

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: CHRIS SALE, ACTING COMMISSIONER,
IMMIGRATION AND NATURALIZATION
SERVICE, ET AL., Petitioners v.
HAITIAN CENTERS COUNCIL, INC., ET AL.

CASE NO: 92-344

PLACE: Washington, D.C.

DATE: Tuesday, March 2, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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CHRIS SALE, ACTING COMMISSIONER, :
IMMIGRATION AND NATURALIZATION :
SERVICE, ET AL., :
:
Petitioners :
v. : No. 92-344
HAITIAN CENTERS COUNCIL, INC. :
ET AL. :

- - - - -X

Washington, D.C.
Tuesday, March 2, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:

MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioners.

HAROLD HONGJU KOH, ESQ., New Haven, Connecticut; on behalf
of the Respondents.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 92-344, Chris Sale, Acting
5 Commissioner, and the Immigration and Naturalization
6 Service v. The Haitian Centers Council, Inc.

7 Ms. Mahoney.

8 ORAL ARGUMENT OF MAUREEN E. MAHONEY

9 ON BEHALF OF THE PETITIONERS

10 MS. MAHONEY: Mr. Chief Justice and may it
11 please the Court:

12 This case concerns the scope of the President's
13 emergency powers to adopt measures that he deems to be
14 necessary to prevent a mass migration of aliens across the
15 high seas and to the ability of the alien migrants to
16 challenge those measures in United States courts.

17 Last May, in the first 20 days, more than 10,000
18 Haitians crowded into unseaworthy vessels and set sail for
19 our shores. The President determined that he could not
20 stop this migration while continuing to offer the migrants
21 any kind of asylum screening on board Coast Guard cutters
22 or at off-shore locations such as Guantanamo.

23 He accordingly concluded that a change in the
24 procedures was required in order to stop the migration and
25 to save lives that he concluded would be lost if that

1 number of people continued to flow out of Haiti in the
2 vessels which are clearly unseaworthy.

3 He accordingly invoked his powers under the
4 Immigration & Nationality Act, which are in the nature of
5 emergency powers, to adopt the procedure that he thought
6 were necessary, and those procedures provided that the
7 Coast Guard should directly repatriate Haitians without
8 asylum screening but that persons who genuinely feared
9 persecution should be given an opportunity to seek
10 admission as a refugee through asylum processing at the
11 embassy.

12 QUESTION: Ms. Mahoney, was this directive aimed
13 at any Haitians who were leaving Haiti, or just Haitians
14 who were leaving Haiti for the United States?

15 MS. MAHONEY: It's directed at Haitians who were
16 leaving for the United States. The executive order
17 directs the Coast Guard to determine whether they have
18 reason to believe that undocumented aliens are seeking
19 entry into United States territorial waters, and the Coast
20 Guard has enforced it in that way.

21 QUESTION: Once the procedures were changed, the
22 exodus that had begun a number of months before was
23 halted. They were effective.

24 The problem that we face now is that the threat
25 of the out-migration continues because the underlying

1 conditions in Haiti that have caused people to wish to
2 leave their country -- a variety of political and economic
3 conditions -- continue to persist.

4 The President has accordingly determined that in
5 order to prevent mass migration, just as last May, and
6 also to prevent loss of life at sea, perhaps hundreds or
7 thousands, the policy of direct repatriation must
8 continue, but the President has also directed that efforts
9 be made to fully fund the asylum processing in Haiti so
10 that those who wish to come to the United States because
11 they genuinely fear persecution will have an opportunity
12 to adjudicate those claims expeditiously in Haiti and flee
13 Haiti through those orderly procedures.

14 QUESTION: Ms. Mahoney, you don't claim that
15 section 1253(h) is unconstitutional, I take it?

16 MS. MAHONEY: No, Your Honor, we're not claiming
17 that it's unconstitutional.

18 QUESTION: Has any effort been made to amend the
19 statute?

20 MS. MAHONEY: Since this occurred?

21 QUESTION: Yes.

22 MS. MAHONEY: Not that I know of. I don't
23 believe that -- a bill might have been introduced, I
24 really can't say, but nothing has certainly gotten very
25 far.

1 The Coast Guard is accordingly still under
2 orders from the President to interdict Haitians and to
3 repatriate them without conducting asylum screening. The
4 court of appeals, nevertheless, told -- directed the
5 commandant of the Coast Guard to disregard the procedures
6 that had been established by the President and to resort
7 to the procedures that had been suspended by the President
8 last year in the national interest.

