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AMERICA'S OFFSHORE REFUGEE CAMPS*

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America's offshore refugee camps rank among the most startling, yet invisible, features of United States foreign policy in the post-Cold War era. Since 1991, our Government has almost continuously maintained tent cities holding thousands of men, women, and children, surrounded by rolls of razor-barbed wire, amid the sweltering heat of the U.S. Naval Base at Guantanamo Bay, Cuba, and the former Panama Canal Zone. Those incarcerated in the camps have witnessed birth and death, hope and despair, and untold waves of frustration and tedium.

Sadly, American detention camps are hardly new. Volumes have been written about the ten internment camps into which more than 110,000 Japanese-Americans were relocated and detained during World War II, camps condoned by such civil libertarian heroes as Franklin Delano Roosevelt, Earl Warren, and Hugo Black.[1] Nor has the territorial United States lacked

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1. *See, e.g.*, PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); MANZANAR (J. Armor & P. Wright, eds., 1988). The Supreme Court upheld the legality of the Japanese internment in a string of now-infamous decisions. Korematsu v. United States, 323 U.S. 214 (1944) (justifying internment policy on grounds of military urgency); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew on Japanese-Americans on grounds of military ne-

its share of refugee camps, particularly in the last quarter of the twentieth century. In the mid-1970s, the U.S. government employed several military bases within the United States as sites for emergency housing, processing, and resettlement of thousands of refugees fleeing Vietnam.[2] The 1980 Mariel "Freedom Flotilla" brought 125,000 Cubans to our shores, some of whom still, incredibly, linger in long-term detention in various federal penitentiaries.[3] Since the late 1980s, the INS has detained thousands of Central American refugees in border facilities and tent-shelters in rural areas in Arizona, California, South Texas, as well as in federal detention facilities in Louisiana and Florida.[4]

As horrific as these experiences have been, three unique features characterize the offshore captivity of Haitians and Cubans in the 1990s. First, these refugees have been intercepted on the high seas and held offshore as part of a conscious "buffer zone" strategy adopted by the United States government to prevent refugees from reaching U.S. territory and asserting rights under U.S. law.[5] Second, refugees have been detained at these offshore sites indefinitely, without regard to whether they might be able to assert or establish individual claims of political asylum. Third and most stunning, the U.S. government has consistently asserted—and some courts have agreed—that these

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cessity). Executive detention of citizens in wartime without trial is not a phenomenon limited to the United States. *See, e.g.*, A.W.B. SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN (1992) (chronicling executive detention in Great Britain during World War II).

2. Brief of Amici Curiae American Jewish Committee and Anti-Defamation League in Support of Respondents at 16, Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993).

3. Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Federal Crisis Management* 467 THE ANNALS 138 (1983); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986); Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (en banc) (holding that Attorney General has statutory authority to detain an undeportable, excludable Marielito alien indefinitely); DAVID MARANISS, FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON 376-81 (1995) (recounting then-Governor of Arkansas Bill Clinton's handling of the Marielito riots at Fort Chaffee).

4. Michael A. Olivas, *"Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 820-23 (1991); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990).

5. *See* Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503 (1993) (describing these strategies).

offshore locations constitute "rights-free zones," where refugees lack any legal rights cognizable under U.S. law and American citizens lack First Amendment rights to communicate with them.[6]

What brought us to this point? How did these offshore refugee camps evolve? What is their human face, and if they are to exist, how should they be run? Remarkably, the vast American immigration literature includes no single history of these refugee camps, or of how they came into being. This essay seeks to fill that gap and to address these vexing questions.

I. GUANTANAMO AND THE EVOLUTION OF U.S. REFUGEE POLICY

A. *Phase 1: Interdiction Plus Screening*

America's offshore refugee camps grew out of the Haitian refugee crisis of the 1990s. In the early 1970s Haitians fleeing the brutal Duvalier regime began attempting, in ever-increasing numbers, the 600-mile voyage to south Florida aboard flimsy makeshift boats.[7] After the numbers of fleeing Haitians surged dramatically upward in 1980,[8] the United States government put into place, pursuant to an unusual 1981 executive agreement with Haiti,[9] a new policy of "interdiction and screening." Under this program, the Coast Guard began "interdicting" fleeing Haitians on the high seas, not far from the Haiti coast, and quickly interviewing (or "screening") them aboard Coast Guard

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6. *See, e.g.*, Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995); Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991); Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir. 1992).

7. Seven thousand eight hundred and thirty-seven Haitians came between 1972 and 1979. Christopher Mitchell, *U.S. Policy Toward Haitian Boat People, 1972-93*, 534 THE ANNALS 69, 70 (1994).

8. In 1980, another 24,530 arrived. *Id.*

9. The September 1981 bilateral agreement called "for the establishment of a cooperative program of interdiction and *selective return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241, at 3559 [hereinafter 1981 U.S.-Haiti Agreement] (emphasis added). In April 1994, President Jean-Bertrand Aristide invoked the six months' termination provision of that agreement and notified the United States that the agreement would terminate as of October 1994. *See* Steven Greenhouse, *Aristide to End Accord That Allows U.S. to Seize Refugee Boats*, N.Y. TIMES, Apr. 8, 1994, at A6.

cutters, bringing to the United States only those few "screened-in" Haitians found to have "credible fears" of political persecution. Those who passed this *prima facie* test for refugee status were, in theory, entitled to full-fledged asylum hearings in the United States where they could establish well-founded fears of political persecution.[10]

In practice, however, of the 22,000 Haitians interdicted at sea during the next decade, only eleven were screened in and brought to the United States to pursue asylum claims.[11] Although the Haitian Refugee Center of Miami (HRC) brought a lawsuit challenging the legality of the interdiction policy, the D.C. federal courts eventually dismissed that suit for lack of standing.[12]

B. *Phase 2: Interdiction and Offshore Detention*

In 1986, Jean-Claude ("Baby Doc") Duvalier, the son and successor of long-time Haitian dictator Francois ("Papa Doc") Duvalier, was finally ousted by popular pressure.[13] After a series of failed short-lived dictatorships, in 1990 more than 67% of the voters in a United Nations-monitored election chose a Catholic priest, Jean-Bertrand Aristide, as Haiti's first freely elected President. During the brief euphoria after Aristide took office, few Haitians fled by boat. But less than a year later, in September 1991, Aristide was himself ousted by military coup and fled to the United States. The Haitian army and paramilitary launched a brutal campaign of killings, torture and arbitrary arrests against Aristide's supporters.[14]

As boatloads of refugees began fleeing Haiti, the United

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10. Brief for Government Respondents in Opposition to Certiorari at 3, Baker v. Haitian Refugee Ctr., No. 91-1292, *reproduced in* Joint Appendix at 252, Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993) (No. 92-344) ("Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum. . . .").

11. Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 368 n.98 (1993).

12. Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

13. Forester, *supra* note 11, at 353.

14. *See, e.g.*, LAWYERS' COMMITTEE FOR HUMAN RIGHTS, HAITI, A HUMAN RIGHTS NIGHTMARE (1992).

States government again responded with the policy of interdiction and on-board screening. INS officials with little knowledge of political conditions in Haiti conducted "credible fear" interviews generally lasting no more than five minutes aboard Coast Guard cutters, under conditions of little or no privacy.[15] In November 1991, the Haitian Refugee Center (HRC) again sued various U.S. government officials in the Florida federal court, seeking to block the practice of returning screened-out Haitians with insufficient process. District Judge C. Clyde Atkins issued a series of restraining orders forestalling large-scale repatriations, but each was quickly reversed on appeal.[16]

As the number of fleeing Haitians swelled, the Bush Administration decided to shift to a new policy: interdiction and offshore detention. Instead of bringing those "screened-in Haitians" who could establish a credible fear of political persecution to the United States, the Coast Guard instead began detaining them behind razor barbed wire in camps hastily erected at the forty-seven-square-mile U.S. Naval Base in Guantanamo Bay, Cuba. The United States occupies that area under a unique, perpetual lease agreement entered between the United States and Cuba in 1903, which provides that "the United States shall exercise complete jurisdiction and control over and within such areas."[17] Thirty-one square miles of that base are on land, an area larger than Manhattan and nearly half the size of the District of Columbia.[18] Over the next eighteen months, more than 36,000 Haitian refugees would pass through Guantanamo camps, where they were subjected to screening interviews by the INS Asylum Officer Corps.[19]

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15. The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement*: Haitian Ctrs. Council, Inc. v. McNary, 6 HARV. HUM. RTS. J. 1, 2 n.4 (1993).

16. Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1552 (S.D. Fla.), *rev'd and remanded in part*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992).

17. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, February 23, 1903, U.S.-Cuba T.S. No. 418.

18. Brief of Amicus Curiae International Human Rights Law Group in Support of Plaintiff-Appellees at 16 nn.16-18, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir.)(No. 92-6090), *vacated as moot*, 113 S. Ct. 3028 (1993) (citing Navy Office of Information, Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba (1985) and THE NEW COLUMBIA ENCYCLOPEDIA 772, 1681 (William H. Harris & Judith S. Levy, eds. 1975)).

