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Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol26/iss3/7
Haitian Asylum Seekers: Interdiction and Immigrants' Rights**

The basic issue in Sale v. Haitian Centers Council, Inc., now pending before the United States Supreme Court, is the legality of the current United States policy of interdicting and returning all Haitians who leave their nation by boat, without determining who might be fleeing persecution. The Bush Administration adopted this policy in May 1992 in what has come to be called the "Kennebunkport Order," and the Clinton Administration has continued to enforce it. My purpose here is not to argue the merits of Haitian Centers Council, but rather to offer a way of placing the interdiction phenomenon into a broader historical context. Doing so is not just an idle academic exercise; understanding the context provides a useful framework for both analysis and argument whenever interdiction is at issue.

"Context" can take many forms. For example, David Martin's contribution to this Symposium places interdiction into an international historical context. He writes persuasively that asylum countries have more and more frequently responded to the growing demand for refuge by adopting measures to deter new arrivals. The ultimate deterrent is, of course, interdiction. Professor Martin's article shows how interdiction and intervention can be viewed as alternatives. I will attempt to place

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** Professor of Law, University of Colorado School of Law. This is an expanded version of remarks presented at the Conference on Refusing Refugees: Political and Legal Barriers to Asylum, at the Cornell Law School, February 20, 1993. I would like to thank Linda Bosniak, Dan Kowalski, Ari Weitzhandler, and Steve Yale-Loehr for very helpful comments on earlier drafts.

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interdiction into a different sort of historical context—that of United States law governing immigration, and in particular the context of evolving judicial review in immigration cases.6

Part I of this article explains the gradual erosion of the plenary power doctrine, which historically placed strict limits on judicial review of the government’s immigration decisions. Part II analyzes the government’s arguments in Haitian Centers Council regarding interdiction and suggests that they represent an attempt to restore much of the immunity that the plenary power doctrine originally provided. Part III discusses doctrinal support for treating interdicted Haitians as having reached the functional equivalent of the United States border for purposes of deciding whether they may be returned to Haiti. Finally, Part IV suggests that the government’s reliance on interdiction contains a paradox. On the one hand, interdiction represents an attempt by the government to enhance its immunity from judicial review. At the same time, however, interdiction undercuts the government’s position by strengthening the Haitians’ claim that courts can protect them from forcible repatriation without ordering their entry into the United States.

I. The Evolution of Immigration Law

A. Classical Immigration Law and the Plenary Power Doctrine

Any discussion of judicial review in immigration cases must begin with the Chinese Exclusion Case,7 which the United States Supreme Court decided in 1889. That case marks the beginning of the plenary power doctrine, which in its purest form severely limits (and often completely forecloses) judicial consideration of constitutional challenges to immigration decisions by the political branches.

In 1882, Congress responded to a wave of West Coast xenophobia by suspending immigration of Chinese laborers for ten years.8 At first, the law provided that Chinese laborers who had been in the United States as of November 1880 could obtain certificates to prove that fact and then use those certificates to secure reentry to the United States

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6. For purposes of this article, I define immigration cases as those regarding the admission and expulsion of aliens. As explained in Part I-C infra, the term “immigration law” is intended to exclude other contexts in which questions arise regarding the rights of aliens, for example, to government employment, welfare benefits, or public education. This definition of “immigration law” is common to the literature. See, e.g., Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 256.


after a temporary visit overseas. The Chinese Exclusion Case concerned the exclusion of one such laborer, Chae Chan Ping, who had left on a visit to China. During his absence, Congress amended the law to bar the return of Chinese laborers to the United States, including those who possessed a certificate. Emphasizing the nation's sovereignty over its territory, the Supreme Court upheld the constitutionality of the statute. According to Justice Field's opinion for a unanimous Court, immigration decisions were nonjusticiable political questions "conclusive upon the judiciary."\(^9\)

In several other key decisions that soon followed, the Supreme Court made it clear that the plenary power doctrine would foreclose a wide variety of constitutional claims. In *Nishimura Ekiu v. United States*,\(^10\) decided in 1892, the Supreme Court rejected the due process argument of a Japanese intending immigrant. The immigration inspector had found that Nishimura was likely to become a public charge and was therefore excludable under the statute. Nishimura argued that the Constitution entitled her to judicial review of that finding.\(^11\) The Court's holding established that the political branches' plenary power over immigration was not limited to determining the substantive categories for admission and exclusion that had been at issue in the *Chinese Exclusion Case*. In addition, plenary power embraced the procedures by which admission to the United States was granted or denied.

The Court's 1893 decision in *Fong Yue Ting v. United States*\(^12\) expanded the plenary power doctrine in yet another direction. At issue was the government's authority to deport an immigrant already present in the United States, rather than the authority to exclude an immigrant seeking admission. *Fong* concerned an 1892 statute that extended the ban on immigration by Chinese laborers for an additional ten years.\(^13\) The same statute provided for the deportation of any Chinese laborers who could not prove that they had entered the United States before 1892.\(^14\) The required proof was a certificate, which the government would issue only on the "affidavit of at least one credible witness,"\(^15\) construed to denote a white witness.\(^16\) In *Fong Yue Ting*, the Supreme Court rejected the claim that this requirement violated the constitutional guarantee of procedural due process.\(^17\)

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9. 130 U.S. at 606. The Court also rejected a subconstitutional argument that the statute violated an 1880 treaty between the United States and China which appeared to guarantee that Chinese laborers then already in the United States could freely leave and return. *See id.* at 600.
10. 142 U.S. 651 (1892).
11. *Id.* at 659-60.
12. 149 U.S. 698 (1893).
14. *See* 149 U.S. at 700 n.1 (citing Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25, 25-26 (repealed 1943)).
15. 149 U.S. at 701 n.1 (quoting regulations issued under Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25, 26 (repealed 1943)).
16. *See id.* at 703, 731.
17. *See id.* at 713.
B. The Erosion of the Plenary Power Doctrine

Notwithstanding these early decisions, the slow evolution over the past one hundred years has been toward greater judicial involvement in immigration matters. Particularly in the past twenty or thirty years, the trend has accelerated.\(^18\) Judicial review has expanded to the point that courts will, under some circumstances, hear constitutional challenges to immigration decisions by the political branches.\(^19\)

The trend toward greater judicial scrutiny of constitutional challenges has taken place primarily along two dimensions. One concerns procedural due process challenges, and the other relates to an immigrant's connection to the United States. A key to understanding both dimensions is the Supreme Court's 1903 decision in *Yamataya v. Fisher,\(^20\)* also known as the *Japanese Immigrant Case*. *Yamataya* had been in the United States for four days when the government tried to deport her on the statutory ground that she was likely to become a public charge.\(^21\) The Supreme Court's decision established that immigrants enjoy greater constitutional rights after they have "entered" the United States. In the parlance, immigrants who have not entered may be "excluded"; those who have entered may be "deported." *Yamataya* announced the courts' willingness to hear procedural due process challenges brought by such deportable immigrants.

