

HUMAN RIGHTS—HAITIAN REFUGEES—HAITIAN REFUGEES
HOUSED AT GUANTANAMO BAY NAVAL BASE HELD TO HAVE
NO VALID CONSTITUTIONAL OR INTERNATIONAL LAW CLAIMS
TO CHALLENGE FORCED REPATRIATION BY THE U.S.
GOVERNMENT. *Haitian Refugee Center v. Baker*, 953 F.2d
1498 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992).

I. FACTS

On September 30, 1991, a military coup d'état overthrew Haiti's President Jean-Bertrand Aristide and his democratically elected government.¹ In the following months, thousands of Haitians fled the country, taking to sea towards the United States and possible political asylum.² These refugees, however, were interdicted by the U.S. Coast Guard and deposited at the Guantanamo Bay naval base³ where they waited for the Bush Administration and the United States courts to decide their fate.

A. *The Refugees*

Aristide's government, the first democratically elected administration in Haiti's history,⁴ enjoyed much popular support even in the face of Haiti's continued economic hardship.⁵ After decades under the totalitarian regimes of Francois "Papa Doc" Duvalier and his son,⁶ Haiti had languished in poverty under tight military control.⁷

¹ *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1. Aristide was captured and exiled to Venezuela. Thomas L. Freidman, *Regional Group Agrees to Increase Penalties on Haiti*, N.Y. TIMES, Oct. 9, 1991, at A3.

² See *infra* note 15 and accompanying text.

³ See *infra* note 14 and accompanying text.

⁴ After Haiti achieved independence from France in 1804, there had not been a free election until Aristide's victory in December, 1990. *United States to Resume Direct Aid to Haiti*, WASH. POST, Mar. 23, 1991, at A22.

⁵ Aristide, a priest turned politician, has been described as enjoying a "near-mystical" popularity. See Pamela Constable, *At UN, Aristide Stands Up For Haiti, Pledging Creation of a Just Society*, BOSTON GLOBE, Sept. 26, 1991, at 28.

⁶ Papa Doc ruled Haiti from 1957 until his death in 1971. His son, Jean-Claude (Baby Doc), continued the despotic Duvalier rule until an uprising forced his exile

For years, the United States government faced a moderate flow of Haitians fleeing their impoverished land.⁸ However, when Aristide took office,⁹ the perpetual flow of Haitian refugees slowed dramatically. During Aristide's eight-month stay in office, the Coast Guard found few refugees in the Windward Passage between Cuba and Haiti.¹⁰ Still, even with this sign of popular faith in his government, Aristide apparently failed to keep the military under control¹¹ and soon fell to a coup.

Soon after the military ousted Aristide, the flow of refugees increased dramatically. The U.S. Coast Guard found itself overwhelmed by the exodus from the new military dictatorship in Haiti.¹² In the first three months after the coup,¹³ almost 10,000 Haitians fled the small nation for the United States and were picked up by Coast Guard vessels patrolling the area.¹⁴

To deal with this rush of refugees, the Pentagon has created tent cities at the naval base at Guantanamo Bay, Cuba.¹⁵ Separated by

in 1986. See Les Whittington, *Haiti's Next Chapter; Talks to Reinstate President Move Ahead While Peasants Struggle*, OTTAWA CITIZEN, Jan. 4, 1992, at B3.

⁷ The *Ton-tons Macoutes*, Duvalier's secret police force, kept the impoverished population under control through fear tactics and torture. See Lynne Duke, *Rights Groups Decry U.S. Haiti Policy; Widespread Abuses Ignored in Interdicting Refugees, Report Says*, WASH. POST, Dec. 31, 1991, at A4.

⁸ Between 1981 and 1991, nearly 25,000 Haitian refugees were interdicted by the Coast Guard. Susan Freinkel, *A Slow, Leaking Boat to Limbo; The Plight of Haitian Boat People is Now Making Headlines, But INS Records Point to Years of Seeming U.S. Indifference to Their Asylum Claims*, THE RECORDER, Dec. 19, 1991, at 1.

⁹ Aristide was inaugurated as President on February 7, 1991. Edwige Balutansky, *Two Aristide Foes Arrested, Charged with Plotting Overthrow*, Reuters, Mar. 27, 1991 (BC Cycle), available in LEXIS, Nexis Library, Intl File.

¹⁰ Before the coup, only 400 Haitian refugees were expected during the whole fiscal year of 1991. *U.S. Agency Out of Funds for Refugees*, CHI. TRIBUNE, Sept. 6, 1991, at 36.