19. Sarah Ignatius, *Haitian Asylum-Seekers: Their Treatment as a Measure of the*

In *HRC v. Baker*, a sharply divided panel of the Eleventh Circuit issued a series of sweeping, conclusory rulings, largely accepting the Government's arguments that Haitians held outside the United States had no rights to challenge the screening process.[20] The Supreme Court then denied HRC's petition for certiorari, over Justice Blackmun's sole dissent.[21] At that point, some 3,000 "screened-in" Haitians—those found to have credible fears of political persecution—were being held at Guantanamo. Had they been brought to the United States, they would have been entitled by statute to asylum interviews with lawyers present.[22] But in February 1992, the Immigration and Naturalization Service (INS) determined to subject those Haitians to asylum interviews *on Guantanamo, without lawyers*, and to send those who failed back to possible persecution and death in Haiti.[23] Without legal assistance or judicial oversight, large numbers of *bona fide* refugees could potentially have been returned to danger in Haiti without a fair hearing.

This news galvanized the Allard K. Lowenstein International Human Rights Clinic, a clinical course at the Yale Law School that Michael Ratner of New York's Center for Constitutional Rights and I had taught for several years.[24] After hastily recruiting co-counsel,[25] in March 1992 our Clinic filed *Haitian*

INS Asylum Officer Corps, 7 GEO IMMIGR. L.J. 119, 119 n.1 (1993). "At various times from November 1991 to June 1992, anywhere from 20-50% of the asylum officer corps was at Guantanamo Bay." *Id.* at 122.

20. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991); Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir. 1992). These opinions did not examine, much less analyze, the peculiar juridical status of aliens being held on Guantanamo, territory subject to exclusive United States jurisdiction and control.

21. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1993).

22. Under 5 U.S.C. § 1158 (1990), "an alien physically present in the United States or at a land border or port of entry" may apply for asylum. By federal regulation, an asylum applicant "may have counsel or a representative present" at such an adjudication. 8 C.F.R. § 208.5.

23. *See* Victoria Clawson et al., *Litigating as Law Students: An Inside Look at* Haitian Centers Council, 103 YALE L.J. 2337, 2353 (1994) [hereinafter *Litigating as Law Students*] (describing memorandum of INS General Counsel Grover Joseph Rees ("Rees Memorandum") setting forth this policy).

24. The Clinic originated, by student request, as an arm of the Allard K. Lowenstein International Human Rights Project, a student-run organization founded at Yale Law School in 1981 to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights.

25. Our co-counsel came to include Joseph Tringali, a trial lawyer and partner at

Centers Council v. McNary, a suit in Brooklyn federal court on behalf of the class of screened-in Haitian refugees and several Haitian service organizations against an array of United States government officials. Our core claim was *Gideon v. Wainwright*[26] redux: lawyers and clients claimed constitutional rights to speak to one another before the clients were returned to possible death or persecution in Haiti.[27] Insofar as the new policy authorized the return of *bona fide* political refugees, we argued, it further violated the express ban against *"refoulement"* or "return" of refugees found in Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees;[28] Article 33's domestic statutory analogue, § 243(h) of the Immigration and Nationality Act;[29] and the 1981 executive agreement between the United States and Haiti.[30]

In the first phase of the *Haitian Centers Council* case (*HCC-I*), Judge Sterling Johnson, Jr. of the Brooklyn federal district court granted us a temporary restraining order (TRO) and a preliminary injunction on Fifth Amendment grounds, requiring that the Haitians be afforded counsel before repatriation to Haiti.[31] The Government twice sought unsuccessfully to stay this "right-to-counsel" ruling before the Second Circuit, before win-

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New York's Simpson, Thacher & Bartlett; Lucas Guttentag, Director of the ACLU's Immigrants' Rights project; and Robert Rubin, Director of the Refugee Rights Project at the San Francisco Lawyers' Committee for Civil Rights.

26. 372 U.S. 335 (1963) (requiring right to counsel in criminal cases).

27. The Haitian refugee plaintiffs asserted Fifth Amendment Due Process rights to counsel before being returned to persecution. The Haitian service organizations asserted a reciprocal First Amendment right of access to Guantanamo for the purpose of giving the Haitian detainees legal counsel. *Cf. In re* Primus, 436 U.S. 412 (1978) (First Amendment protects advocacy organization's right of access to particular persons to disseminate legal advice.).

28. July 28, 1951, 19 U.S.T. 6259, 6275, 189 U.N.T.S. 150, ("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 . . . political opinion."). The United States became a party to the Refugee Convention when it acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, *entered into force* Oct. 4, 1967.

29. 8 U.S.C. § 1253(h)(1)(1988) ("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 on account of his . . . political opinion")(emphasis added).

30. 1981 U.S.-Haiti Agreement, *supra* note 9 (authorizing the United States to interdict Haitian flag vessels, but only so long as interdicted refugees are interviewed and allowed to substantiate their asylum claims before repatriation).

31. 789 F. Supp. 541 (E.D.N.Y. 1992).

ning a 5-4 stay pending appeal from the Supreme Court.[32] Following the stay, the Government returned to Haiti some eighty-nine of our "screened-in" clients, who had insisted upon having counsel present at their asylum hearings.[33] In June 1992, the Second Circuit upheld our "right-to-counsel" injunction on appeal and dissolved the stay, a ruling upon which the Government then sought Supreme Court review.[34]

C. *Phase 3: Deliberate* Refoulement

On Memorial Day 1992, as large numbers of Haitians again began to flee, the United States policy shifted yet again: to a policy of deliberate direct return of Haitian refugees to Haiti. From his Kennebunkport vacation home, President Bush issued an executive order authorizing the Coast Guard to return all fleeing Haitians to Haiti without any process whatsoever.[35] In our view, the new policy constituted a textbook example of forbidden *refoulement.* The "Kennebunkport Order"—as our spin control team quickly dubbed it—effectively erected a "floating Berlin Wall" around Haiti, which prevented Haitians from fleeing not just to the United States, but to any of a score of islands between the United States and Haiti.

The new policy evoked not *Gideon*, but the infamous "Voyage of the Damned"—the ill-fated voyage of the *St. Louis* in 1939—when the United States rebuffed fleeing Jewish refugees arriving at New York and Miami harbors, forcing many back to die in Nazi gas chambers.[36] Invoking three counts in our existing complaint, our Clinic sought a new TRO, now challenging the Kennebunkport Order as a violation of: Article 33 of the Refugee Convention; Article 33's domestic statutory analogue, section 243(h) of the Immigration and Nationality Act;[37] and the 1981 U.S.-Haiti executive agreement.[38] These laws, we argued, jointly mandated that executive officials shall not return

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

33. *See Litigating as Law Students*, *supra* note 23, at 2358-59.

34. 969 F. 2d 1326 (2d Cir. 1992), *vacated as moot*, 113 S. Ct. 3028 (1993).

35. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

36. GORDON THOMAS & MAX MORGAN WITTS, VOYAGE OF THE DAMNED (1974).

37. 8 U.S.C. § 1253(h)(1)(1988).

38. *See supra* note 9.

political refugees with colorable asylum claims forcibly and summarily to a country where they will face political persecution.

In a brief order issued the following week, Judge Johnson denied our TRO, citing adverse Second Circuit precedent,[39] but in frank language, virtually invited us to appeal.[40] On an expedited appeal, the Second Circuit declared the *refoulement* policy illegal, finding that the new Bush policy violated the plain language of § 243(h)(1) of the INA (*HCC-II*).[41] But just days after the Second Circuit opinion issued, the Government sought and won another Supreme Court stay of the injunction blocking implementation of the Kennebunkport Order.[42] Two months later, over our opposition, the Court granted certiorari and agreed to review the Second Circuit's decision.[43]

Amid this frenzy, a new hope suddenly emerged. During his presidential campaign, Bill Clinton repeatedly praised the Second Circuit for making the "right decision in overturning the Bush Administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing."[44] At a

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39. Judge Johnson cited Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982), which held, "under the circumstances presented here," that Article 31 of the Refugee Convention was not a direct source of individual rights. *Id.* at 219. Because "[s]ome provisions of an international agreement may be self-executing and others non-self-executing," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 11, comment h, *Bertrand* did not deny the self-executing nature of Article 33, the most fundamental, mandatory, and nonderogable provision of the Refugee Convention. Significantly, the Second Circuit did not rely on *Bertrand* in its decision in *Haitian Centers Council* and the Supreme Court's later opinion in the case implied that Article 33 *is* self-executing. *See* 113 S. Ct. at 2562 & n.35.

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

1992 U.S. Dist. LEXIS 8452, at *5 (E.D.N.Y. June 5, 1992).

41. 969 F.2d 1350 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2549 (1993).

42. 113 S. Ct. 3 (1992).

43. 113 S. Ct. 52 (1992).

44. Statement by Bill Clinton on Decision by U.S. Court of Appeals: Bush Administration Policy is Illegal (July 29, 1992) (emphasis added). Only three days after the Kennebunkport Order issued, Governor Clinton declared:

press conference only one week after his election, the President-elect reiterated that position.[45] Reversing the usual plaintiffs' strategy, we reckoned that our best chance was to delay Supreme Court review of both Second Circuit victories until after the November election, in order to give President-elect Clinton time to abandon both Bush Haitian policies.

D. *Phase 4: The Release of the Guantanamo Haitians*

While the *Haitian Centers Council* litigation wore on, the numbers of Haitians on Guantanamo gradually dwindled. The direct return policy adopted in May 1992 cut the inflow of new Haitians to Guantanamo. Blocked by the Second Circuit's order from conducting uncounseled asylum interviews on Guantanamo, the U.S. government meanwhile screened in and paroled into the United States for asylum proceedings more than 10,000 (about 28%) of the Haitians who passed through

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> *I am appalled by the decision of Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum.* It was bad enough when there were failures to offer them due process in making such a claim. Now they are offered no process at all before being returned.
>
> *This process must not stand.* It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world. This most recent policy shift is another sad example of the Administration's callous response to a terrible human tragedy.