*Yamataya* has had significant impact in two respects. First, courts since *Yamataya* have been more willing to hear procedural due process challenges than claims that an immigrant has a substantive constitutional right to enter the United States.\(^22\) Second, and more pertinent to placing interdiction into historical context, courts since *Yamataya* have been more willing to hear constitutional claims when the immigrant has developed some connection with the United States. A key (but not exclusive) factor in assessing that "connection" is the immigrant's physical location when the government acts in an allegedly unlawful manner. In common sense terms, the question has become: is the immigrant "here" or "there"?

\(^18\) See articles cited supra note 7.

\(^19\) A similar evolution in judicial review has taken place on a subconstitutional level, in cases involving judicial scrutiny of statutes, regulations, operations instructions, and their interpretation by agencies. I have written elsewhere about the relationship between the increase in judicial willingness to hear constitutional claims and judicial willingness to hear subconstitutional challenges to the government's immigration decisions. See Phantom Norms, supra note 7.

\(^20\) 189 U.S. 86 (1903).

\(^21\) *Id.* at 94-96 (citing Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084).

\(^22\) This greater willingness to hear procedural due process challenges is discussed much more fully in Procedural Surrogates, supra note 7. Key precursors of this aspect of *Yamataya* include the dissents in *Fong Yue Ting*. See Fong Yue Ting, 149 U.S. 698, 763 (Fuller, C.J., dissenting); id. at 741-42 (Brewer, J., dissenting); id. at 760 (Field, J., dissenting).
C. Reasons for the Erosion of the Plenary Power Doctrine

A crucial factor behind the erosion of plenary power is the fundamental ambivalence in the way our public law—and perhaps our society generally—treats immigrants. Outside the context of immigration decisions, immigrants enjoy decidedly more legal hospitality. This more generous attitude is evident in a line of cases that began with the Supreme Court’s 1886 decision in *Yick Wo v. Hopkins.* *23* *Yick Wo* invalidated, on equal protection grounds, the enforcement of a San Francisco municipal ordinance in a manner which made it impossible for Chinese immigrants to operate laundries. *Yick Wo*’s modern progeny includes *Graham v. Richardson,* *24* which struck down an Arizona residency requirement that restricted immigrants’ access to welfare programs. Similarly, *Plyler v. Doe* *25* struck down a Texas statute that effectively barred the children of undocumented aliens from attending public schools. And when immigrants are charged with crimes, even immigration-related ones, they have constitutional protections that roughly track the basic principles of the constitutional criminal procedure applicable to United States citizens. *26*

To be sure, the *Yick Wo* line of cases has never stood for the proposition that immigrants enjoy the same constitutional rights as citizens. Some of these cases rest partially on the rationale that the states may not encroach on the federal immigration power. Nonetheless, the *Yick Wo* tradition is that courts should analyze immigrants’ rights—if only outside the immigration context itself—in a way that parallels their analysis of citizens’ rights. Some of the decisions in the *Yick Wo* line of cases in fact confer less generous treatment on immigrants than on citizens. But at least these decisions do not disclaim any meaningful judicial role—in contrast to the seminal plenary power cases.

For the political branches, and especially the executive branch, the erosion of the plenary power doctrine represents a significant loss of power to an increasingly active judiciary. In this historical context, the Haitian interdiction policies that have been in effect since September 1981 take on a special significance.

23. 118 U.S. 356 (1886). See also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896), which held that an alien could invoke Fifth and Sixth Amendment protections before being imprisoned for being in the United States illegally.
II. Interdiction and the Evolution of Immigration Law

Interdiction effectively restores much if not all of the immunity that the plenary power doctrine originally established. It achieves this by manipulating one of the dimensions of the expansion of judicial review since Yamataya—the immigrant’s connection with the United States. This connection includes the physical connection that arises when an immigrant arrives at the border, and in many cases, crosses it as well. Interdiction transforms an asylum seeker who would otherwise be “here” into an asylum seeker who is merely “there.” In this way, interdiction has fundamentally altered how courts view the key issues in the Haitian Centers Council litigation.

A. Interdiction and the Issues in Haitian Centers Council

Haitian Centers Council is the second of two recent cases involving Haitian asylum seekers. The first, Haitian Refugee Center, Inc. v. Baker,27 started in November 1991. The controversy at that point concerned not the Kennebunkport Order, but rather an interdiction policy that had been in effect since 1981.28 That policy was based on an agreement between the United States and Haiti which allowed the United States government to interdict Haitian flag vessels on the high seas.29 The Immigration and Naturalization Service (“INS”) individually screened the interdicted Haitians to determine if each had a “credible fear of persecution.”30 At first, screening took place on board United States Coast Guard cutters, but it later occurred at the United States Naval Base at Guantánamo Bay, Cuba.

The “credible fear” test was intended as a preliminary screening device, and was meant to be easier to meet than the asylum statute’s usual “well-founded fear of persecution” test for eligibility.31 About

thirty percent of interdicted Haitians demonstrated a "credible fear," were "screened in," and thus allowed to come to the United States for a final decision on their asylum claims. The approximately seventy percent who could not show a "credible fear" were "screened out" and accordingly returned to Haiti.

On November 19, 1991, the Haitian Refugee Center, Inc. v. Baker litigation was filed in the federal district court for the Southern District of Florida. The plaintiffs brought constitutional and statutory challenges to the procedures for screening the interdicted Haitians and repatriating those who were "screened-out." Although the district court issued a preliminary injunction that barred the government from repatriating screened-out Haitians, the government eventually prevailed in the Eleventh Circuit Court of Appeals, and the Supreme Court denied certiorari on February 24, 1992.

