining order in the history of the Second Circuit, a request ten times larger than the bond ultimately awarded in the Texaco-Pennzoil contract dispute. See *Pennzoil Co. v. Texaco Inc.* 481 U.S. 1 (1987).

5. After we won both *HCC I*, 969 F.2d 1326, and *HCC II*, 969 F.2d 1350, at the Second Circuit, we informed the government's attorneys that if they maintained their Rule 11 motion against us, we would counter-move against them under Rule 11 for maintaining a frivolous Rule 11 motion against us purely for harassment purposes. The government reconsidered, and we eventually reached a settlement under which both the original Rule 11 motion and the threatened counter-motion were dropped. The litigation over Rule 11 sanctions attracted considerable public attention. See, e.g., Anthony Lewis, *Mockery of Justice*, N.Y. Times, May 21, 1992, at A29; Jeff Rosen, *Washington Diarist: Sweet Mystery*, New Republic, Nov. 9, 1992, at 50.

6. *Haitian Ctrs. Council, Inc. v. McNary*, 112 S.Ct. 1714 (1992) (Blackmun, Stevens, O'Connor, Souter, JJ., dissenting).

7. See *HCC I*, 969 F.2d 1326, (2d Cir. 1992), petition for cert. filed, *McNary v. Haitian Ctrs. Council, Inc.*, 61 U.S.L.W. 3287 (U.S. Sept. 22, 1992) (No. 92-528). The Supreme Court

Our second case, the “non-return” case, began in May 1992, when the Bush administration changed course yet again and decided that henceforth it would simply return all Haitians coming from Haiti by boat directly to Haiti without any screening whatsoever.⁸ In effect, the Bush administration made a blanket determination that none of the fleeing Haitians were political refugees, thereby dispensing with the legally required individualized determination as to whether or not the people were political refugees or economic migrants. Following that decision, the administration quite literally began to take fleeing Haitians back to the people who were persecuting them.

In our view this was flatly illegal. In 1968, the United States acceded to the U.N. Protocol Relating to the Status of Refugees⁹ and thereby became party to article 33 of the 1951 Refugee Convention.¹⁰ Article 33 clearly states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where life or freedom would be threatened on account of his . . . political opinion.” To accommodate this international legal obligation, Congress enacted the Refugee Act of 1980,¹¹ amending section 243(h) of the Immigration and Nationality Act.¹² Previously, section 243(h) had given the Attorney General discretion to “withhold deportation of any alien . . . within the United States” to conditions of persecution abroad.¹³ In 1980, Congress made three key changes in that provision. First, Congress removed the Attorney General’s discretion and made the provision mandatory. Second, Congress mandated that the Attorney General shall not deport or return any alien to conditions of persecution. Third, Congress deleted the modifying language “within the United States,” thus extending the legal protection of the section to “any alien,” wherever located. Thus, the plain wording of the statute, passed within the plenary immigration power of Congress¹⁴ and signed by the President, now

ultimately vacated the Second Circuit’s decision in *HCC I* as moot. See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

8. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) [hereinafter “Kennebunkport Order”].

9. Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967, and adopted by the United States Nov. 1, 1968).

10. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

11. Refugee Act, Pub. L. No. 96-212, 94 Stat. 107 (1980).

12. Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h)(1) (1988).

13. *Id.*

14. U.S. Const. art. I, § 8, cl. 4 (“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . .”).

states that the "Attorney General shall not . . . return any alien . . . to a country if [he] determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion."¹⁵

In 1981 the Justice Department specifically recognized that these obligations apply on the high seas.¹⁶ At the same time, the United States entered an executive agreement with the Haitian government that explicitly recognizes the extraterritorial application of these legal requirements.¹⁷ So it is hard to imagine an obligation that could have been more explicitly applicable to the situation at hand than this obligation not to return fleeing political refugees to their persecutors.

Yet on May 23, 1992—Yale Law School's graduation day—President Bush so directed: that fleeing Haitian refugees be returned directly to their persecutors without any process whatsoever. The students in our clinic quite literally took off their graduation robes and went back to work, filed for another TRO and ultimately prevailed again before the Second Circuit. That court held that the policy pursued under the Kennebunkport Order plainly violated section 243(h) of the Immigration and Nationality Act, as well as article 33 of the Refugee Convention, the treaty provision that the Act incorporates.¹⁸ In October 1992, the Supreme Court granted certiorari, and scheduled argument for March 1993.