Statement of Governor Bill Clinton on Haitian Refugees (May 27, 1992) (emphasis added). While the Government's petition for certiorari was pending, Governor Clinton issued a statement "reaffirm[ing] my opposition to the Bush Administration's cruel policy of returning Haitian refugees to their oppressors in Haiti without a fair hearing for political asylum." Governor Clinton Reaffirms Opposition to Bush Administration's Policy on Haiti (Sept. 9, 1992). Finally, the most comprehensive public statement of the incoming Clinton-Gore Administration's immigration agenda stated the Administration's intent to "Stop the Forced Repatriation of Haitian Refugees—Reverse Bush Administration policy, and oppose repatriation." BILL CLINTON & AL GORE: PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 119 (1992).

45. He stated:

> [W]ith regard to the Haitians, *I think my position on that has been pretty clear all along.* I believe that there is a legitimate distinction between political and economic refugees. But I think that we should have a process in which these Haitians get a chance to make their case. I think that the blanket sending them back to Haiti under the circumstances which have prevailed for the last year was an error *and so I will modify that process.*

WASH. POST, Nov. 13, 1992, at A10, (emphasis added).

Guantanamo, repatriating the rest to Haiti.[46] By the fall of 1992, only about 310 Haitian men, women, and children remained at Guantanamo, held in Camp Bulkeley, a crude outpost about eighteen miles from the center of the base. Although all had credible claims of political persecution—*i.e.*, were screened-in—the INS barred them from entering the United States solely because most were afflicted with the HIV virus.

As the months passed, the Haitians held at Guantanamo grew increasingly desperate. Their mental and physical condition deteriorated and many endured intense pain.[47] To break the impasse, in September 1992, the Government offered a settlement: the Guantanamo Haitians would have a right to counsel during asylum interviews, but only so long as those failing the interviews could be returned to Haiti. To present the settlement offer to our clients, our legal team was granted access to the Guantanamo clients for the first time in October 1992. Although the Haitians quickly rejected the Government's settlement offer, through this consensual arrangement, lawyers for the Haitians had continuous access to the Guantanamo camps for the next nine months.

In January 1993, just before taking office, President-elect Clinton astonished everyone by reneging on his campaign promises and announcing that he would maintain the Bush policy of *refoulement* indefinitely. Within weeks, it became clear that the Clinton Administration would defend both the summary return policy and the legality of the Guantanamo internment in court, adopting the Bush rationale that the Haitians had no legal rights outside the United States. The unexpected reversal made the Guantanamo Haitians increasingly desperate and distrustful of their lawyers. To publicize their plight, they began a lengthy hunger strike, and several attempted suicide. The military began confining recalcitrant Haitians in the Navy brig for days on end, without even a fig leaf of due process. After the disastrous mass suicide at the Branch Davidian complex in Waco, Texas

46. Ignatius, *supra* note 19.

47. *See generally Litigating as Law Students*, *supra* note 23, at 2360-76; Cathy Powell, *"Life" at Guantanamo: The Wrongful Detention of Haitian Refugees*, 2 RECONSTRUCTION 58 (1993).

in the spring of 1993, the Guantanamo Haitians threatened similarly desperate group acts.[48]

Stalled in the courts, our legal team began grass-roots political organizing to publicize the crisis.[49] Yale law students began a hunger strike that was picked up by dozens of other campuses across the country. Reverend Jesse Jackson and other civil rights leaders began staging press conferences and mass arrests in cities across the country, joined by such celebrities as tennis player Arthur Ashe, singer Harry Belafonte, film director Jonathan Demme, and actress Susan Sarandon.[50]

In March 1993, the Clinton Administration defended the Bush Administration's direct return policy before the Supreme Court. Just one week later, the Guantanamo phase of the case returned to Brooklyn federal court for consideration of permanent relief. Given that some of our desperate clients had been held for more than eighteen months, we realized that it was no longer enough simply to secure them lawyers. We realized, grimly, that in the space of a single year, the same lawsuit had evolved from replays of *Gideon v. Wainwright* (the right-to-counsel case) to *The St. Louis* (the direct return of the Jews) to *Korematsu v. United States*[51] (the Japanese internment case) as our Government had worked a succession of human rights abuses upon poor, black, sick Haitians. On the eve of trial we decided to amend our complaint to raise the *Korematsu* issues directly, challenging the legality of our clients' confinement in what we called "America's first HIV-concentration camp."

Following a two-week trial, Judge Sterling Johnson, Jr. ordered the sickest Guantanamo Haitians immediately released. Shortly thereafter, he issued a permanent injunction ordering the rest of the Guantanamo Haitians released, declaring illegal our clients' confinement in America's first HIV-concentration

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48. *See Litigating as Law Students*, *supra* note 23, at 2375.

49. *See id.* at 2370-79.

50. Sarandon and actor Tim Robbins even pleaded for the freedom of the Guantanamo Haitians before a worldwide television audience at the 1993 Academy Awards ceremony. *See* William Grimes, *Eastwood Western Takes Top 2 Prizes in 65th Oscar Show*, N.Y. TIMES, Mar. 30, 1993, at C1.

51. 323 U.S. 214 (1944) (allowing confinement of Japanese-American citizens in World War II internment camps because emergency wartime circumstances supposedly required it).

camp (*HCC-III*).[52] Judge Johnson unambiguously rejected the Government's claim that aliens incarcerated on Guantanamo have no constitutional rights. "If the Due Process Clause does not apply to the detainees at Guantanamo," he wrote, the Government "would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin."[53] Judge Johnson went on to rule: that the Government had violated the American lawyers' First Amendment rights by denying them access to the Haitians for purpose of counselling, advocacy, and representation; that defendants had violated the Haitians' due process rights by denying them the procedures available to asylum applicants in the United States, by showing deliberate indifference to their medical needs, and by subjecting them to informal disciplinary procedures and indefinite detention; and that the defendants had abused their statutory authority under the Administrative Procedure Act by conducting unauthorized asylum interviews on Guantanamo and denying parole to the screened-in Haitians.[54]

After several days deliberation, in June 1993, the Clinton Administration chose not to seek a stay of Judge Johnson's order. In due course, the Clinton Administration settled the case, closed the camp, and brought the last of the Guantanamo Haitians into the United States.[55] Ironically, on that same day, the Supreme Court ruled against the Haitians in the direct return case (*HCC-II*), in an opinion from which only Justice Blackmun dissented.[56] Although Justice Stevens, writing for the Court, accepted the Government's position that neither section 243(h) nor Article 33 applied to Haitians apprehended on the high seas, he took pains to specify that "[t]he wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration."[57]

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52. 823 F. Supp. 1028 (E.D.N.Y. 1993).

53. *Id.* at 1042.

54. *Id.* at 1040-50.

55. Two months later, however, the Government did appeal Judge Johnson's ruling, but the appeal was ultimately settled, and the court's order vacated by settlement.

56. 113 S. Ct. 2549 (1993).

57. 113 S. Ct. at 2556. "In spite of the moral weight of [respondents'] argument,

E. *Phase 5: Haitian "Safe Haven" Camps on Guantanamo*

The end of the *HCC* litigation marked only a pause in the broader Haitian political crisis. In the summer of 1993, the Clinton Administration helped broker an accord between President Aristide and the coup leaders at Governors Island, New York, which provided for Aristide's return to Haiti by October 30, 1993. Two weeks later, the parties agreed to a separate "New York Pact," which called upon the armed forces to respect the Governors Island agreement and to end an array of human rights violations. It soon became clear, however, that the coup leaders would honor neither pact, as numerous Aristide supporters and cabinet ministers were murdered on the streets of Port-au-Prince.[58]

As the October 1993 deadline for Aristide's return approached, the U.S.S. *Harlan County*, a warship carrying lightly armed military personnel, was sent to Haiti with the stated goal of retraining the Haitian military. When Haitian gangs staged an anti-American demonstration at the dock, the ship retreated. The Clinton Administration began enforcing a multinational blockade off the coast of Haiti, alongside Coast Guard cutters charged with intercepting and returning fleeing boat people directly to Haiti.[59]

With the collapse of the Governors Island accord, the deadline for Aristide's return passed. Violence and human rights violations in Haiti surged upward. In early 1994, Haitians discouraged by the collapse of the Governors Island Accord again began taking to the high seas in large numbers.

As the Clinton Administration maintained its policy of direct return, domestic political pressure began to build. After months of silence, President Aristide finally condemned the summary repatriation policy and announced that he would terminate the 1981 U.S.-Haiti Agreement as of October 1994.[60] The African-

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both the text and negotiating history of Article 33 indicate that it was not intended to have extraterritorial effect." *Id.* at 2563.

58. *See, e.g.*, Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1.

59. R. W. Apple, Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993, at A1.

60. *See* Steven Greenhouse, *Aristide to End Accord That Allows U.S. to Seize*

American community began drawing attention to the gross inconsistency of the Haitian policy with our international obligations and the discriminatory treatment of Haitians vis-à-vis Cubans and other immigrant groups. Transafrica leader Randall Robinson undertook a hunger strike to publicize the Haitians' plight, personalizing the issue and becoming a focal point for media attention. The African-American community magnified its voice through the increasingly powerful forty-member Congressional Black Caucus (CBC), which in March 1994 sent President Clinton a letter announcing that "The United States' Haiti policy must be scrapped."[61]

In May 1994, President Clinton finally conceded that his Haitian policy had failed. He appointed former Congressman William H. Gray, an African-American and former CBC member, as his new special envoy to Haiti, apparently acceding to Gray's own demands that the Administration abandon its direct return policy.[62] Initially, Clinton announced that he would shift to a new policy of subjecting fleeing Haitian boat people to full-fledged refugee interviews aboard United States Navy ships docked in the harbor at Kingston, Jamaica.[63] But the policy change, coupled with favorable weather and new desperation in Haiti, coincided with a refugee outflow of more than 15,000 refugees that quickly swamped the capacity of the Jamaican processing facility.