Then, on February 29, 1992, the INS announced that interdicted Haitians who had tested HIV-positive would not be allowed to come to the United States for a final asylum interview and decision. The statutory basis for this policy was the Immigration and Nationality Act (INA) Section 212(a)(1)(A)(I), which provides for the exclusion of any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance." Instead, their asylum claims would be decided after an interview held at Guantánamo Bay. Several of the screened-in HIV-positive Haitians requested legal assistance, but the government declined to afford them access to volunteer counsel for their asylum interview. The Haitian Centers Council litigation was filed on March 17, 1992, to raise constitutional and statutory claims against these restrictions. All of these claims would be stronger if the Haitians had reached the United States instead of being interdicted.

32. See Ignatius, supra note 31, at 126.
34. See Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992); Haitian Refugee Center, Inc. v. Baker, 950 F.2d 685 (11th Cir. 1991); Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991). The government has consistently maintained that the Haitian Refugee Center outcome precludes the Haitian Centers Council litigation, but the district court and Second Circuit have rejected that argument. See Haitian Centers Council, 789 F. Supp. at 545-46; Haitian Centers Council, 969 F.2d 1326, 1334-38; Haitian Centers Council, 969 F.2d 1350, 1354-57. Because the Kennebunkport Order has mooted the issues presented in Haitian Refugee Center, this article focuses on the Haitian Centers Council litigation, but much of this article's analysis would apply to the issues in Haitian Refugee Center as well.
35. See Memorandum from Grover J. Rees, General Counsel, Immigration and Naturalization Service, to John Cummings, Immigration and Naturalization Service, regarding Interviews of "Screened in" Persons Subject to Medical Exclusion (Feb. 29, 1992) (on file with the author and the Cornell International Law Journal).
37. For more background on the Haitian Centers Council and Haitian Refugee Center litigation, see Haitian Centers Council, 969 F.2d at 1329-34; Haitian Centers Council, 789 F. Supp. at 542-43.
One key constitutional claim that this group of Haitians asserts is a Fifth Amendment due process right to be represented by counsel at no expense to the government in connection with the final asylum determinations at Guantánamo Bay. From Yamataya and later cases, it is clear that these interdicted Guantánamo Bay detainees would have such a right if they had both reached the border and entered the United States, thus becoming "deportable" immigrants. Indeed, one of the plaintiffs' arguments is that reaching Guantánamo Bay should be treated as reaching United States soil for determining the extent of the Haitians' legal rights. However, the INS bars access by volunteer attorneys to asylum interviews at Guantánamo Bay. The district court granted, and the Second Circuit affirmed, a preliminary injunction that continues to bar the government from repatriating this "screened-in" group without access to volunteer counsel. This group, including relatives, now numbers about 250 and remains at Guantánamo Bay today. It is not clear that the Supreme Court will agree with the courts below that this group, having never entered the United States, has a Fifth Amendment due process right to counsel at no expense to the government.

On May 24, 1992, President Bush issued the "Kennebunkport Order," revoking the 1981 policy of interdiction with screening. The new policy provides for the interdiction and repatriation of all Haitians leaving Haiti by boat with no procedures to determine if any are fleeing

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38. See Haitian Centers Council, 969 F.2d at 1339-46 (discussing "serious questions going to the merits of the 'screened in' plaintiffs' fifth amendment claims"). Volunteer counsel and Haitian refugee organizations also asserted First Amendment rights to access to their clients. See id. at 1333. Similar claims had been raised and rejected in the 11th Circuit litigation. See Haitian Refugee Center, 953 F.2d at 1511-15 (First Amendment); Haitian Refugee Center, 789 F. Supp. at 1574-75 (Fifth Amendment).

39. See Haitian Centers Council, 969 F.2d at 1341 n.8; see also Jean v. Nelson, 727 F.2d 957, 967 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990); Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991).

40. See Haitian Centers Council, 969 F.2d at 1341-44; Haitian Centers Council, 789 F. Supp. at 547 (Guantánamo Naval Base "is subject to United States jurisdiction").


The question of a Fifth Amendment due process right of access to volunteer counsel is not now before the Supreme Court, but the government has filed a petition for certiorari that includes as one of the questions presented: "Do aliens outside United States have rights under Fifth Amendment's Due Process Clause in connection with their attempts to enter this country?" 61 U.S.L.W. 3338 (U.S. Sept. 22, 1992).

persecution. The Kennebunkport Order did not mention Haiti specifically, but it was released to the news media with a White House statement that the order "will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti." According to the government, Haitians who fear persecution and seek safe haven in the United States are to apply for refugee status at the United States Embassy in Port-au-Prince, the Haitian capital.

On May 29, the plaintiffs in Haitian Centers Council asked the district court to issue a temporary restraining order against the new interdiction policy. The district court declined to do so, but on July 29, 1992, the Second Circuit reversed on the ground that INA Section 243(h) protects the interdicted Haitians from being repatriated without some determination as to possible refugee status. Section 243(h)(1) provides for "nonrefoulement"—that the "Attorney General shall not deport or return any alien" to the country from which he fled if "such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." The Supreme Court granted a stay of the Second Circuit order on August 1, 1992, and granted the government's petition for certiorari on October 5, 1992.

Another constitutional issue in Haitian Centers Council is whether any special interdiction policy directed at Haitians violates equal protection because the government is discriminating on the basis of race. This claim was part of both the original Haitian Centers Council case concerning access to volunteer counsel and the amended case directed against the Kennebunkport Order. If the interdicted Haitians had reached the border, had entered the United States, and were being detained here, it is an open question whether they would succeed with such a claim. The Supreme Court avoided a similar equal protection question in Jean v. Nelson, a 1985 decision that interpreted the asylum statute and regulations to bar race and national origin discrimination as a subconstitutional matter. In spite of this uncertainty, it is clear that the Haitians'
entry into and physical presence in the United States would make this equal protection claim stronger than the same claim brought by Haitians with less physical connection to the United States. So far, I have maintained that the Haitians' procedural due process and equal protection claims would be stronger if, instead of being interdicted, they had reached our shores and entered the United States. But what if they had merely reached the border, where they either were apprehended by government officials or voluntarily presented themselves to apply for asylum? Let us assume, in other words, that these Haitians did not manage to cross the border into the United States. Having not "entered," they would be subject to "exclusion" rather than "deportation."