In sum, our position has been that the government's policy is not only lawless, but also mindless and heartless. The government's position is mindless because while our foreign policy is to denounce the Haitian military regime as illegitimate, and starve it with sanctions, our immigration policy is to return fleeing refugees to Haiti as fast as we can. There is a fire in the barn in Haiti, but when people start to flee, we decide that the problem is the people fleeing, not the fire. And our solution is to shove the people back in the barn and close the door. At the same time that we have finally brought down the Berlin Wall in Germany, our government has erected its own "floating Berlin Wall" around Haiti, designed to keep people in and dissuade them

15. 8 U.S.C. § 1253(h)(1).

16. Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims.").

17. Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559-61 (even on high seas, the United States is bound by its "international obligations mandated in the Protocol Relating to the Status of Refugees," and the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status").

18. *HCC II*, 969 F.2d 1350 (2d Cir. 1992), cert. granted, 113 S.Ct. 52 (1992), rev'd sub nom. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

from fleeing. This policy has converted our own Coast Guard into agents of a brutal dictatorship that we ourselves have repeatedly called illegitimate. Moreover, while we are condemning Serbian death camps in the former Yugoslavia and the inability of international monitors to inspect them, we are funding our own internment camp in Guantanamo, a modern-day leper colony in which acknowledged refugees are dying of the HIV virus, and from which lawyers, the press, and outside medical consultants are all barred. In short, this policy combines two of the most disgraceful episodes of our recent history: the turning back of the Jews on the *St. Louis* to the Nazi gas chambers in 1939¹⁹ and the Japanese internment during World War II.²⁰ Yet surprisingly, very few people seem upset about these events.

Just as this policy is mindless, it is also heartless. Let me tell you the story of two real people, two of our clients. One is a named plaintiff, Mr. Bertrand (a pseudonym), who was a political activist in Haiti. His wife was killed by the military regime and so he fled by boat in the fall of 1991. The Coast Guard interdicted Mr. Bertrand, screened him in, and brought him to Guantanamo, where he led a political activist group in the refugee camp. When he learned of our lawsuit, he decided that he had a right to see a lawyer before he could be re-interviewed and sent back to Haiti. Yet when the Supreme Court stayed the District Court's preliminary order requiring that he be given a lawyer,²¹ Bertrand refused to submit to an interview without a lawyer. For his sins, he was herded onto a Coast Guard boat, returned to Port-au-Prince, driven off the boat with a fire hose, and fingerprinted by the Haitian police. There he was recognized by Haitian soldiers, who later pursued him to his house, beat him savagely, breaking his collarbone and his left shoulder, and forced him into hiding where he remains today. This is a man who would flee again by boat if the Bush policy of summary return were not in place.

Let me tell you a second story, about Silieses Success, one of our clients on Guantanamo who recently has come to the United States for medical treatment. Remember that she is one of the "lucky ones," because she is in the United States now.²² This poor woman gave birth to her first child on Guantanamo. Shortly thereafter, she and the baby were brought back to their open tent and left there in the

19. See Gordan Thomas & Max Morgan Witts, *Voyage of the Damned* (1974).

20. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

21. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S.Ct. 1714 (1992).

22. Silieses Success' story is recounted in Anna Quindlen, *Set Her Free*, *N.Y. Times*, Nov. 18, 1992, at A27.

rain. The baby, not surprisingly, contracted pneumonia, and was medically evacuated to the United States at enormous expense, only to fall into a coma. At that point, the government contacted her lawyers for the first time to ask whether they could turn off the baby's respirator. Silieses consented, the respirator was turned off, and the baby died, whereupon someone suggested that the baby's body be returned to Guantanamo to be buried while the mother stayed in the United States. When we protested, it was alternatively suggested that the baby's body remain here, while the mother return to Guantanamo by herself, because after all, having delivered the baby and the baby having died, there was no longer any medical reason for her to remain here. Through volunteer lawyers, we filed a political asylum application on Silieses' behalf, whereupon she was summarily removed from the hospital and brought to the Varick Street Detention Center in New York where she remains today, sleeping on the floor. And she is one of the "lucky ones."