In July 1994, the Administration switched course again and announced that henceforth, all fleeing refugees would be given "safe haven" in various offshore camps, most prominently in Panama, Honduras, and various Caribbean countries. At the same time, however, Special Envoy Gray cautioned that refugees in the safe haven would not be permitted to seek resettlement in the United States. While the new policy thus ostensibly protected boat people against involuntary return to Haiti, it

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Refugee Boats, N.Y. TIMES, Apr. 8, 1994, at A6.

61. Peter J. Boyer, *The Rise of Kweisi Mfume*, NEW YORKER, Aug. 1, 1994, at 34.

62. *Id.* at 34. Other personnel changes, for example, the appointment of Strobe Talbott as Deputy Secretary of State, also apparently played a role in promoting reconsideration of the direct return policy.

63. Remarks of President Clinton Announcing William H. Gray III as Special Adviser on Haiti and an Exchange with Reporters, 30 WEEKLY COMP. PRES. DOCS. 1010 (May 8, 1994) [hereinafter "Clinton Announcement"].

provided them no opportunity to seek asylum in the United States, except by the dangerous course of returning to Port-au-Prince and filing for refugee status there.[64] In short order, the Administration reopened the Guantanamo naval base under United States military command, now establishing eight safe haven camps for more than 16,000 Haitian detainees. The Clinton Administration also began building other offshore safe haven camps across the Caribbean, in Antigua, Dominica, St. Lucia, Suriname, and the Turks and Caicos Islands. Within weeks, large numbers of Haitians began to repatriate "voluntarily" from these camps, raising serious concerns about the Administration's claim that any Haitian who articulated a fear would be given "safe haven," no questions asked.[65]

F. *Phase 6: Cuban "Safe Haven" Camps*

As the Haitian camps swelled, a new crisis broke. In July 1994, while the Government was scrambling to respond to the new Haitian outmigration, about seventy Cuban refugees unsuccessfully sought to escape Castro's regime aboard the tugboat *13 de Marzo*. After Cuban naval authorities sank the ship, the survivors were forced to return to Cuba, where they were imprisoned by the Castro regime. In the ensuing weeks, thousands of Cubans openly demonstrated against the Castro government, for which they were arrested and incarcerated. In response, Castro announced in August that he would permit persons seeking exodus to leave Cuba. In the next few weeks, more than thirty thousand Cuban refugees fled on makeshift rafts, relying on longstanding U.S. refugee policy granting asylum (and eventually permanent residence and citizenship) to fleeing Cubans under the Cuban Adjustment Act of 1966.[66] Florida Governor Lawton Chiles, caught in a tight electoral race, declared a state of emergency and announced that Florida law enforcement and National Guard personnel would blockade Key West in an effort to contain the flotilla.[67]

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64. *Should We Invade Haiti?*, NEWSWEEK, July 18, 1994, at 40.

65. Roberto Suro, *Haitians' Guantanamo Bay Camp Is Long on Lines, Short on Space, Officials Say*, WASH. POST, July 19, 1994, at A5.

66. 8 U.S.C. § 1255 (1992); *see generally* HUMAN RIGHTS WATCH, CUBA: REPRESSION, THE EXODUS OF AUGUST 1994, AND THE U.S. RESPONSE (1994).

67. CNN Transcript No. 838-2 (Aug. 6, 1994).

On August 19, 1994, without any intervening statute or executive order or act of Congress, the Government reversed thirty-five years of U.S. policy and began detaining Cuban refugees behind barbed wire at Guantanamo and Panama. President Clinton "ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to the naval base at Guantanamo."[68] There the Cubans were placed in alphabetically numbered camps and granted a "safe haven" status equivalent to that being accorded the Haitians: they were (1) interviewed; (2) their names and identities recorded; (3) given identification bracelets; (4) asked whether they desire safe haven status; and (5) asked questions on a separate questionnaire to determine whether they might be excludable from safe haven because "they might be guilty of crimes or otherwise not qualified under international standards."[69] Within weeks, more than 23,000 Cubans and 16,000 Haitians were being detained in safe-haven camps on Guantanamo, amid a mood of rising frustration.[70] The Cuban group included thousands of minor children, several hundred pregnant women, about 100 refugees (residing at "Camp Foxtrot") who had fled Cuba *before* the policy change of August 19, 1994, and an undetermined number of refugees who were interdicted within United States territorial waters or who had actually arrived in the United States, but were nevertheless brought to Guantanamo for detention.[71] In addition, about 9,000 refugees were being held in Panama, largely in camps in the Empire Range, a U.S. military reservation within the former Canal Zone.[72]

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68. 30 WEEKLY COMP. PRES. DOCS. (Aug. 19, 1994).

69. Deposition of Brunson McKinley, Deputy Assistant Secretary of State for Population, Refugees and Migration, at 146, Cuban American Bar Ass'n v. Christopher, No. 94-2183 (S.D. Fla. deposition taken Nov. 29, 1994) [hereinafter McKinley Deposition].

70. James Bock, *Rescued into Limbo: Crisis in the Caribbean*, THE SUN (Baltimore), Sept. 18, 1994, at A1; David Cazares, *Refugee Camps are Intolerable, Report Says*, FORT LAUDERDALE SUN-SENTINEL, Sept. 24, 1994, at A14.

71. Declaration of Maria Dominguez, Cuban American Bar Ass'n v. Christopher, No. 94-2183 (S.D. Fla. filed as exhibit Dec. 6, 1994); Letter from Alejandro Licea Ferrer, Cuban American Bar Ass'n v. Christopher, No. 94-2183 (S.D. Fla. filed as exhibit Dec. 6, 1994); Letter of Jesus Andres Barroso Jimenez, Cuban American Bar Ass'n v. Christopher, No. 94-2183 (S.D. Fla. filed as exhibit Dec. 6, 1994).

72. McKinley Deposition, *supra* note 69, at 98-99.

On September 9, 1994, the U.S. and Cuban governments signed an unprecedented agreement ("Clinton-Castro Communique"), whereby the two governments "recognize[d] their common interest" in preventing Cubans from leaving by sea, confirmed that the Cubans "will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States" for indefinite detention, and agreed to "arrange" "the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994." The joint communique further announced that the United States would accept a minimum of 20,000 refugees per year, but confirmed that Cuban refugees rescued at sea would remain in safe haven facilities on Guantanamo or elsewhere for "indefinite" detention.[73]

When the Clinton Administration first announced the new Cuban safe-haven policy, it mollified Cuban-American groups by arguing that the policy was necessary to blunt Castro's adventurism. By October 1994, however, the patience of the Cuban-American community had worn thin. Twenty-five prominent Cuban-American attorneys,[74] assisted by our Clinic, filed an eleven-count complaint before Judge C. Clyde Atkins of the Miami federal district court in *Cuban American Bar Association (CABA) v. Christopher*.[75] The plaintiffs requested an order tem-

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73. 54 U.S. DEP'T OF STATE DISPATCH, no. 37 (Sept. 12, 1994) [hereinafter Clinton-Castro Communique].

74. The group included Xavier Suarez, the former mayor of Miami; Roberto Martinez, the former U.S. Attorney; and Jose Garcia-Pedrosa, the former Miami City Attorney.

75. Cuban American Bar Ass'n v. Christopher, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 23, 1994) [hereinafter *"CABA"*]. Plaintiffs' complaint alleged defendants' denials: (1) of the First Amendment rights of the Cuban American Bar Association and other Cuban legal service organizations to communicate with their clients; (2) of the detainees' First and Fifth Amendment rights to obtain and associate with retained counsel; (3) of the detainees' right to refugee processing; (4) of the due process rights of minor refugee plaintiffs; (5) of the due process rights of pregnant refugee plaintiffs; (6) of the due process rights of detainees to reasonable medical care; (7) of the due process rights of detainees by subjecting them to arbitrary discipline; (8) of the due process rights of detainees by subjecting them to indefinite detention under an unauthorized extra-statutory legal regime; (9) of the statutory and treaty-based rights of detainees to resist coerced repatriation; (10) defendant Attorney General's unlawful, arbitrary, capricious and unauthorized exercise of her statutory parole discretion; and (11) defendants' denial of the due process rights of detained refugee plaintiffs to legitimate expectations of parole. Only Counts 1 and 9 were before the District Court on the original TRO.

porarily restraining the Government from denying Cuban-American legal organizations access to their clients and from involuntarily repatriating Guantanamo detainees back to Cuba. At the hearing on the TRO, the Government lawyer again asserted that: "[T]he Cubans who are in safe haven at Guantanamo, are without rights under our Constitution" or any other U.S. laws.[76] In short order, the Haitian Refugee Center intervened on behalf of the Haitians on Guantanamo.[77] Judge Atkins rejected the Government's claims and issued a TRO granting the Cuban-American lawyers access to their clients on Guantanamo.[78] But on expedited appeal, the Eleventh Circuit reversed, holding that "these [Cuban and Haitian] migrants are without legal rights that are cognizable in the courts of the United States. . . ."[79] In so holding, the Eleventh Circuit expressly disagreed with Judge Johnson's view in *HCC-III* that Guantanamo is subject to U.S. law, by virtue of being under exclusive U.S. jurisdiction and control. The court further held that even Cuban and Haitian legal organizations who are American citizens have no First Amendment rights to communicate with or associate with their clients on Guantanamo, because the clients themselves have no underlying rights.[80]

The sweep of the Eleventh Circuit's ruling was startling. Read literally, the panel's ruling that "the First Amendment does not apply to the migrants or to the [American] lawyers at

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76. Record in Cuban American Bar Ass'n v. Christopher, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 23, 1994) at R5:27-73 (transcript of Oct. 26, 1994 hearing) [hereinafter *"CABA Record"*]. Defendants further alleged that Cuban detainees must first "voluntarily" return to Cuba from Guantanamo to assert their refugee status and that "under the prevailing law the defendants could, if they chose, forcibly repatriate the Cubans currently in [so-called] safe haven." *Id.* at R5:27-77, R1:23-3, R1:23-11.