Interdiction undermines the constitutional and statutory claims of these hypothetical "excludable" Haitians as well. To be sure, aliens in exclusion generally enjoy less extensive rights, at both constitutional and statutory levels, than aliens in deportation. However, the formal line between exclusion and deportation is much less dispositive of would-be immigrants' rights than it once was. Prominent decisions have analyzed the rights of asylum seekers who were being detained in the United States without placing much weight on whether they were in exclusion or deportation. More practically and more importantly, many of those who reach the border will manage to evade immigration authorities and enter the United States in fact. Interdiction ensures that Haitian asylum seekers will not enter, thus depriving them of the rise in legal stature that comes with being subject to deportation rather than exclusion.

Under the current grant of certiorari in Haitian Centers Council, the central issue of substantive refugee law is what appears to be a question of statutory interpretation: whether Section 243(h) of the Immigration and Nationality Act applies to Haitians who are interdicted pursuant to the Kennebunkport Order. The government argues that Section 243(h) does not apply extraterritorially, and thus does not apply to aliens who have not reached the United States border. The government also argues that Section 243(h) constrains only the Attorney General, not the Coast Guard. Of course, it is only because of interdiction

56. The district court in Haitian Refugee Center declined to grant a preliminary injunction on this basis, see Haitian Refugee Center, 789 F. Supp. at 1575, and the Eleventh Circuit concurred, see 953 F.2d at 1506, 1510. Accord, Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1403-04 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).
57. Brief for the Petitioners at 29-36.
58. Id. at 29.
that the government can make these arguments.\textsuperscript{59}

Although this issue has a subconstitutional appearance, it has several constitutional aspects. First, the government urges a broad interpretation of presidential power over immigration to protect United States sovereignty "in this sensitive area of military operations and foreign policy."\textsuperscript{60} According to the government, this executive power—a constitutional norm—should persuade the Court to interpret Section 243(h) not to apply extraterritorially.\textsuperscript{61} A second argument, closely related to the first, is that even if executive power does not suggest such a general limitation on Section 243(h), in this particular context it trumps the interdicted Haitians' rights under Section 243(h).\textsuperscript{62} While

\textsuperscript{59} A similar analysis would apply to another subconstitutional issue in the Supreme Court: whether the Immigration and Nationality Act and the Administrative Procedure Act should be interpreted to preclude judicial review. \textit{See id. at} 13-18.

\textsuperscript{60} \textit{Id. at} 13. \textit{See also id. at} 56-57 (injunctive relief against Kennebunkport Order would "impede the flexibility the President requires to address the migrant problem within the broader context of the sensitive and fluid situation affecting Haiti generally, which is the subject of ongoing diplomatic and economic measures"); \textit{Petition for Writ of Certiorari} ("equitable principles foreclose an award of injunctive relief to aliens outside the United States that bars implementation of the President's directives in this sensitive area of military operations and foreign policy"), excerpted in \textit{INTERPRETER RELEASES} 1164 (1992).

\textsuperscript{61} \textit{See Brief for the Petitioners at} 28 ("In the absence of a clear statement, an Act of Congress should not be construed to interfere with that fundamental attribute of sovereignty by barring measures undertaken by the President, pursuant to express statutory authorization, to prevent illegal entry of aliens."). For a fuller discussion of the influence of constitutional norms on interpretation of immigration statutes, see \textit{Phantom Norms}, supra note 7.

\textsuperscript{62} The Second Circuit rejected this argument. \textit{See Haitian Centers Council, 969 F.2d at} 1366. It also rejected the "undercurrent in the government's brief to the effect that this case presents a 'political question' which is beyond the scope of judicial decisionmaking." \textit{Id. at} 1367. The government's argument that the Immigration and Nationality Act and the Administrative Procedure Act preclude judicial review is similarly based on a broad interpretation of discretionary presidential power in immigration matters. \textit{See Brief for the Petitioners at} 14.

The government also argues that broad presidential power in immigration matters should also inform the Court's reading of Article 33.1 of the UN Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, incorporated by reference in Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225. \textit{See Brief for the Petitioners at} 36-37. Article 33.1 provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

In \textit{Haitian Centers Council}, the Supreme Court's grant of certiorari does not include the question whether article 33.1 applies to the interdicted Haitians. The district court had found that the UN Protocol was not self-executing, that it therefore had the force of law in United States courts only to the extent that it had been implemented through legislation, and that the government's nonrefoulement obligations would thus be determined solely with reference to Section 243(h) of the Immigration and Nationality Act. \textit{See Haitian Centers Council, Inc. v. McNary, 92-CIV-1258, 1992 WL 155853, at *11 (E.D.N.Y. 1992)} (citing Bertrand v. Sava, 684 F.2d 204, 218 (2d Cir. 1982) as controlling precedent), discussed in \textit{Haitian Centers Council, 969 F.2d at} 1353. The Eleventh Circuit reached the same conclusion in \textit{Haitian Refugee Center, 949 F.2d at} 1110.
both of these arguments are directed at the statute, they rely on a constitutional norm of broad presidential power over immigration to protect United States sovereignty. And, as I have explained, any constitutional analysis of immigrants' rights is fundamentally altered when, due to interdiction, Haitian asylum seekers are kept outside the United States.

B. Interdiction and Plenary Power: Parallels in Rhetoric

The government is using interdiction to skew the inquiry into an immigrant's physical connection to the United States, thus effectively restoring much of the plenary power doctrine as it might have once applied to these facts. Indeed, there are striking parallels between the rhetoric in the seminal plenary power cases and the government's brief in Haitian Centers Council. In both contexts, the government characterized questions of immigration law and policy as matters of "national security" beyond the appropriate reach of judicial review.