9 We respectfully ask this Court to reverse the
10 order of the court of appeals and to permit the 20
11 military vessels that are currently stationed off the
12 coast of Haiti to operate under the direction of the Coast
13 Guard and the President and not the Federal courts.

14 QUESTION: Ms. Mahoney, after the court of
15 appeal's ruling last spring, was an injunction actually
16 entered by the district court?

17 MS. MAHONEY: Yes, it was, Your Honor, but this
18 Court stayed it.

19 QUESTION: And was -- did the injunction -- was
20 it directed against the Commandant of the Coast Guard and
21 the Commandant of the naval base at Guantanamo Bay, too?

22 MS. MAHONEY: Yes, I believe that it was
23 directed against all of the defendants, and definitely
24 against the Commandant of the Coast Guard.

25 QUESTION: What did it command them to do?

1 MS. MAHONEY: It commanded them not to return
2 any interdicted Haitian who would be threatened with
3 persecution in Haiti, and necessarily, in order to comply
4 with that order, Your Honor, we would have to conduct some
5 sort of asylum screening so that we could be in compliance
6 with the injunction, otherwise we wouldn't know whether we
7 were returning someone who might fear persecution.

8 QUESTION: Is the asylum screening, Ms. Mahoney,
9 that's taking place in Haiti pursuant to the Government's
10 obligations under section 1253?

11 MS. MAHONEY: No, it is not, Your Honor. The
12 Government does not have obligations under 1253(h) outside
13 of the territory of the United States.

14 QUESTION: So this is just a gratuitous effort
15 on the part of the Government.

16 MS. MAHONEY: Well, it is a humanitarian effort
17 on the part of the Government to provide an orderly way
18 for persons with genuine fears of persecution in Haiti to
19 seek asylum and come to the United States.

20 The situation that he had before, when we were
21 conducting screening on Coast Guard cutters and at
22 Guantanamo, was conducting thousands and thousands of
23 people to essentially risk their lives so that they could
24 get the opportunity to apply for asylum outside of their
25 own country and the chance to come to the United States,

1 even though the vast majority of those people will not
2 ultimately be found to be eligible for asylum.

3 This unnecessarily creates the risk of loss of
4 life at sea, and it interferes with our foreign policy
5 initiatives, which very fundamentally depend upon bringing
6 order and stability into that country.

7 QUESTION: If a person in Haiti is found
8 eligible for asylum, what steps are taken to allow him to
9 enter the United States?

10 MS. MAHONEY: They are transported to the United
11 States, and hundreds of people have in fact been brought
12 to the United States pursuant to that procedure, which
13 again is being expanded by the President, and emergency
14 refugee funding was just devoted to that.

15 We are not under an obligation to provide that
16 process, but it is part of the procedures that the
17 President had determined constitute an appropriate
18 response to the emergency situation in Haiti. In this way,
19 the asylum claims can be made in an orderly way.

20 They can be adjudicated more effectively because
21 persons at the embassy and asylum employees who are
22 adjudicating the claims can look into the allegations.
23 Trying to conduct asylum interviews on Coast Guard cutters
24 at Guantanamo did not produce results that really very
25 accurately reflect the true nature of the claims.

1 QUESTION: What is the authority of the United
2 States to conduct such extrastatutory -- take such
3 extrastatutory steps?

4 MS. MAHONEY: Oh, those are not extrastatutory.
5 That is a procedure that Congress adopted in section 1157.
6 It's a procedure for refugee admissions for aliens who are
7 outside the United States. In fact --

8 QUESTION: All right.

9 MS. MAHONEY: The system that Congress set up
10 really reflects the differences in the obli -- in the
11 benefits that are to be afforded to aliens outside the
12 United States and aliens who have reached our shores.

13 Congress provided that you could apply for
14 asylum in the United States and it could be granted in the
15 discretion of the Attorney General if you've reached our
16 borders. Outside the United States, you could only apply
17 for asylum if the President determined in consultation
18 with the Congress that a nation represented a
19 particular -- an area of humanitarian concern.

20 And Haiti is one of the very few nations in the
21 world where we have actually established in-country
22 asylum-processing centers -- I believe there are only five
23 or six -- and this was done, again, to try to facilitate
24 the adjudication of those claims and to stop this exodus
25 which is threatening our foreign policy interests and

1 humanitarian interests as well.

2 I'd like to emphasize that we do not --

3 QUESTION: None of this has anything to do with
4 the legal issue in front of us, though, I believe. The
5 position you've taken is that you have no obligation to
6 permit aliens to come to the United States in order that
7 they may apply for asylum here.