77. Order on Provisional Intervenors' Motion for Temporary Restraining Order, Cuban American Bar Ass'n v. Christopher, No. 94-2183-Civ-Atkins (S.D. Fla. Nov. 22, 1994).

78. Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order, Cuban American Bar Ass'n v. Christopher, No. 94-2183-Civ-Atkins (S.D. Fla. Oct. 31, 1994). Several days later, the U.S. Court of Appeals for the Eleventh Circuit modified that order to require the Government to "afford reasonable and meaningful access for legal counsel . . . to only the named detained plaintiffs and any other detainees who in the future request counsel by written declaration." Cuban American Bar Ass'n v. Christopher, No. 94-5138 (11th Cir. Nov. 7, 1994) (denying appellees' motion for summary reversal, but partly granting motion for stay).

79. Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995).

80. *Id.* at 1429-30.

Guantanamo Bay . . . "[81] would permit the United States government to bar American citizens on Guantanamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, and would free U.S. officials to punish Americans on Guantanamo for writing open letters, criticizing the President, or even engaging in religious worship.[82] Similarly, the panel's holding that Cuban and Haitian refugees on Guantanamo and Panama "are without legal rights that are cognizable in the courts of the United States"[83] would theoretically free American officials deliberately to terrorize those refugees, to starve them, to subject them to forced abortions and sterilizations, or to discriminate against them based on the color of their skin.

Finally, the panel's conclusion that the Government's decision to grant the Guantanamo detainees safe haven was a "gratuitous humanitarian act,"[84] not a liberty interest protected by due process, exposed the new American "safe haven" camps for what they are. For if detainees may not work in the camps, may not apply for political asylum, may not leave (except to return to the very place they fled) and may be forcibly repatriated at the whim of the U.S. government, those camps effectively offer no safe haven at ail. The *Cuban American Bar Association* case thus helped clarify when permissible humanitarian safe haven crosses the line into illegal indefinite arbitrary detention. By establishing refugee camps within an offshore "rights-free zone" on Guantanamo, the U.S. government has created a kind of "reverse Ellis Island," where aliens no longer come for brief stays on their way to America, but for indefinite stays, with their only option to return to the very place from which they fled.

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81. *Id.* at 1429.

82. These examples are not merely hypothetical. In March 1995, for example, U.S. authorities on Guantanamo apparently excluded paintings by Cuban refugees from a Guantanamo art show because they were critical of U.S. policy. Pamela S. Falk, *Trapped in Cuba*, N.Y. TIMES, April 15, 1995, at 19.

83. Cuban American Bar Ass'n v. Christopher, 43 F.3d at 1430.

84. *Id.* at 1427.

G. *Phase 7: The Haitian Invasion and Repatriation*

Even as the *CABA* plaintiffs sought rehearing *en banc*, the U.S. government moved quickly to reduce Guantanamo's population. As the Cuban exodus was beginning, the United Nations Security Council voted a "Desert Storm"-type resolution, authorizing members states "to form a multinational force under unified command and control and, in this framework, to use all necessary means [including a military invasion] to facilitate the departure from Haiti of the military leadership" and to restore Aristide's government.[85] But popular opinion in the United States ran strongly against a Haitian invasion, and President Clinton's Republican adversaries denounced the prospect as bearing no relation to our national interest.[86] Meanwhile, the Haitian regime, finally faced with serious economic sanctions, remained defiant, expelling international monitors, electing a figurehead President, and announcing plans to hold new elections to replace Aristide.[87]

In mid-September, the Clinton Administration began actively to threaten a military invasion of Haiti. The President claimed that he did not need congressional approval for the invasion, over the objection of numerous constitutional law scholars.[88] On September 15, President Clinton gave the Haitian military junta an ultimatum to leave or be driven out. But almost simultaneously, a presidential delegation led by former President Jimmy Carter negotiated an agreement with the Haitian coup leaders which averted the invasion by calling for the leaders to leave by October 15, 1994, or whenever the Haitian Parliament enacted an amnesty law. On September 19, 1994, American

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85. *U.N. Resolution for Invasion of Haiti*, N.Y. TIMES, Aug. 1, 1994, at A6; Richard D. Lyons, *U.N. Authorizes Invasion of Haiti To Be Led by U.S.*, N.Y. TIMES, Aug. 1, 1994, at A1.

86. Eric Schmitt, *U.S. Move on Haiti Seen as Weeks Away*, N.Y. TIMES, Aug. 1, 1994, at A6; Richard L. Berke, *Presidential Hopefuls at a Republican Forum Jab at Clinton's Foreign Policy*, N.Y. TIMES, July 28, 1994, at A10.

87. Larry Rohter, *Haitian Military Greets Invasion Vote With Defiance*, N.Y. TIMES, Aug. 2, 1992 at A3.

88. Ruth Marcus, *Administration is Challenged on Issue of Haiti Invasion Vote*, WASH. POST, Sept. 4, 1994, at A18. The correspondence between the President's lawyers and the constitutional law scholars regarding the legality of the ultimate deployment of U.S. troops to Haiti is reproduced in *War Powers: Deployment of U.S. Military Forces into Haiti*, 89 AM. J. INT'L L. 122-30 (1995).

soldiers began landing in Haiti, and within days, numbered in the tens of thousands.[89] Within a month, amid continuing street violence, the Haitian Parliament had granted a limited amnesty,[90] the coup leaders had resigned, and President Aristide had returned to Haiti in triumph.

As 1995 began, the cycle of depression and violence on Guantanamo began to repeat itself. Although the United States government sought to make the camps more permanent, the conditions in the camps remained abominable. Press visitors reported flooded tents during tropical storms; children suffering from frequent illness, lice, cuts from barbed wire, animals and insects, and intense psychological trauma.[91] As one congressional observer noted,

> At the camp, there is almost no electricity and the lights are shut off at night. It is buggy and there are no swimming facilities despite 100 degree heat. There is no plumbing; drinking water comes from a long hose. Some refugees have injured themselves or attempted suicide to get special treatment. The U.S. soldiers, few of whom speak Spanish, are generally empathetic but can do little to help.[92]

As the detainees grew more desperate, violent incidents began to erupt on a regular basis at the Guantanamo Cuban camps.[93] More than thirty Cubans tried to hang themselves or to overdose on prescription drugs at the Cuban detention camp in Panama,[94] while numerous others sought almost daily to escape.[95] Another thirty-nine attempted suicide in the

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89. Larry Rohter, *2,000 U.S. Troops Land Without Opposition and Take Over Haiti's Ports and Airfields*, N.Y. TIMES, Sept. 20, 1994, at A1.

90. Larry Rohter, *Haitian Bill Doesn't Exempt Military from Prosecution*, N.Y. TIMES, Oct. 8, 1994.

91. Lisette Alvarez, *Cubans at Guantanamo are sinking into despair*, MIAMI HERALD, Nov. 28, 1994, at 12A.

92. Falk, *supra* note 82.

93. *See, e.g.*, Patrick J. McDonnell, *Frustration Builds at Cuban Refugee Camp*, HOUSTON CHRONICLE, Sept. 8, 1994, at A20.

94. Eric Schmitt, *Suicide Attempts on the Rise Among Cuban Reguees*, N.Y. TIMES, Jan. 23, 1995, at A3.

95. Lisette Alvarez, *Cubans risk all again—to return home*, MIAMI HERALD, Nov. 25, 1994, at 1A ("Here on the edge of Guantanamo Naval Base, 600 men and women spend their days at Camp November scheming to break out. It happens just about every day. Five on Wednesday. Twenty-three on Tuesday. Eight on Monday—an escape that detonated a land mine, seriously injuring one refugee. . . .").

Guantanamo camps, and large-scale rioting in the Panama camps left two Cubans dead, more than thirty Cubans wounded, and 221 U.S. soldiers injured, casualties more severe than the U.S. military losses in Haiti.[96] In response, the Panamanian government demanded that the U.S. military evacuate the remaining 7,600 Panamanian detainees by March under heavily armed guard. U.S. government efforts to secure spaces in third countries, such as Spain, produced less than one hundred places. Lacking other options, the U.S. government returned the Panamanian Cubans to Guantanamo, with one American soldier accompanying every two refugees aboard the transport planes. U.S. officials began talking of a "five-year plan" for detaining the Cuban refugees in the Guantanamo camps, permitting family visitors and installing wood-frame structures, churches, and bowling alleys.[97] Meanwhile, the cost of the offshore refugee operation grew to $30 million a month.[98]

To clear space in the Guantanamo camps, the Clinton Administration announced that the 4,000 Haitians in the Guantanamo safe haven would be obliged to leave in early January 1995. The Administration reasoned that with Aristide's return, continuation of Haitian safe haven had become unnecessary, overlooking the reality that many parts of Haiti, particularly those outside Port-au-Prince, remained in the hands of local section chiefs and paramilitary groups who continued to use violence as instruments of control.[99] To encourage Haitian repatriations, the U.S. government offered returnees $80 U.S. dollars apiece upon arrival, plus the possibility of temporary employment for two to four months in sanitation or public works if they opted for voluntary return. Those who did not opt for voluntary return by the due date would lose the added incentives, but would be returned anyway.[100]

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96. Falk, *supra* note 82.