For example, the Court's opinion in Fong Yue Ting stated that "[t]he United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective." Similar rhetoric is evident in the district court opinion in Haitian Refugee Center, Inc. v. Gracey. This 1985 decision upheld the pre-May 1992 policy of interdiction with screening. Relying primarily on the Chinese Exclusion Case and another key plenary power case, Gracey found that "the President's power to suspend the entry of illegal aliens from the high seas by interdiction has a clear constitutional basis." Similarly, the government's brief in Haitian Centers Council relies on the seminal plenary power doctrine cases in emphasizing the need to safeguard the nation's sovereignty, arguing that "[b]y enjoining the President's action, the court of appeals has interfered directly with the operation of military vessels under his command and upset the delicate balance of diplomatic and other measures he insti-

63. I am not necessarily suggesting that the Bush Administration was fully aware of immigration law history when it issued the Kennebunkport Order. My point is more limited, simply that the policy is intended to have the effect that I am describing.
64. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893), discussed in text accompanying notes 12-17 supra.
67. 600 F. Supp. at 1400.
68. See Brief for the Petitioners at 28, 36-37. The government's attorney opened oral argument before the Supreme Court by saying that the case primarily concerns the President's emergency powers under the Immigration and Nationality Act to prevent a mass migration of aliens to the United States. In support, she later cited a leading plenary power case, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), stating that "[t]he President must be allowed to construe his authority to protect U.S. sovereignty and save lives." See Supreme Court Hears Argument in Haitian Refugee Case, 70 INTERPRETER RELEASES 277, 279 (1993).
tuted to resolve the broader crisis..."69 The government's brief also argues that judicial scrutiny will "undermine the ability of this Nation to speak with one voice, through the President" on the question of the United States' obligations regarding refugees.70

C. Haitian Centers Council: Arguing About Interdiction

Within this historical context of the government's efforts to invoke plenary power, the parties' arguments about interdiction in Haitian Centers Council merit examination.71 Not surprisingly, the government's brief characterizes the issue as whether Section 243(h) applies extraterritorially.72 This approach assigns no special significance to interdiction. It assumes that a Haitian whom the United States Coast Guard interdicts in international waters is simply an alien who is outside the United States. Thus, the interdicted Haitian occupies a constitutional and statutory position that is arguably no better than if he or she had applied for a visa in Port-au-Prince.73 According to the government, the plaintiffs in Haitian Centers Council are arguing that Section 243(h) "confers a free-standing right upon aliens anywhere in the world."74

More surprisingly, the plaintiff-respondents' brief partially adopts the government's view that the issue is whether Section 243(h) applies extraterritorially. A substantial part of the brief argues for the general proposition that Section 243(h) applies extraterritorially.75 To be sure, the plaintiffs argue in several places that interdiction merits special treatment, and that it uniquely undermines the government's argument against extraterritorial application of Section 243(h). However, these points emerge only on the periphery of the plaintiffs' argument. For example, the plaintiffs point out that "the executive action at issue has itself extended the statute extraterritorially," but they do so in response

69. Brief for the Petitioners at 10. See also id. at 13 (referring to interdiction as part of "this sensitive area of military operations").
70. Id. at 57.
71. Because the central substantive issue currently before the Court is the statutory issue of the application of Section 243(h), I will focus on the arguments about interdiction in that context, but my comments also apply to the other constitutional and statutory issues in the case.
72. See Brief for the Petitioners at 27 ("Section 1253(h) has no application to aliens outside the United States.").
73. Id. at 36. See also id. at 55 (characterizing Second Circuit as having construed Section 243(h) "to confer a free-standing right of non-patriation on aliens anywhere in the world"). This argument is consistent with the government's position in the Second Circuit. See, e.g., 969 F.2d at 1341 ("The appellants argue that since the detained Haitians have not 'entered' the United States...they are not entitled to any protections under the due process clause.").
74. This is consistent with the district court's analysis in Gracey. See Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1404 (D.D.C. 1985) (holding plaintiffs cannot obtain relief under statute because they never reached United States), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).
75. See Brief for Respondents at 8-39. See also id. at 17 (Section 243(h) is "available to 'any alien' without geographic limitation"); id. at 21 ("'Refouler' is a term of art, but one that is not limited to a state's territory.").
to the government's reliance on a general presumption against extraterritorial application of statutes.\textsuperscript{76}

A different and stronger plaintiffs' argument would be that it is immaterial whether Section 243(h) has general extraterritorial application, to a Haitian in Port-au-Prince, for example. Instead, a narrower ground for deciding the case in the plaintiffs' favor is that interdiction merits unique treatment in any constitutional or subconstitutional analysis of "extraterritoriality." The reason is precisely because interdiction skews the results of a court's constitutional and statutory inquiry into an immigrant's connection to the United States. A court should disregard the interdiction, and instead adopt the constitutional or statutory analysis that would apply \textit{but for} the interdiction. A court would thus ask what constitutional and statutory rights interdicted Haitians would enjoy if they had reached South Florida and applied for asylum while in exclusion or deportation proceedings.\textsuperscript{77}

The distinction is significant and merits more attention in both argument and analysis. Take, for example, the issue of whether interdicted, screened-in Haitians detained at Guantánamo Bay may invoke due process protections under the Fifth Amendment. If the Court accepts the government's framing of the issue, the plaintiffs can win only if \textit{any} immigrants may invoke Fifth Amendment due process rights at Guantánamo Bay. But alternatively, the Court could treat interdiction as a special case of extraterritoriality. In particular it could neutralize the effect of interdiction on constitutional and statutory analysis. The Court could hold that persons who are at Guantánamo Bay only because they were interdicted en route to the United States are entitled to invoke the Fifth Amendment, even if other immigrants at Guantánamo Bay may not.

In drawing this distinction, I do not wish to second-guess the plaintiffs' tactical choices. There are good reasons for this part of their brief to focus on the general question of Section 243(h)'s extraterritorial application. In particular, this was the approach of the Second Circuit decision that the Supreme Court is now reviewing. There, as in the plaintiffs' brief, the Second Circuit was somewhat ambivalent in framing the issue. The Second Circuit did point to the special character of interdiction, writing: "[a]bsent proactive government intervention of the sort presented here, § 243(h)(1)'s ban on 'return' of aliens to their persecutors could not be invoked by persons located outside the borders of

\textsuperscript{76} Id. at 34. \textit{See also} id. at 9 ("No government has ever before taken to the high seas to intercept fleeing refugees and return them, forcibly and without process, to their persecutors."); id. at 34 n.62:

Similarly, only petitioners' attempts to circumvent the constraint of § 243(h), through interdiction on the high seas, results in the extraterritorial reach of the statute. Respondents know of no case in which the presumption, which petitioners' [sic] manipulate in an attempt to avoid judicial review, has been applied to permit the executive to act extraterritorially, where a statute would preclude such conduct domestically.