¹¹ President Aristide made moves to eliminate the remnants of Duvalierist sympathies in the military by retiring some high ranking officers. Also, in March of 1991, his government broke up an apparent coup plot organized by a former army officer. Balutansky, *supra* note 9.

¹² Even as late as January, 1992, 2300 Haitians were being housed on Coast Guard cutters. *State Department Briefing*, Federal News Service, Jan. 30, 1992, available in LEXIS, Nexis Library, Currnt File.

¹³ Almost one month after the coup, the United States declared an economic boycott which may have contributed to the volume of refugees. See Balutansky, *supra* note 9.

¹⁴ *Refugee Influx Builds, 85 Haitians Opt to Go Home*, UPI, Dec. 30, 1991 (BC Cycle), available in LEXIS, Nexis Library, Intl File.

¹⁵ Sam Fulwood, III, *Haitians Hope Repatriation Rumors Don't Become Fact*, L.A. TIMES, Jan. 21, 1992, at A10.

sex and family status on unused runways, the refugees receive two meals a day and have access to medical¹⁶ and portable restroom facilities.¹⁷ However, these tent cities are merely uncomfortable temporary housing, not the planned destination of the refugees.

While at Guantanamo, the "migrants,"¹⁸ as the Bush Administration calls them, have been interviewed in keeping with INS procedures and screened for valid claims for political refugee status.¹⁹ These procedures include short interviews with such questions as "Why do you want to come to America?"²⁰ The interviews are performed while the INS denies the refugees access to legal counsel for advice concerning their rights under American law.²¹

Those interviewees whom the INS determines to have possible claims for political asylum are allowed to travel to the United States for a hearing on those claims, but those who fail their interviews are marked for repatriation to Port-au-Prince, Haiti.²² As of February 4, 1992, 3609 of the more than 14,000 Haitian refugees have qualified to apply for political asylum.²³ According to the Bush Administration, the rest of the Haitians are merely economic, not political, refugees²⁴ and therefore unqualified to even apply for admission to the United States.²⁵ Still, many of these Haitians speak of fear for their lives at the hands of the new military dictatorship upon their forced return to Haiti.²⁶ The Administration retorts that

¹⁶ Medical tests show that as much as 10 percent of the refugees at Guantanamo may have the AIDS virus. David Adams, *HIV Scare Complicates Fate of Haitian Boat People*, THE INDEPENDENT, Jan. 29, 1992, at 10.

¹⁷ Merle English, *INS Allows Some Haitians Into U.S.*, NEWSDAY, Jan. 1, 1992, at 13.

¹⁸ They have been called migrants to support the Bush Administration's policy of returning them without violating domestic or international law. See *State Department Briefing*, Federal News Service, Nov. 19, 1992, available in LEXIS, Nexis Library, Currnt File.

¹⁹ See *infra* notes 63-67 and accompanying text.

²⁰ See *infra* note 62.

²¹ Lawyers for the Haitian Refugee Center have been denied access to the tent cities. See Fulwood, *supra* note 15.

²² Port-au-Prince, the capital of Haiti, is the point where the returnees are received, processed, and identified by Haitian officials. See *infra* note 43.

²³ Deborah Scroggins, *Haitian Boat People: Victims of Cold War?*, ATLANTA CONST., Feb. 4, 1992, at A1. A January report put the number of refugees at more than 14,000. Carol Giacomo, *U.S. Moves to Stem Haitian Exodus*, Reuters, Jan. 30, 1992 (BC Cycle), available in LEXIS, Nexis Library, Intl File.

²⁴ See *State Department Briefing*, *supra* note 18.

²⁵ Giacomo, *supra* note 23.

²⁶ See English, *supra* note 17.

there is no evidence of any repatriated Haitian facing local reprisals.²⁷

B. *The Legal Battle*

The Bush Administration contends that most of the Haitians fleeing their homeland are merely economic refugees and therefore not entitled to seek refuge in the United States.²⁸ The Haitian Refugee Center of Miami countered this argument in a lawsuit, asserting that the refugees have a right of association and counsel under the First Amendment and a right to *non-refoulement*²⁹ under Article 33 of the 1967 U.N. Protocol Relating to the Status of Refugees.³⁰