97. Fabiola Santiago, *For Cubans, A Long Haul in Limbo: A New City the Refugees Would Rather Not Call Home*, MIAMI HERALD, Feb. 12, 1995, at A1.

98. *Id.*

99. *See Beheading Sows Terror in Rural Haiti*, MIAMI HERALD, Nov. 19, 1994, at A1; Briefing Paper of Human Rights Watch/Americas, *Human Rights Concerns in Haiti* (Dec. 8, 1994), *reprinted in* Appendix X, Petition for Writ of Certiorari, Haitian Refugee Ctr. v. Christopher, at 80a-86a (U.S.S.Ct. filed Mar. 31, 1995).

100. Larry Rohter, *U.S. Starts the Return of Haitians from Guantanamo*, N.Y.

In early January, the U.S. government began repatriating Haitians at a rate of 500 per day, clearing Guantanamo of nearly all of its Haitian population in less than two weeks.[101] Once again, the Haitian Refugee Center's last-ditch effort to block the repatriations failed.[102] By January's end, the only Haitians left on Guantanamo were about 300 unaccompanied minors and twenty-seven HIV-positive adults who had, in the summer of 1994, established full-fledged asylum claims aboard the Jamaican processing facility. In a grim replay of the *Haitian Centers Council* case, in late February 1995, the United States finally agreed that the HIV-positive Haitians would be paroled from Guantanamo into the United States.

At this writing, however, more than 300 unaccompanied Haitian children between the ages of six and seventeen still linger on Guantanamo, many of them suffering from clinical depression. Although some have family in the U.S., they may well yet be forcibly returned to Haiti unless granted humanitarian parole by the Attorney General.[103]

TIMES, Jan. 7, 1995, at A3. The one concession made to those with asylum claims was that the INS assured that those who expressed fears of returning would be given an interview by an "asylum-trained" INS officer—not a bona fide member of the asylum officer corps—who would then determine whether or not there were substantial grounds for believing that, related to the migrant's individual circumstances and notwithstanding the changed conditions in Haiti, the migrant would face serious harm, for reasons not related to personal disputes, if he or she was returned to Haiti. *INS Protocol for Termination of Safe Haven* (Jan. 1, 1995) (on file with author).

101. *Id.*

102. The case, again captioned Haitian Refugee Ctr. v. Christopher, No. 95-22-Civ-KMM (S.D. Fla. filed Jan. 5, 1995), *aff'd*, 43 F.3d 1431 (11th Cir. 1995), was brought on an application for a Temporary Restraining Order before Judge K. Michael Moore of the United States District Court for the Southern District of Florida on the day the Haitian repatriations were scheduled to begin. In an order later affirmed by the Eleventh Circuit, Judge Moore orally acknowledged that the repatriates would suffer irreparable injury, but refused to grant the TRO on the ground that the Haitians had no substantial likelihood of success on the merits.

103. *See* Letter to the Editor from Len Kaminsky, Executive Director, National Center for Haitian American Legal Defense and Education, N.Y. TIMES, Apr. 6, 1995, at A30 ("Many [of these children] watched their parents being killed. . . . Others witnessed the drowning of parents or other relatives on their journey to escape the repression caused by the 1991 coup. . . ."); *but see* Letter to the Editor from Phyllis E. Oakley, Assistant Secretary of State, Population, Refugees and Migration, N.Y. TIMES, Apr. 15, 1995, at A18 (reporting that 50 of the original 327 Haitian unaccompanied minors have been reunited with their families).

Meanwhile, in February 1995, the Coast Guard detained sixteen Cuban refugees near the Florida coast, within U.S. territorial waters.[104] Although those refugees had technically reached the United States, and were entitled under past readings of the law to exclusion hearings, the Coast Guard took them to Guantanamo to join more than 20,000 Cubans still in indefinite detention.[105] Although talk continues about easing U.S. sanctions on Castro's government or entering a new agreement with Cuba about the status of the Guantanamo refugees, the Clinton Administration has, as yet, announced no plan for dealing with the underlying political problem that caused the refugee flight.[106]

At this writing, indefinite offshore detention continues and ironies abound. Just one day before President Clinton traveled to Haiti to transfer control of the security force to United Nations supervision,[107] he was welcomed at the Florida state house with a moving violin rendition of the National Anthem played by Lizbet Martinez, the twelve-year-old named plaintiff in the *Cuban American Bar Association* case (who was paroled

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104. Andres Viglucci, *84 More Cubans Picked Up at Sea*, MIAMI HERALD, Feb. 16, 1995, at A1; Mireya Navarro, *Stream of Cubans Highlights Restiveness in Cayman Refugee Camp*, N.Y. TIMES, Feb. 16, 1995, at A24.

105. Taylor Ward, *Captain Charged in Cubans' Voyage*, ST. PETERSBURG TIMES, Apr. 1, 1995, at 3B. The case raises squarely the question whether refugees who have reached U.S. waters are "in the United States" and thus statutorily entitled to exclusion hearings before repatriation. The Bush Administration's INS General Counsel, Grover Joseph Rees III, had issued an opinion saying that they are, and the Bush Administration had routinely brought into the U.S. any Haitian or Cuban refugees interdicted within the twelve-mile limit. Memorandum from Grover Joseph Rees III, General Counsel, Immigration and Naturalization Service, to Office of Legal Counsel, Dep't of Justice, re: *Immigration Consequences of Arrival into the Territorial Waters of the United States* (June 15, 1993). Rees' successor in the Clinton Administration, former Michigan Law Professor T. Alexander Aleinikoff, had also endorsed that position. But in the fall of 1993, the Assistant Attorney General for the Office of Legal Counsel of the Department of Justice reversed that position, opining that such refugees had not reached a land border or "port of entry" for purposes of the INA, and thus were not entitled to an exclusion hearing. *See* Memorandum for the Attorney General from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, re: *Immigration Consequences of Undocumented Aliens' Arrival into United States Territorial Waters* (Oct. 13, 1993).

106. Carla Anne Robbins, *Odd Allies Await Clinton If U.S. Shifts Cuba Policy*, WALL ST. J., Mar. 16, 1995; Steven Greenhouse, *White House is Reviewing Cuban Policy*, N.Y. TIMES., Mar. 8, 1995, at A12; Falk, *supra* note 82.

107. Steve Komarow, *Haiti Put in U.N. Hands Today*, U.S.A. TODAY, Mar. 31, 1995, at 9A.

in only after she filed suit against Clinton's Administration).[108] After startup costs of $100 million and Senate appropriations cuts from Guantanamo's budget, the United States continues to run offshore camps at a cost of $700,000 per day, "something," a Pentagon spokesman said, "we're preparing to maintain for the indefinite future."[109] For the long-term Cuban detainees, the irony is particularly poignant. Having fled Communist Cuba in search of rights in the United States, they now find themselves indefinitely detained by the United States, yet in *noncommunist* Cuba, a place in which, remarkably, they also find that they have no rights.

II. LESSONS FROM THE OFFSHORE CAMPS

Offshore refugee camps have become a disturbingly permanent feature of post-Cold War U.S. foreign policy.[110] But if the history recounted above suggests anything, it is that our Government has performed this task poorly. The two closest parallels to the modern-day camps, the Japanese internment camps of World War II[111] and the Guantanamo camp for HIV-positive Haitian refugees in 1991-93, proved to be unmitigated disasters. In both cases, the United States military professed humanitarian objectives, but ended up treating detainees like prisoners of war, denying them due process and other rights, access to counsel, and adequate medical and living conditions.[112]

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108. Gerald Ensley, *A Hectic, Happy 18 Hours with Clinton*, TALLAHASSEE DEMOCRAT, Mar. 31, 1995, at 8A ("The girl, who also played the song on a Coast Guard cutter that plucked her family from the Gulf of Mexico in last year's Cuban freedom flotilla, gave Clinton a miniature angel, which he said he will keep in the Oval Office as a reminder of children at the Guantanamo Bay refugee camp.").

109. Dana Priest, *Pentagon May Employ Others to Watch Refugees*, WASH. POST, Mar. 6, 1995, at A9 (quoting Pentagon spokesman Dennis Boxx); Santiago, *supra* note 97, at 22A; Eric Schmitt, *Senate Panel Cuts Spending for Pentagon*, N.Y. TIMES, Mar. 3, 1995, at A18 (reporting Senate Appropriations Committee cut of "$52 million the Navy wanted to improve roads and dining halls at the Guantanamo Bay base, where 27,000 Cuban refugees are living.").