\textsuperscript{77} \textit{See supra} notes 38-62 and accompanying text.
In the end, however, the Second Circuit spoke to the general extraterritoriality question: "the district court erred in concluding that § 243(h)(1) does not apply to aliens outside the United States." The plaintiffs' brief may strike the optimum tactical balance. It presents strong arguments both that Section 243(h) applies extraterritorially as a general matter, and that Section 243(h) applies to these Haitians merely because they were interdicted, without calling much attention to the distinction between them. But for purposes of analysis, and quite possibly future tactics as well, the distinction is important and deserves further elaboration.

III. Precedent for Treating Interdiction as Unique

A. Affirmative Acts of the United States Government

The broad analytical basis for treating interdiction as unique is the idea that the government's affirmative acts may expand the territorial scope of its constitutional and statutory obligations. A leading example is the Second Circuit's 1958 decision in *United States ex rel. Paktorovics v. Murff.* The case involved a Hungarian refugee who had been allowed into the United States in 1956 under the Attorney General's "parole" authority. A would-be immigrant who is granted "parole" is physically allowed into the United States but is formally regarded as not having "entered," and thus enjoys no more rights than an excludable would-be immigrant. After Paktorovics had been in the United States for about eight months, the government revoked his parole on the ground that he had allegedly concealed aspects of his prior membership in the Communist Party. The Second Circuit found that the decision to revoke parole was within the Attorney General's delegated authority. The court reasoned, however, that because Paktorovics had been "invited here pursuant to the announced foreign policy of the United States."
States," he was entitled to a hearing even though he had merely been paroled into the United States. Casting its decision as a reading of the parole statute, the court expressed "serious doubt" as to the statute's constitutionality as a procedural due process matter if it were construed otherwise.

Most recently, similar reasoning is evident in the Haitian Centers Council preliminary injunction that bars repatriation of the screened-in Haitians detained at Guantánamo Bay unless they are provided access to volunteer counsel. In upholding this preliminary injunction, the Second Circuit cited Paktorovics and found—that the "affirmative actions" by the government "established a reasonable expectation by the 'screened in' plaintiffs in not being wrongly repatriated." The court added: "we believe this expectation to be protected by the due process clause." The general reasoning pattern that emerges from decisions like Paktorovics and the right to counsel preliminary injunction in Haitian Centers Council is that the government's affirmative acts, including interdiction in international waters, may enhance the legal rights of would-be immigrants.

B. The "Functional Equivalent of the Border"

Given the general proposition that the government's affirmative acts may expand the territorial scope of its obligations, the concept of the "functional equivalent of the border," borrowed from criminal procedure, lends specific support for treating interdiction separately. The government is subject to fewer Fourth Amendment constraints when administering the border by, for example, searching individuals and vehicles to check for undocumented aliens and prohibited or dutiable items. This greater freedom of action applies not only at the physical border, but also at other locations where the government performs border-related tasks. As the Supreme Court stated in its 1973 decision in Almeida-Sanchez v. United States, "[w]hatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well."

83. 260 F.2d at 614.
84. Id. at 612.
85. In this regard, Paktorovics may be a "phantom norm" decision of the sort analyzed in Phantom Norms, supra note 7.
86. See supra notes 35-43 and accompanying text.
87. 969 F.2d at 1345. The court also cited Chun v. Sava, 708 F.2d 869, 877 (2d Cir. 1983).
88. Id.
90. 413 U.S. 266 (1973).
91. Id. at 272. The Court continued:

For example, searches at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an
While Almeida-Sanchez discussed the possibility of finding a "functional equivalent of the border" inside the United States, other decisions have emphasized the flexibility of the concept. One court noted, "the functional equivalent of the border need bear no particular time or space relationship to the actual border." Some decisions have applied the concept to searches that take place offshore but within the "territorial sea" of the United States, which now extends twelve nautical miles from shore. Other decisions have applied the "functional equivalent of the border" concept to searches that take place beyond territorial waters and on the part of the "high seas" that is termed the "contiguous zone" or "customs waters," which extend from twelve to twenty-four nautical miles from shore.

Other cases have expanded the "customs waters" concept even further to include "constructive customs waters," which can lie on the high

airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.  


92. United States v. Barenbo-Burgos, 739 F. Supp. 772, 778 (E.D.N.Y. 1990). See also United States v. Hill, 939 F.2d 934, 936 (11th Cir. 1991) ("For the purpose of suspicionless Customs searches, the border is elastic.").


94. See United States v. Hidalgo-Gato, 703 F.2d 1267, 1270-73 (11th Cir. 1983); United States v. MacPherson, 664 F.2d 69, 72-73 (5th Cir. 1981); United States v. Williams, 617 F.2d 1063, 1098 (5th Cir. 1980); United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978). See also 46 U.S.C. § 1903 (c) (1988) ("a vessel subject to the jurisdiction of the United States includes... a vessel located within the customs waters of the United States"). On the definition of "contiguous zone," art. 24, Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 1612-13 (1964), provides: "In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to... prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea... ." The same convention further provides: "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." Id. The term "high seas" for transit purposes (as opposed to seabed uses, for example) thus encompasses the "contiguous zone." See United States v. Cilley, 785 F.2d 651, 656 (9th Cir. 1985); United States v. Warren, 578 F.2d 1058, 1065 n.4 (5th Cir. 1978) (en banc); art. 1, Convention of the High Seas, 13 U.S.T. 2312 (1962) ("The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."). See generally CARTER & TRIMBLE, supra note 93, at 965-66.
seas beyond the contiguous zone. Under this line of analysis, a foreign vessel is deemed to be within the “constructive customs waters” of the United States, if the United States and the vessel’s country of registry have entered into a “treaty or other arrangement” that allows United States authorities to board and search the vessel. While the cases in this last group do not expressly use the “functional equivalent of the border” formula, the underlying idea is the same—the government can exercise border control in a variety of locations, ranging from onshore to out beyond the contiguous zone.