8 MS. MAHONEY: That is correct, Your Honor. I --

9 QUESTION: So maybe we can talk about that legal
10 issue.

11 MS. MAHONEY: The -- the point here, Your Honor,
12 is that the power that the President has under 1182(f) and
13 1185(a)(1) is to adopt procedures -- these are in the
14 nature of emergency powers, and they are to adopt
15 procedures in response to crises abroad or international
16 situations which he thinks to be appropriate in the
17 national interest, and it is these combination of
18 procedures, direct return plus the availability of the 207
19 screening, that makes for both a humanitarian policy and
20 one that is certainly well within his legal authority.

21 The scope of the powers that were conferred by
22 Congress were addressed by this Court in *Knauff v.*
23 *Shaughnessy* in 1950 before the '52 amendments to the INA,
24 and there the Court emphasized that these powers were very
25 broad, were in the nature of emergency powers, and in fact

1 so broad that the President could in fact suspend
2 exclusion hearings when he deemed it to be appropriate,
3 even for aliens who had reached our borders.

4 In that case, the bride -- alien bride of an
5 American soldier was not allowed entry and was not given a
6 hearing because the President had delegated unreviewable
7 discretion to the Attorney General to deny such procedures
8 when he thought it appropriate in the national interest.

9 QUESTION: Ms. Mahoney, who directs the Coast
10 Guard under the current policy?

11 MS. MAHONEY: The Department of Transportation,
12 the Commandant of the Coast Guard. The Attorney General
13 has not issued any directives to the Coast Guard, Your
14 Honor.

15 QUESTION: Does the Attorney General ordinarily
16 have jurisdiction over the conduct of the United States on
17 the high seas?

18 MS. MAHONEY: No, Your Honor, the Attorney
19 General does not.

20 Under 8 U.S.C. section 1357 his responsibilities
21 are to enforce the immigration laws within the borders of
22 the United States and within the territorial waters, so
23 this further underscores that if Congress intended to
24 limit the scope of the President's emergency powers under
25 1182(f) and 1185(a)(1), surely they would not have simply

1 written 1253(h) as a direction to the Attorney General and
2 included it in parts 4 and 5, which deal with exclusion
3 and deportation proceedings. These are --

4 QUESTION: Ms. Mahoney, may I just interrupt you
5 on one point before you get too far from it? Isn't there
6 a law to the effect that the Coast Guard is deemed legally
7 to be executing the policies of whatever department it may
8 be responsive to so that if the Coast Guard is
9 implementing a policy which is set by the Attorney General
10 it would be treated as the Attorney General for statutory
11 purposes?

12 MS. MAHONEY: Your Honor, you're referring, I
13 believe, to 14 U.S.C. section 89, and it does provide that
14 when the Coast Guard is acting under the -- basically as
15 the agent of a particular department, that it will use its
16 procedures, but here it is clear that the Coast Guard is
17 acting at the direction of the President under the
18 President's powers under 1182(f) and 1185(a)(1), and that
19 is a very different source of power than that which is
20 conferred on the Attorney General to enforce our
21 immigration laws within the boundaries of the United
22 States.

23 The Attorney General is responsible for making
24 refugee determinations in the course of exclusion and
25 deportation proceedings, and I would note that 1253(h),

1 the express language is directed to the Attorney General,
2 and if the Attorney General makes a determination that a
3 person would be subject to persecution, then they shall
4 not be deported or returned.

5 That language simply has no bearing on the
6 President's exercise of his powers, separate powers under
7 1182(f).

8 QUESTION: So basically your argument is that
9 1253(f) is really irrelevant to the issue that we've got
10 here.

11 MS. MAHONEY: No, Your Honor, I wouldn't say
12 that it's irrelevant. I -- I mean, certainly, it's the
13 issue that the court of appeals looked at and said it was
14 not extraterritorial, which we agree with, but this simply
15 shows that, given that the President was exercising
16 authority under different sections, if Congress had
17 intended to circumscribe those powers, it would not have
18 written 1253(h) in the way that it did. It clearly is
19 addressed to the Attorney General and his exercise of
20 powers, and this is particularly so, given that the --
21 given the broad interpretation of 1185(a)(1) that had
22 already been adopted in *Knauff v. Shaughnessy* when
23 Congress --

24 QUESTION: Isn't it true that both 1182(f) and
25 1185 deal with the power of the President to prevent entry

1 into the United States, rather than to return to any
2 particular destination? It addresses a different problem,
3 I think.

4 MS. MAHONEY: I don't believe so, Your Honor. I
5 think that those powers are very broad, they're designed
6 to give the -- the President the authority to -- it says
7 to control the travel of aliens and prevent -- not
8 prevent, excuse me, and to prohibit attempts to enter.