On November 18, 1991, the Haitian Refugee Center, Inc. (HRC or Refugee Center) filed suit on behalf of the refugees in the United States District Court for the Southern District of Florida,³¹ claiming that their lawyers had a First Amendment right to meet with the refugees instead of leaving the Haitians ignorant of their rights when confronted by INS interviewers. Also, the HRC alleged that the INS procedures were flawed and should conform to the 1967 U.N. Protocol Relating to the Status of Refugees.³²

On December 3, United States District Judge C. Clyde Atkins³³ issued a preliminary injunction preventing the United States from forcibly returning the refugees to Haiti before the merits of the Refugee Center's claims were adjudicated.³⁴ The judge based the injunction on a finding that there was a substantial likelihood that the HRC would prevail on its claims of: (1) a right of association and counsel based on the First Amendment and (2) "the Haitian plaintiffs' right of non-refoulment [sic], which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees."³⁵

²⁷ Giacomo, *supra* note 23.

²⁸ *Id.*

²⁹ *Refoulement* is the forcible return of refugees to states where they are likely to suffer political persecution. See 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 93 (1972).

³⁰ Haitian Refugee Center v. Baker, 949 F.2d 1109 (11th Cir. 1991) [hereinafter *Haitian Refugee Center I*]. For information on the U.N. Protocol, see *infra* notes 49-58 and accompanying text.

³¹ *Federal Judge Again Forbids Repatriation*, UPI, Dec. 20, 1991, available in LEXIS, Nexis Library, Intl File.

³² See 949 F.2d at 1112.

³³ Atkins is a veteran district judge appointed by President Lyndon B. Johnson. See Rosalind Resnick, *Haitian Refugee Imbroglia Pits Four Factions; Courts in Standoff*, NAT'L L.J., Jan. 13, 1992, at 3.

³⁴ The district judge's order is unpublished but is described in *Haitian Refugee Center I*, 949 F.2d 1109.

³⁵ 949 F.2d 1109, 1110.

The government appealed the injunction, and on December 17 the Eleventh Circuit reversed Atkins' order by a 2-1 decision,³⁶ asserting that the injunction did not give the HRC access to the refugees at Guantanamo and therefore did not address the HRC's claim of a right of access to the refugees.³⁷

Later that same day, Atkins countered with a restraining order while his court considered the plaintiffs' claim of a right of access to the refugees at Guantanamo.³⁸ However, on December 19 the Circuit Court canceled that restraining order, asserting that the district judge had already decided the merits of the claim.³⁹ Nevertheless, on December 20 Atkins reinstated his restraining order, holding that the HRC and its lawyers did have the right under the First Amendment to meet with their refugee clients.⁴⁰

The merits of this constitutional claim and the companion claim under the U.N. Protocol were argued before the Eleventh Circuit Court of Appeals on January 22, 1992.⁴¹ Before that decision on the merits came down, however, the Supreme Court dissolved the preliminary injunction that prevented the forced repatriation of the refugees.⁴² Thus, the government was able to begin forcibly repatriating the Haitians even before the circuit court decided the merits of the HRC's claims.⁴³

On February 4, 1992, the Eleventh Circuit handed down its decision dismissing the claim of the HRC, holding that since the Haitian refugees did not actually enter United States territory, they had no valid cause of action under United States or international law.⁴⁴ *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992).

³⁶ *Id.*

³⁷ *Id.* at 1110.

³⁸ *U.S. Appeals Court Repeats Decision to Repatriate Haitian Refugees*, Agence France Presse, Dec. 20, 1991, available in LEXIS, Nexis Library, Intl File.

³⁹ *Haitian Refugee Center v. Baker*, 950 F.2d 685, 686 (11th Cir. 1991) [hereinafter *Haitian Refugee Center II*].

⁴⁰ John Lancaster, *Judge Again Blocks Return of Haitians; Ruling in Miami Undermines U.S. Plans to Begin Forced Repatriation*, WASH. POST, Dec. 21, 1991, at A4.

⁴¹ *Judge Takes Haitian Refugee Appeal Under Advisement*, UPI, Jan. 22, 1992 (BC Cycle), available in LEXIS, Nexis Library, Intl File.

⁴² *Baker v. Haitian Refugee Center*, 60 U.S.L.W. 3544 (U.S. Jan. 31, 1992).

⁴³ On February 3, the first boatload of returnees reached Port-au-Prince. Scroggins, *supra* note 23.

⁴⁴ *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992). [hereinafter *Haitian Refugee Center III*].