Typically, the government uses the functional equivalent concept to free itself of constitutional and statutory constraints on search and seizure. Indeed, if the United States government were to argue that the concept of “constructive customs waters” authorizes a customs search of Haitian flag vessels, it would want to rely on an agreement with Haiti permitting interdiction for customs purposes. That agreement could be an ad hoc arrangement to search individual vessels, or it could be a treaty or other standing arrangement, such as the 1981 United States-Haiti interdiction agreement to control “illegal migration.” Such arrangements would extend out into international waters the government’s freedom to perform border functions.

In Haitian Centers Council, however, the “functional equivalent of the border” concept would have the opposite result, one that the government is trying to avoid. Applying the concept would have the effect of restoring many constitutional and statutory rights to the interdicted Haitians. In spite of the difference in effect, both the customs and immigration situations illustrate how the “border” is not a fixed location, but rather wherever the government performs border functions, which certainly include control of entry.

Under this analysis, the Haitians interdicted by the Coast Guard have already reached the functional equivalent of the United States border, and thus should be treated as having reached the border for purposes of seeking nonrefoulment. They should be permitted to rely on the protections of Section 243(h), regardless of whether Section 243(h)

95. See United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991); United States v. Doe, 860 F.2d 488, 490 (1st Cir. 1988); United States v. Robinson, 843 F.2d 1, 2-3 (1st Cir. 1988); United States v. Alomia-Riascos, 825 F.2d 769, 770-71 (4th Cir. 1987); United States v. Molinares Charris, 822 F.2d 1213, 1216-17 (1st Cir. 1987); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); United States v. Gonzalez, 776 F.2d 931, 935-36 (11th Cir. 1985); United States v. Bent-Santana, 774 F.2d 1545, 1548-49 (11th Cir. 1985); United States v. Romero-Galue, 757 F.2d 1147, 1153-54 (11th Cir. 1985).


has general extraterritorial application. Somewhat surprisingly, this argument has received little attention in the recent Haitian cases. The only published decision that mentions it is the Eleventh Circuit opinion in the related Haitian Refugee Center, Inc. v. Baker litigation,\textsuperscript{100} where the court rejected the argument almost summarily.\textsuperscript{101}

C. The Verdugo-Urquidez Problem

A question that naturally arises is whether my suggested treatment of interdiction is consistent with United States v. Verdugo-Urquidez,\textsuperscript{102} a 1990 Supreme Court decision that apparently limited the extraterritorial application of the Constitution. Verdugo involved warrantless searches by the United States Drug Enforcement Agency of a Mexican national's residences in Mexico. The United States government sought to introduce the fruits of those searches into evidence in a federal criminal trial in the United States. The Supreme Court held that the Fourth Amendment does not apply to the search and seizure by United States agents of property that is located in a foreign country and owned by a nonresident alien who has no voluntary attachment to the United States.\textsuperscript{103}

On balance, Verdugo has little, if any, effect on my suggested treatment of interdiction. First, the majority was careful to tie its reasoning to the language of the Fourth Amendment—certainly not a Court favorite in recent years—and in particular to the warrant clause. The Verdugo majority relied heavily on the Fourth Amendment's reference to "the people," contrasting it to the broader language and presumably broader scope of the Fifth and Sixth Amendments.\textsuperscript{104} Second, there is a more fundamental difference that distinguishes the search in Verdugo from the Haitian interdiction.

Although the warrantless searches in Verdugo were acts of the United States government, the government did not cause the location of those acts to be outside the United States. The government did not actively prevent Verdugo from reaching the United States and the protections that the Constitution offers to those who reach or cross the border. Verdugo remained outside the United States voluntarily, and as long as he did so, he remained beyond the Fourth Amendment's protections. In this respect, he was much more like a Haitian who unsuccessfully applies

\textsuperscript{100} 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992).
\textsuperscript{101} The discussion reads as follows:
Plaintiffs argue that the language of § 1158(a) should be read to include a land border or port of entry or its functional equivalent. Plaintiffs contend that because the United States government is reaching out into the Caribbean to interdict them, it is effectively extending the borders to that extent. We decline to interpret the statute this broadly. The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry.
Id. at 1510 (citing Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1404 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987)).
\textsuperscript{102} 494 U.S. 259 (1990).
\textsuperscript{103} \textit{Id.} at 264-75.
\textsuperscript{104} \textit{Id.} at 264-68.
for a visa in Port-au-Prince and then claims that he or she has been
denied procedural due process. That Haitian is "outside" the United
States under any reasonable characterization of the facts, and it requires
a truly "extraterritorial" application of the Constitution to offer him
protection under the Due Process Clause. In contrast, the interdicted
Haitian would be in the United States, or at least at the border, but for
the government's affirmative act of interdiction. To alter the Verdugo
facts to approximate interdiction, we would need to imagine that the
United States government caused property to be moved out of the
United States, searched the property without a warrant, and then
claimed that the Fourth Amendment did not apply.

There is precedent like Verdugo for subconstitutional extraterritorial
ity, and it merits an analogous analysis. In 1991, the Supreme Court
held in EEOC v. Arabian-American Oil Co.\textsuperscript{105} that Title VII as it read at that
time was not applicable to the employment practices of United States
employers who employed United States citizens abroad. In that case, as
in Verdugo, extraterritoriality was not a state of affairs manufactured
by the United States government. An entirely different analysis would have
been necessary, if the United States government had forcibly relocated
the employer to an overseas location, and then claimed that it had no
duty to follow its statutory mandate under Title VII.

IV. Interdiction and the Problem of "Entry"

In Haitian Centers Council, the Supreme Court can treat interdiction in any
of several ways. It could, as I have suggested, treat interdiction as dis-
sect from the general question of extraterritoriality. Or, the Court
might view the issue as simply whether Section 243(h) applies extraterri-
itorially. While the latter seems much more favorable to the govern-
ment, it contains a paradox.