Remember that all this has happened to people who have tried to come to our country, simply because they believed what they read on the Statute of Liberty. As of late 1992, 290 Haitians remain on Guantanamo, about 230 of whom apparently have the HIV virus.²³ Many of them have already established well founded fears of political persecution without legal counsel and so, by any standard, are political refugees. They are being imprisoned solely because they have the HIV virus, even though they have committed no crimes and cannot transmit the disease except consensually. Many of these people are suicidal. All are deeply distrustful, and simply cannot believe what has happened to them. They cannot believe that the United States is doing this to them. This is what separates *this* human rights tragedy from Somalia, Bosnia, and so many other human rights situations around the globe in which the U.S. government is playing a largely passive role. The Haitian policy is something that our government has poured money into, continues to pour money into, and is aggressively litigating before the Supreme Court. I see no reason why U.S. taxpayers should fund this national disgrace.

Fortunately, during his campaign, President Clinton made a number of strong statements about the Bush administration's Haitian refugee policy. His book, *Putting People First*, says that he would "[s]top the [f]orced [r]epatriation of Haitian Refugees" and reverse

23. See, e.g., Lynne Duke, U.S. Camp for Haitians Described as Prison-like, Wash. Post, Sept. 19, 1992, at A1.

the Bush administration policy.²⁴ He has condemned the HIV-exclusion in immigration and praised as correct the Second Circuit's ruling in our favor which is now under Supreme Court review.²⁵ We must all urge the new President to move quickly to reverse these heartless policies.

One final point. Our government claims that the laws we cite do not bind it, because those laws do not apply on the high seas. But if that were true, then the United States government could go out on the high seas, deliberately hunt down fleeing Jewish refugees and return them to the Nazi gas chambers. If the government's case were true, then if President Aristide himself—by any standard, a political refugee—were fleeing to the U.S. by boat, he, too, could be picked up, taken to Guantanamo, held there indefinitely without a lawyer, or, under the Kennebunkport Order, simply returned to Haiti and delivered directly into the hands of the military regime.

This is the human face, the horror, of our Haitian interdiction program. If it strikes you as senseless, if it strikes you that this cannot possibly be the law, that is because it cannot possibly be the law. Let us urge our leaders to end this human tragedy—and this human rights outrage—immediately and let these political refugees get on with their lives.²⁶

24. Bill Clinton & Al Gore, *Putting People First: How We Can All Change America* 119 (1992).

25. *Id.*; see also Joan Biskupic, *Administration to Defend Bush Policy in Court*, Wash. Post, Mar. 1, 1993, at A9 (quoting press release, Bill Clinton, *Bush Administration's Policy is Illegal* (July 29, 1992) ("The Court of Appeals [for the Second Circuit] made the right decision in overturning the Bush Administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing.")).

26. Postscript: Two months after these remarks were made, President Clinton announced that, notwithstanding his earlier campaign promises, he would continue indefinitely the Bush policies of forced summary return of Haitian refugees and of incarcerating HIV-positive "screened-in" Haitians on Guantanamo. On March 2, 1993, the author defended the Second Circuit's ruling in *HCC II* before the Supreme Court, and on March 8, 1993, the Lowenstein Clinic and its co-counsel conducted a two-week trial of *HCC I* before the United States District Court for the Eastern District of New York. Following that trial, on March 26, 1993, Judge Sterling Johnson, Jr., issued an interim order, pursuant to which 55 of the Haitians on Guantanamo were brought to the United States. *Haitian Ctrs. Council, Inc., v. Sale*, No. 92-1258, 1993 U.S. Dist. WL 105468 (E.D.N.Y. March 26, 1993). On June 8, 1993, Judge Johnson issued a final memorandum opinion ordering the release of all Haitian refugees remaining on Guantanamo. See *Sale v. Haitian Ctrs. Council, Inc.*, 823 F. Supp. 1028 (E.D.N.Y. 1993). The government eventually complied, and within two weeks closed the internment camp and brought all Haitians on Guantanamo to the United States.