II. LEGAL BACKGROUND

A. *United States Adoption of U.N. Refugee Policies*

On July 28, 1951, the United Nations adopted the Convention Relating to the Status of Refugees.⁴⁵ Its Article 33 addressed *non-refoulement*, stating that:

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.⁴⁶

For purposes of this Convention, a refugee was any person who had a "well-founded fear of being persecuted . . . [and] is outside the country of his nationality . . ."⁴⁷ However, the Convention limited itself to people who had been refugees due to events occurring before January 1, 1951.⁴⁸ To correct this limitation, the 1967 Protocol Relating to the Status of Refugees (Protocol) generally restated the 1951 Convention but applied itself perpetually by eliminating the January 1, 1951 provision.⁴⁹

With its accession to the Protocol in 1968,⁵⁰ the United States bound itself to abide by Article 33. Earlier in 1965, Congress had passed a statute allowing the government to withhold deportation of an alien immigrant who could show a clear probability of persecution based on "race, religion, nationality, membership in a particular social group, or political opinion."⁵¹ This language mirrored Article 33 in its categories of reasons for withholding of deportation; however, the Protocol made the withholding of such deportation mandatory, not optional on the part of the government.⁵²

⁴⁵ Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (effective April 22, 1954).

⁴⁶ *Id.* at art. 33(1).

⁴⁷ *Id.* at art. 1A(2).

⁴⁸ *Id.*

⁴⁹ United Nations Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁵⁰ *Id.*

⁵¹ 8 U.S.C. § 1253(h)(1) (1965). This statute amended the 1952 Immigration and Nationality Act which mentioned only physical persecution. Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §§ 1101-57 (1952) [hereinafter INA].

⁵² *Id.* See also Fulwood, *supra* note 15 and accompanying text.

To further codify the Protocol, Congress passed the Refugee Act of 1980.⁵³ The Act changed the statutory provision that gave the government the option to withhold deportation of refugees who showed a clear probability of persecution; upon passage of the Act, the government was required to withhold deportation of these refugees.⁵⁴ However, this provision has been regarded by some authorities to be limited to aliens physically present within the United States, since it follows sections in the United States Code which speak only of deportation.⁵⁵

The Protocol states that no State "shall expel *or return* ("refouler") a refugee . . . to . . . territories where his life or freedom would be threatened."⁵⁶ Thus, the Protocol asserts that no refugees should be returned to danger by any State, regardless of whether the refugees were actually within the physical boundaries of that State. The 1982 version of the United States statute follows this language, but omits the French term *refouler*.⁵⁷ The present statute does, however, mention the "return" of refugees in addition to their deportation.⁵⁸

B. *INS Procedures Concerning Haitian Refugees*

In 1981, the United States Secretary of State entered into an agreement with the government of Jean-Claude Duvalier that gave the United States power to interdict and board Haitian vessels that might be carrying illegal immigrants.⁵⁹ While on board, INS agents were to determine whether any immigrants might qualify for political asylum.⁶⁰ The INS developed special procedures for their agents to follow when interviewing the Haitians.⁶¹

⁵³ Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. §§ 1157-59 (1982).

⁵⁴ "The Attorney General shall not deport or return any alien . . ." 8 U.S.C. § 1253(h)(1) (1982).

⁵⁵ See 8 U.S.C. § 1158(a) (1982), which specifically applies to aliens physically present within the United States. This statutory section is an amendment to the INA. Furthermore, section 1253 is entitled "Countries to which aliens shall be deported; cost of deportation." 8 U.S.C. § 1253 (1988).

⁵⁶ Convention Relating to the Status of Refugees, *supra* note 45, at art. 33(1) (emphasis added).

⁵⁷ 8 U.S.C. § 1253(h)(1) (1982).

⁵⁸ *Id.*

⁵⁹ Haiti Migrants-Interdiction Agreement, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241.

⁶⁰ *Id.* Those immigrants who were deemed unqualified would be returned to Haiti. Duvalier's government promised not to prosecute these returnees. *Id.*

⁶¹ The guidelines are included in the majority opinion of *Haitian Refugee Center III*, 953 F.2d at 1501.