In parts II and III of this article, I explained how the government's
interdiction policy can enhance its immunity from judicial review. The
paradox is that interdiction also increases the government's exposure to
judicial review; it does so by strengthening what would otherwise be the
Achilles' heel of the plaintiffs' position in Haitian Centers Council. This
most fundamental problem with the plaintiffs' Supreme Court brief is
the assertion that "[t]his is not a case about entry,\textsuperscript{106} but rather about
the right not to be returned to Haiti. Those who seek nonrefoulement
typically do so at the border or after having entered the United States.
For them, any claim to nonrefoulement is about entry in some signifi-
cant respects. To grant them nonrefoulement in turn opens the door to
their release from detention, to work authorization, and to other meas-

\textsuperscript{105} 111 S. Ct. 1227 (1991).

\textsuperscript{106} Brief for Respondents at 8. The Second Circuit reached a similar conclusion.
See 969 F.2d 1326, at 1366 ("The President's power to regulate 'entry' into the
United States is not questioned on this appeal.").
ures that are aspects of durable asylum and thus begin to approach de
fato entry.

The plaintiffs' reluctance to acquiesce in the government's "entry"
characterization is understandable, given the long history of judicial
reluctance to review the political branches' substantive admission de-
cisions. This background accounts, for example, for the Tenth Circuit's
surreal order in Rodriguez-Fernandez v. Wilkinson. That case involved a
Marielito Cuban detainee who sought release on parole, claiming that
indefinite detention would violate his rights under the Fifth and Eighth
Amendments. The court ordered his release, but in an effort to cast the
order as anything other than admission to the United States, the court
noted that release was not necessarily release within the United
States.

Reno v. Flores, recently decided by the United States Supreme
Court, is another case in which active judicial involvement can have a
profound impact on who enjoys de facto entry into the United States,
notwithstanding the efforts of immigrants' advocates to minimize those
implications. Flores was a class action challenging INS policies regard-
ing detention of minor children in deportation proceedings. To the extent
that success in the litigation would have led to the children's release,
even if temporary, the consequences of such a decision included various
forms of de facto entry into the United States. These concerns are
central to the plenary power doctrine, on which the Court majority
relied to reject the plaintiffs' constitutional arguments.

A recent development in Haitian Centers Council reflects similar con-
cerns about judicial intervention in "entry" decisions. On March 26,
1993, Judge Johnson ordered the government to provide adequate med-
cal treatment to the most seriously ill of the HIV-positive Haitians
detained at Guantánamo Bay. Conceding that adequate medical care
was unavailable at Guantánamo Bay, the government responded to the
judge's order by paroling thirty-six seriously ill detainees into the
United States for treatment. What is noteworthy but unsurprising is that
Judge Johnson drafted the order to avoid ordering "entry" into the
United States, in conformity with the general pattern of judicial self-
restraint on entry questions. Instead, the court ordered only that the
government either provide medical care at Guantánamo Bay or "medi-
cally evacuate such class members to a place (except Haiti) where such

107. 654 F.2d 1382 (10th Cir. 1981).
108. Id. at 1390. For discussions of Rodriguez-Fernandez, see Phantom Norms, supra
note 7, at 593-94; Procedural Surrogates, supra note 7, at 1666-69.
109. 61 U.S.L.W. 4237 (Mar. 23, 1992), rev'd Flores v. Meese, 942 F.2d 1352 (9th
Cir. 1991) (en banc).
110. For a discussion of the lower court opinions in Flores, see Procedural Surrogates,
supra note 7, at 1672-73.
111. The Court set forth this reasoning in rejecting the plaintiffs' "substantive due
process" argument. 61 U.S.L.W. at 4240-41. It then rejected the plaintiffs' "proce-
dural due process" argument, reasoning that it merely recast the "substantive due
process" argument in procedural terms. 61 U.S.L.W. at 4242.
medical care is available.”112

While the government’s interdiction policy can enhance its immunity from judicial review, paradoxically it also strengthens the plaintiffs’ argument that Haitian Centers Council is not a case about entry.113 Interdiction does this—and thus seriously weakens the government’s case—by creating a physical gap between two United States “boundaries.” One border is the functional equivalent—the place where the government first performs the border function of controlling entry. Interdiction effectively moves this functional border outward into international waters. The second “boundary” is of a different sort—the place where border functions end, and where we can begin to speak of Haitians “entering” American society. This remains at or near the physical, territorial border, which for the vast majority of Haitians is the South Florida coast.

The gap that interdiction creates between these “boundaries” minimizes the likelihood that application of constitutional and statutory protections to immigrants by virtue of interdiction will lead to consequences that amount to de facto entry. Because of this gap between “boundaries,” the plaintiffs accurately dissociate nonrefoulement from entry when they argue that “[t]he Second Circuit’s order does not require petitioners to admit any Haitians to this country; nor does it bar Haitians from sailing to third countries, from being brought to Guantánamo naval base, or even from being interdicted, so long as bona fide refugees are not returned.”114 When asylum seekers are interdicted, a ruling that they enjoy constitutional and statutory rights, whether under the Fifth Amendment or under Section 243(h), still leaves the government with these and other options. These options are always technically available to the government, but they are difficult to use in practice with respect to asylum seekers who are already at the border or in the United States.

The paradox, then, is that interdiction has two legal effects that tend to neutralize each other. On the one hand, interdiction helps the government to minimize its constitutional and statutory obligations to Haitian asylum seekers. On the other hand, interdiction undermines the government’s argument that the courts, by imposing those same obligations, would exceed their traditional role in immigration matters.

This paradox contains an important lesson: even if interdiction could be interpreted to allow the government to avoid its constitutional and statutory obligations, there is no good reason to do so. Some control over the influx of asylum seekers, including some forms of interdiction, can be exercised in conformity with the dictates of the United

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113. Brief for the Petitioners at 28 (referring to “illegal entry of aliens”).
States Constitution, the Immigration and Nationality Act, and the Refugee Convention. The end of total interdiction need not signal the beginning of open borders or loss of control over the influx of asylum seekers. The fundamental problem with the Kennebunkport Order is that it prevents rational discourse about what policies might be fair, reasonable, and constitutional.