110. Priest, *supra* note 109 (quoting Pentagon spokesman Dennis Boxx) ("We're in [this business] for the long term.").

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

112. *See HCC-III*, 823 F. Supp. 1028, 1045 (E.D.N.Y. 1993) (Johnson, J.) ("[T]he detained Haitians are neither criminals nor national security risks. Some are pregnant mothers and others are children. . . . The Government has failed to demonstrate to this Court's satisfaction that the detainees' illness warrants the kind of indefinite

By and large, the camps have been populated and staffed by people of good will, caught in an impossible situation. The refugees themselves, nearly all Haitian or Cuban,[113] find themselves in agonizing limbo. Having fled by boat in search of political asylum, they languish on Guantanamo, barred from the United States, yet too fearful to return home. The United States government officials who placed them there as a stopgap measure hunt frantically for solutions to the complex political crises that triggered the refugee flight. The camps' military custodians profess humanitarian goals, but under pressure too often revert to bureaucratic instincts to control the detainees and to treat them as prisoners. The nongovernmental organizations (NGO) seeking to serve the refugees find themselves stymied by truncated access, insufficient resources, and little real solace to offer detainees who want freedom, not a better life in the camps. Finally, the lawyers who sue to gain access to the detainees, to improve camp conditions, to vindicate their rights, and to secure their release encounter courts overly receptive to the Government's claims that these are refugees without rights, simply because they are held outside U.S. territorial borders.

What lessons can we learn from these offshore refugee camps? And if, for better or worse, we are in the business of running such camps, how should we run them?

A. *Lesson 1: Safe Haven, Not Indefinite Detention*

The history recounted above reveals that a fine line separates a desirable policy of temporary safe haven from a counterproductive one of indefinite arbitrary detention. The Clinton Administration deserves credit for finally (if belatedly) revoking the cruel Bush policy of directly returning Haitian refugees in the summer of 1994, and for attempting to eliminate gross disparities of treatment between the Haitian and Cuban

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detention usually reserved for spies and murderers.").

113. On a trip to Guantanamo with other nongovernmental organization representatives in the summer of 1994, I learned that a boatload of *Chinese* refugees also had been interdicted a few weeks earlier near Norfolk, Virginia, and briefly brought to Camp Bulkeley, Guantanamo, before being repatriated to the Peoples' Republic of China.

refugees. Yet the policy solution at which the Administration ultimately arrived—long-term offshore detention of both Haitian and Cuban refugees without rights—has created deep problems of its own.

First, it is unclear why the Administration chose to apply indefinite "safe haven" option to the Cubans, at a time when it clearly had no political solution in mind for the underlying Cuban crisis. As I have elsewhere argued, refugee outflows such as we have recently seen in Haiti and Cuba are paradigmatic of the New World Disorder.[114] As human rights abuses proliferate in a country such as Cuba, refugees flee *en masse*, inviting the United States executive branch to react to the underlying political crisis. Instead, the executive branch too often responds not to the crisis, but to the *refugee outflow*, as the Clinton Administration did, for example, in striking its extraordinary September 1994 deal with Castro to cut off Cuban outmigration.[115] The deal placed the Administration in the awkward position of, on the one hand, reaffirming its condemnation of the Castro regime, while on the other, explicitly cooperating with that regime to prevent the flight of its citizens. Not only did Castro apparently get the better of this deal, but "[t]he U.S. now has a stake in whatever Fidel Castro does to keep up his end of the bargain."[116] If courts rebuff transnational public lawsuits,[117] as the Eleventh Circuit has done thus far with the *Cuban American Bar Association* case, upside-down human rights policy will result. For the official United States government position, now legitimated by judicial endorsement and legislative acquiescence, will be harsh on

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114. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*," 103 YALE L.J. 2391, 2424-25 (1994).

115. *See* Clinton-Castro Communique, *supra* note 73.

116. Grover Joseph Rees, *Clinton's Iron Curtain*, WALL ST. J., Sept. 14, 1994, at A22 ("Past enforcement measures, inflicted by gunboats, have included shooting people and sinking vessels full of men, women and children."); *see also id.* ("The Castro regime won. It agreed only to prevent people from leaving Cuba, exactly as it was doing six weeks ago and for 30 years before that. This was done not as a favor to the U.S., but because such repression is an important ideological and practical component of a system that seeks to exert total control over the lives of its subjects.").

117. *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991) (describing such suits as efforts by private nongovernmental organizations to prod our Government to more proactive, human rights-sensitive measures).

refugees and curiously tolerant of human rights abusers, a far cry from the human rights policies to which we are ostensibly committed.

While in the Haitian situation, the Administration could at least claim that it was holding the refugees offshore until a date certain—the return of Aristide—in the Cuban case, the detention is avowedly indefinite and open-ended. Moreover, the policy switch was especially shocking in light of the thirty-five-year U.S. policy of not simply tolerating, but actually encouraging Cuban flight to the United States.[118] In effect, the executive branch worked a partial unilateral repeal of the Cuban Adjustment Act of 1966, by barring Cuban refugees who come by sea from gaining access to its benefits, unless they can escape the U.S. Coast Guard blockade and physically touch American soil.[119]

As implemented, the new U.S. "temporary safe haven" policy has at least five defects under international human rights law, which call into question whether the policy truly offers safe haven. First, the policy functions to discourage Cubans and Haitians from leaving their country, notwithstanding international norms declaring that "[e]veryone has the right to leave any country, including his own . . . "[120] Second, the detention is explicitly designed to be indefinite, not temporary, and refugees may apparently be subjected to further deprivations of

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118. As recently as 1992, when it enacted the Cuban Democracy Act, Congress found (and the President ratified by his signature) that:

> The Cuban people have demonstrated their yearning for freedom and their increasing opposition to the Castro government by risking their lives in organizing independent, democratic activities on the island and by undertaking hazardous flights for freedom to the United States and other countries. . . .

22 U.S.C. § 6001 (1992).

119. Under the Cuban Adjustment Act of 1966, as amended, *supra* note 66, Cubans fleeing to the United States by boat have been automatically paroled in upon reaching shore, and their status has been adjusted to permanent resident status at the end of one year. Although some have discussed repealing the Act, see Paul Anderson, *Repeal of Cuban Refugee Act Urged*, MIAMI HERALD, Mar. 15, 1995, at 6A, so long as the law remains on the books, the executive branch would seem bound to take care that its spirit be enforced and its provisions faithfully executed.

120. Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., art. 13(2), U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 12(2), 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (entered into force Mar. 23, 1976).

liberty, without formal process, even within the Guantanamo camps.[121] Third, the Guantanamo detainees clearly include a large number of *bona fide* political refugees.[122] Yet within the offshore camps, these refugees are denied the right to assert their asylum claims anywhere except in the country from which they fled, in violation of international human rights law.[123] Thus, this is a "safe haven" that does not simply defer a refugee's right to seek asylum, but effectively *precludes* it. Fourth, unlike temporary protected status in the United States, which affords the refugee a right to work and conduct a normal life, refugees held offshore are confined to a barren environment, where they necessarily have dramatically limited opportunity to engage in meaningful activities. These restraints amount to penalties upon the refugees for their flight, and denials of the freedom of movement to which they are entitled under refugee law.[124]

Fifth, notwithstanding the Eleventh Circuit's conclusion in the *Cuban American Bar Association* case that the grant of safe haven is a "gratuitous humanitarian act," which confers on the recipients no entitlement or liberty interest to which due pro-

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121. Universal Declaration of Human Rights, *supra* note 120, art. 9 ("No one shall be subjected to arbitrary . . . detention"); International Covenant on Civil and Political Rights, *supra* note 120, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention"). In *HCC-III*, Judge Johnson noted that prolonged detention is valid only where "there are valid reasons for it, i.e., where the alien possesses a criminal record or constitutes a national security risk, . . . the alien bears some responsibility for delaying the process, and . . . the detention will eventually end." *HCC-III*, 823 F. Supp. at 1045 (citations omitted). None of these conditions appear to be met here.

122. One of the named plaintiffs in the *Cuban American Bar Association* case is a refugee who unsuccessfully sought to escape Castro's regime aboard the tugboat *13 de Marzo*, see *supra* text accompanying note 66, and was imprisoned upon his return to Cuba. *CABA Record* at R1:21-at 6 (describing named plaintiff Nestor Rodriguez Labori).

123. Universal Declaration of Human Rights, *supra* note 120, art. 14(1) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution"); American Convention on Human Rights, OEA/Ser. L/V/II, 23 Document Revision 2, art. 22(7) ("Everyone has the right to seek and be granted asylum in a foreign territory. . . ."); American Declaration of the Rights and Duties of Man, Res. XXX, Pan American Union, Final Act of the Ninth Conference 38-45 (1948), art. 27 ("Every person has the right . . . to seek and receive asylum in a foreign territory. . . .").

124. Article 31 of the 1951 U.N. Convention Relating to the Status of Refugees, to which the U.S. is a party, *supra* note 28, further bars Contracting States from "impos[ing] penalties, on account of their illegal entry or presence, on refugees who [are] coming directly from a territory where their life or freedom as threatened" and from applying unnecessary restrictions on their freedom of movement.

cess attaches,[125] "safe haven" is in fact a status well-established in international law.[126] Simple fairness would seem to demand that a person who has been "processed in" to safe-haven status should not be involuntarily divested of that status and repatriated against his will without equivalent process (such as legal counsel) and informed consent made in conditions designed to permit an uncoerced choice.[127] Yet our Government continues to insist not only that it has the right to repatriate Haitian and Cuban refugees from Guantanamo at will, but also that it has a right to do so without affording those refugees any process whatsoever to inform their decision or to prevent their coercion.[128]

During the *HCC* litigation, U.S. officials specifically conceded that Article 33 of the 1951 Refugee Convention bars the U.S. government from returning refugees involuntarily to persecution from the Panama Canal Zone, and territory such as Guantanamo, which is subject to exclusive U.S. jurisdiction.[129]

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125. 43 F.3d at 1427.