The agents were directed to keep a log of the answers to eight questions,⁶² keeping in mind "the necessity of being keenly attuned . . . to any evidence which may reflect an individual's well-founded fear of persecution by his or her country."⁶³ If there was "any indication of possible qualification for refugee status," the INS agents were instructed to conduct individual interviews.⁶⁴ In 1988, the INS revised its policy by requiring its agents to interview every Haitian separately.⁶⁵ Even "bare claims" of refugee status were to be considered evidence of possible validity.⁶⁶ These instructions were promulgated pursuant to a 1981 Executive Order made to "ensure the fair enforcement of our laws . . . and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland."⁶⁷

Apparently, the INS agents often failed to meet these guidelines. A Coast Guard situation report stated that on March 6, 1989, an INS agent took 18 minutes to decide that 38 Haitians were merely economic migrants.⁶⁸ Also, critics charge that interviews were not conducted individually and that the INS agents often failed to follow up on clear indications of valid asylum claims.⁶⁹ To counter such abuse of discretion by agents, the INS began requiring a minimum of twenty minutes for each interview.⁷⁰ In addition, some refugees were interviewed twice at Guantanamo so that INS agents could properly screen their claims.⁷¹

Such weaknesses in the INS procedures and the failure of INS agents to properly follow them helped lead to the HRC's constitutional claim of the refugees' right, under the First Amendment, to consult with a lawyer.⁷²

⁶² The questions were: "1. Name; 2. Date of Birth; 3. Nationality; 4. Home Town . . . ; 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?" *Haitian Refugee Center III*, at 1502.

⁶³ *Id.* at 1501.

⁶⁴ *Id.* at 1502.

⁶⁵ Freinkel, *supra* note 8.

⁶⁶ *Haitian Refugee Center III*, 953 F.2d at 1502.

⁶⁷ Exec. Order No. 12324, 46 Fed. Reg. 48,109 at 48,210 (1981), *reprinted in* 8 U.S.C. § 1182.

⁶⁸ Freinkel, *supra* note 8. The Coast Guard documents were obtained through the Freedom of Information Act. *Id.*

⁶⁹ *Id.*

⁷⁰ This procedure began in June, 1991. *Id.*

⁷¹ 200 of 700 Haitians previously determined to be economic refugees were found to have possible claims for asylum. *Id.*

⁷² *See Haitian Refugee Center I*, 949 F.2d 1109 (11th Cir. 1991).

III. ANALYSIS

By holding that the Haitian refugees at Guantanamo Bay have no rights under the United States Constitution or international law, the Eleventh Circuit Court of Appeals has set a precedent which makes refugee access to this country more difficult and less structured than United States statutes or United Nations agreements intended. More importantly, the decision misapplies United States statutes modeled after the 1967 U.N. Protocol Relating to the Status of Refugees.

A. Access to Lawyers and the INS Screening Process

With the current INS system for screening refugees, the denial of access to lawyers will lead to repatriation of some refugees who may have valid claims for asylum under United States law and legitimate refugee status under the 1967 Protocol.

Although the INS is trying to improve its system, a simple interview by an agent is far from reliable. Even if the agents fully follow the procedures, a valid claim may not get the attention it deserves. Often, the refugees are tired and ill from days on generally unseaworthy boats. Faced with the knowledge that they could likely be returned to Haiti, they would naturally be confused and frightened. This situation holds especially true for those Haitians held at Guantanamo,⁷³ where INS agents have had to interview thousands of Haitians. Even some of these agents have recognized the inadequacy of their methods after having been required to re-interview 700 refugees.⁷⁴

By granting the refugees access to counsel, the possibility of failing to recognize potentially valid claims could be greatly reduced. A lawyer could help determine the exact nature of each refugee's true status and, at the very least, reassure the refugees who have almost no access to information and no idea what their fate will be.⁷⁵

Granting the refugees access to lawyers would actually improve the INS screening process. The presence of representatives who know the responsibilities of INS agents would greatly reduce the misapplication of INS procedures that the Service itself recognizes can occur. While the Service does react to its agents misapplying INS guidelines, this self-policing system is slow to react to mistakes or abuses. Permitting legal representation of the refugees would better ensure the proper

⁷³ English, *supra* note 17.

⁷⁴ Freinkel, *supra* note 8.

⁷⁵ English, *supra* note 17.

application of INS guidelines, thus reducing the risk that an individual with a "well-founded fear of persecution"⁷⁶ will slip through the cracks in the system.

As the situation stands today, the INS agents have an inordinate amount of discretion. If the agents interdict Haitian refugees before those refugees reach United States territory, they have responsibility only to their superiors in Washington. With the heavy workload of the agents and the mass of bureaucracy within the INS, problems with interviews of Haitian refugees are apt not to be addressed until years after they surface, when it is too late for particular refugees who might have had plausible claims for asylum.