126. *See, e.g.*, Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 624 (1986); S.C. Res. 819, U.N. SCOR, 48th Sess. 3199th mtg., at 2, U.N. Doc. S/RES/819 (19913). (establishing Bosnian safe areas); McKinley Deposition, *supra* note 69, at 150 ("'Safe Haven' is a term of art . . . a very frequent form of protection.").

127. In *HCC-II*, the Second Circuit held that "[u]pon being 'screened-in,' the Haitian aliens' fundamental legal and human rights status is changed vis-a-vis the United States government. Once 'screened-in' . . . the plaintiffs are entitled to due process prior to United States officials altering their now-different status." 969 F.2d at 1345. The United States government would seem to have similarly altered the status of the offshore detainees by granting them "safe-haven" status, thereby entitling them to some kind of due process before they may be repatriated.

128. In *Cuban American Bar Association*, the U.S. Government asserted that Guantanamo detainees "have *no* [substantive] right to avoid even *involuntary* repatriation and have no procedural due process rights in connection with decisions to exclude them from the United States and return them to their country of origin." Gov't Brief in *Cuban American Bar Association v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) at 20-21 (emphasis in original).

129. In urging the Supreme Court to review *HCC-I*, defendants conceded that "[t]he Second Circuit's decision . . . may well bar such [uncounseled] voluntary repatriations." Petition of Solicitor General for Writ of Certiorari at 13, n.9, McNary v. Haitian Ctrs. Council, Inc., 113 S. Ct. 3028 (1993) (No. 92-528). Moreover, when the U.S. government switched in May 1992 to the direct return policy, it took pains to assure the Second Circuit that it would not attempt forcibly to repatriate the screened-in Haitians then being held on Guantanamo. Thus, in its Second Circuit brief in that case, the Government declared that "the Department [of State] regards the [Refugee] Convention as applicable (through the Protocol) to *all territories for which the United States is responsible for the conduct of foreign relations, including*

Article 1(C)(1) of the Refugee Convention requires signatory states to ensure that a refugee under their protection who chooses to repatriate does so voluntarily.[130] The UNHCR's Executive Committee (of which the United States is a member), the U.N. body responsible for implementing the Convention, has repeatedly affirmed that to comport with Article I, repatriation programs must establish the uncoerced willingness of refugees to return to their countries of nationality.[131] Nor does it make sense to deem a refugee's decision to return voluntary when it is made under oppressive living conditions, without accurate information or the advice of their chosen counsel. If criminal prosecutors may not coerce adjudicated felons to waive their rights without counsel, INS officials should also not be allowed to coerce *noncriminal* asylum-seekers to execute uncounseled waivers of their safe-haven status, particularly when they have requested the assistance of counsel.[132]

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the Panama Canal Zone, Puerto Rico, the Virgin Islands, Guam, and American Samoa." Brief for Appellees at 43, n.28, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir.) (No. 92-6144), *rev'd*, 113 S. Ct. 2549 (1993) (emphasis added). Like the Canal Zone, Guantanamo plainly constitutes a "territory for the conduct of whose foreign relations the United States is responsible." Under the permanent agreement between the United States and Cuba, the "United States shall exercise *complete jurisdiction and control* over and within" Guantanamo, including all entry and exit points. Guantanamo Agt., *supra* note 17, art. 111 (emphasis added); *HCC-I*, 969 F.2d at 1342. Executive order and federal regulations authorize U.S. naval officials to regulate entry and exit of all persons into the base, Exec. Order No. 8749 (1941); 32 C.F.R. 761.3(a), and thus to bear full responsibility for Guantanamo's foreign relations. Moreover, the Department of State has repeatedly asserted that the United States maintains responsibility for the international relations of both Guantanamo and the Canal Zone, for example, in applying the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America to Guantanamo and the Panama Canal Zone because of their status as "territories within the zone of application for which, *de jure* or *de facto*, the United States is internationally responsible." *Dig. of U.S. Prac. Int'l Law* 1616 (1978).

130. United Nations High Commissioner on Refugees has interpreted Article 1 as requiring true voluntariness. Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* 27-28 (re-edited 1992); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (UNHCR *Handbook* "provides significant guidance in construing the Protocol" and "has been widely considered useful in giving content to the obligations that the Protocol establishes").

131. Voluntary Repatriation, Conclusion No. 18, 31st Session (1980); Voluntary Repatriation, Conclusion No. 40, 36th Session (1985). The U.N. General Assembly has formally declared that repatriation should be encouraged only "in accordance with the freely expressed wishes of the refugees themselves." G.A. Res. 1285, U.N. GAOR, 8th Sess. (1958); 1967 Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR 22d Sess., U.N. Doc. A/PV.1631 (1967).

132. In the criminal context, the Supreme Court has held that waivers should be

In sum, the Clinton policy of safe haven, as it is currently operating in the U.S. offshore camps, seems badly flawed. A safe haven policy that discourages flight, has no terminus, precludes asylum, prevents meaningful work, and coerces repatriation is a "safe haven" in name only.

B. *Lesson 2: Lawful Camp Conditions*

Our Government's new challenge is to create lawful, humanitarian safe-haven sites at Guantanamo. Arrangements made hastily to establish the camps too quickly become entrenched as the wisest or most desirable arrangements to run the camps in the medium or long-term. The most immediate imperative is that refugees not be treated like criminals: disciplinary procedures should protect their rights to due process and disciplinary conditions should be humane.[133]

As such sites are expanded, they must have the following features: shelters capable of withstanding the elements; refugees housed in family groups and allowed freedom of movement within the camps; private voluntary agencies, nongovernmental organizations, and the United Nations High Commissioner on Refugees, not the United States military, running the camp's religious, education, and recreational services; the United States

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made "voluntarily, knowingly and intelligently," free of "intimidation, coercion, or deception" and "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986) (O'Connor, J.). When the waiving party requests counsel, that request must be respected and any subsequent uncounseled waiver of rights deemed invalid. Michigan v. Jackson, 475 U.S. 625, 636 (1986). In earlier El Salvadoran litigation, INS officials coerced Salvadoran refugees to sign voluntary repatriation forms, instead of advising them of their right to apply for asylum, held them incommunicado in coercive conditions, and interfered with their rights to communicate with their chosen counsel. In enjoining those practices, the District Court found: that the Government's voluntary repatriation form "communicates no information regarding availability of asylum," Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988); that due process requires full "notice . . . in order to ensure that class members' waiver of rights is knowingly, voluntarily, and intelligently made," *id.* at 1506; that the INS was obligated to provide the aliens with lawyers' names "before offering voluntary departure to a class member," *id.* at 1509, and that the Government could not expel the alien "until such counsel has had a reasonable opportunity for such communication." *Id.* at 1513.

133. Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1045 (E.D.N.Y. 1993) (disciplinary procedures require "written notice, a hearing, an opportunity to call witnesses, access to counsel, and guarantee of an impartial decisionmaker").

Public Health Service and not the military providing health care; with mail and phone access made available to the refugees, along with ready access of press, human rights monitors, volunteer religious organizations, and doctors. Social activities at the camps—education, religion, books, recreation, intracamp communication and the like—must be greatly expanded to maintain morale and reduce tensions and frustration. In the current Guantanamo camps, for example, internal communication remains dismal. Refugees have little or no news of the outside world. There is no effective rumor control or regular place to confirm or deny information. Similarly, even after many months, medical and public health counseling are sadly lacking.

The access of lawyers and legal counseling is as important to the success of these camps as medical counseling. During the *HCC* litigation, the Government gradually realized that lawyers served a useful mediating role with the refugees and thus permitted lawyers continuous access to the base for the last nine months of the suit. Although the Government is currently restricting the access of lawyers to the new Guantanamo camps, and the courts have upheld those restrictions, that decision seems not to be based on space or logistical considerations, given the available space in tents pitched in existing camps. Both NGOs and lawyers warrant much broader access to the Guantanamo camps than is currently available.

The larger picture is depressing. In effect, we have built offshore cities of more than 20,000 people without constructive outlets, with little to do besides getting frustrated. Boredom, rising tensions, and inevitable frictions between detainees and the military make the camps a potential powderkeg, unless our Government moves in an enlightened way to correct the errors of the past.

Safe haven policies are an appropriate response when extraordinary, temporary, and massive refugee exoduses occur, which overwhelm existing asylum processes and seem likely to be of brief duration. But they are only an interim form of refugee relief, and should not function to deter refugee flight or to coerce repatriation through attrition or frustration. For the Haitians and Cubans caught in limbo, our Government must move quickly to other solutions. Safe haven policies must be de-

signed as temporary humanitarian measures to buy time, not as ends in themselves that turn into new and continuing human rights violations.

III. CONCLUSION

I once hoped that history would remember the reopening of Guantanamo to Haitians in 1994 as only a temporary measure, pending the return of President Aristide, guided by an enlightened effort to avoid the pitfalls of the ill-fated HIV-detention camp of 1991-93. But as the Cuban refugee crisis has progressed, the massive Cuban camps now established on Guantanamo are acquiring a sad history and dynamic of their own. Those who do not learn the lessons of history are condemned to relive it. Only time will tell whether our Government will relive those sad lessons, or move to take wiser steps to realize our humanitarian ideals in the way America runs these offshore refugee camps.