B. The Eleventh Circuit Court's Mistaken Answer

The Eleventh Circuit Court avoids the question of misapplied or abused INS procedures by holding that since the refugees never reached United States territory, they are not entitled to judicial review of their claims or to legal representation. This argument is based on the proposition that the INA statute applies only to refugees within the United States, since the relevant section⁷⁷ is in the part of the INA dealing with deportation.⁷⁸ However, the plain meaning of the statute and the relevant legislative history indicate that this reading of the statute is flawed.

The court failed to recognize the origins of the language in 8 U.S.C. § 1253(h). While the title of the section mentions only deportation,⁷⁹ section 1253(h) states that the "Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."⁸⁰ Revised in 1980,⁸¹ this section goes beyond mere deportation to include "return," the best one-word English equivalent to "refouler." Thus, its language parallels the language of the 1951 Convention and the 1967 Protocol.⁸²

⁷⁶ Convention Relating to the Status of Refugees, *supra* note 45, at art. 33(1); 8 U.S.C. § 1253(h)(1) (1982); *see also* text accompanying notes 56-58.

⁷⁷ 8 U.S.C. § 1253(h) (1988).

⁷⁸ Part V of the INA deals with deportation, which is the expulsion of an individual out of the United States to another nation. *See* 8 U.S.C. § 1251 (1988).

⁷⁹ 8 U.S.C. § 1253. *See also supra* note 55.

⁸⁰ 8 U.S.C. § 1253(h) (emphasis added).

⁸¹ *See supra* note 53.

⁸² *See supra* notes 45-58 and accompanying text.

Since Congress included "return" in its revision of the INA, refugees with claims of adverse effects from INS procedures need not set foot on United States soil to have justiciable claims. Under the Administrative Procedures Act (APA), "a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review."⁸³ The Haitian refugees certainly fall within the scope of this provision.

The court skirted the APA by asserting that the statute gives the INS absolute discretion to decide the fate of the refugees. In *Greenwood Utilities Commission v. Hodel*, the Eleventh Circuit held that judicial review of agency action is allowed "only if a specific statute somehow limits the agency's discretion."⁸⁴ This decision follows the language of the two exceptions to the APA; judicial review does not apply where "statutes preclude judicial review"⁸⁵ or where "agency action is committed to agency discretion by law."⁸⁶ However, in the present case, the language of the relevant statute renders these exceptions inapplicable.

The statute at issue asserts that the government "shall not deport or return" refugees whose life or freedom might be threatened.⁸⁷ This language is a mandate, not a grant of discretion. The Supreme Court agrees; it has already granted judicial review of INS procedures in deportation cases.⁸⁸ Since the return of refugees is a companion to deportation in 8 U.S.C. § 1253(h), judicial review should also apply to cases involving the return of refugees to their native countries. Although the Haitian refugees at Guantanamo Bay never actually reached United States territory and therefore are technically not subject to deportation, they are still protected by the same statute.

IV. CONCLUSION

The Eleventh Circuit misapplied federal law when it held that the Haitian refugees housed at Guantanamo Bay had no right to judicial review of their claim for association with attorneys under the First Amendment or their challenge to INS procedures. The United States statute preventing the Attorney General from deporting individuals

⁸³ 5 U.S.C. § 702 (1988).

⁸⁴ 764 F.2d 1459, 1464 (11th Cir. 1985).

⁸⁵ 5 U.S.C. § 701(a)(1) (1988).

⁸⁶ 5 U.S.C. § 701(a)(2) (1988).

⁸⁷ 8 U.S.C. § 1253(h).

⁸⁸ See, e.g., *McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991).

who might have valid claims for asylum also prevents the return of such individuals to their native countries. In the statute, this "return" is mentioned in addition to deportation. Thus, a refugee need not reach the territorial borders of the United States to be covered by the statute.

The language of the statute follows that of Article 33 of the United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, which the United States acceded to in 1968. The Convention and its 1967 Protocol use the French term *refouler* in parenthesis after the word "return." By simply dropping the French term, Congress did not change the meaning of the provision. Combined with the Administrative Procedures Act, a proper reading of the statute gives refugees access to United States courts for challenges to injurious INS procedures.

By failing to properly interpret United States law, the Court of Appeals for the Eleventh Circuit has allowed the United States government to violate both domestic and international law by returning Haitian refugees to their homeland without clearly establishing their status as mere economic refugees.

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