9 QUESTION: That's right. It talks about entry.

10 MS. MAHONEY: Right.

11 QUESTION: To suspend entry.

12 MS. MAHONEY: To -- to suspend entry, but
13 1185(a)(1) specifically talks about prohibiting travel,
14 and by adopting rules and regulations that he deems
15 appropriate.

16 QUESTION: Well, it deals with aliens who are to
17 depart or enter, or attempt to enter or depart.

18 MS. MAHONEY: Attempt to enter, Your Honor.
19 Essentially, the proclamation in 1981 said that the
20 attempt to enter the territorial waters of the United
21 States on the high seas by undocumented aliens was
22 prohibited. So essentially what the President is doing
23 here is enforcing and asking the Coast Guard to enforce
24 that limitation that was established by proclamation for
25 the purposes of protecting the sovereignty of the United

1 States.

2 QUESTION: Not, but if there were another
3 statute that said you shall never send anybody to Cuba,
4 for example in so many words, that wouldn't -- this
5 statute would be -- the statute on the books would still
6 leave the President full of power to control entry and
7 departures from the United States. Because the statute
8 would then place a limit on where he could return someone.
9 He couldn't send them to Cuba, and that's what they argue
10 here. I don't know if they're right or not.

11 MS. MAHONEY: Well -- well, that could be,
12 except that in this case these facts demonstrate that that
13 would make the powers that have been conferred on the
14 President ineffective under these circumstances. The
15 President has determined that he cannot do any sort of
16 refugee screening or take them anywhere else. He simply
17 cannot enforce the interdiction program if he is
18 prohibited from taking them back to Haiti.

19 QUESTION: Right.

20 MS. MAHONEY: So, in other words, the -- it
21 would be difficult to believe that Congress intended to
22 skirt -- circumscribe the President's authority in a way
23 that he has to permit a mass migration across the seas to
24 our shores. I mean we're talking about potentially
25 100,000 people.

1 QUESTION: Well -- well maybe it's impractical
2 and unrealistic, but at least theoretically consistently
3 with the law, he could interdict them and send them
4 someplace other than -- than Haiti.

5 MS. MAHONEY: Well --

6 QUESTION: And that would be consistent with the
7 statutory authority to keep everybody out of the United
8 States.

9 MS. MAHONEY: Uh --

10 QUESTION: Maybe he can't do that as a practical
11 matter.

12 MS. MAHONEY: But he can't do that. That's the
13 point. He can't enforce --

14 QUESTION: But if you just look at the words,
15 it's consistent with the various --

16 MS. MAHONEY: He can't enforce the prohibition
17 and 1253(h) is not directed to the President, it's
18 directed to the attorney general.

19 QUESTION: The attorney general, I understand.

20 MS. MAHONEY: I'd also like to turn to the fact
21 that the court of appeals didn't address the threshold
22 issue really, of why it could assert jurisdiction in this
23 case, what was the cause of action here?

24 QUESTION: The APA does provide a cause of
25 action, but we submit it does not provide a cause of

1 action for aliens outside of the United States to
2 challenge the President's authority in this manner. The
3 whole history of our immigration laws has been to deny
4 access to aliens outside the United States to U.S. courts.
5

6 And, in fact, if we look at the provisions of
7 the Immigration and Nationality Act, they demonstrate very
8 clearly that the way that aliens get a right to bring
9 challenges in U.S. courts is to have territorial presence,
10 to be here, to be at the borders or to be in the United
11 States.

12 1105(a) specifically says that orders of
13 exclusion, and that would include, for instance, orders
14 saying that you are not allowed to come into the country
15 which are issued to persons outside the United States as
16 well as persons inside the United States, can only be
17 challenged by persons who are at the border. Orders of
18 deportation, of course, can be challenged by people who
19 are -- are within the United States.

20 QUESTION: Yes. If a treaty that said it was a
21 self-executing treaty had a provision in which the United
22 States undertook not to deter any person from attempting
23 to enter the United States, would an alien then have the
24 authority to seek the assistance of our courts to prohibit
25 the President from violating that treaty?

1 MS. MAHONEY: Your Honor, if self-executing were
2 meant to create a cause of action, an actual cause of
3 action on behalf of that alien, I suppose that's true.
4 But I don't think that -- certainly there's nothing in the
5 text of article 33 or in the convention as a whole that
6 indicates that it itself creates causes of action that can
7 be brought in United States courts.

8 QUESTION: Do we have any treaties --

9 MS. MAHONEY: And it was --

10 QUESTION: -- Which create causes of action
11 analogous to the one we're discussing in this
12 hypothetical?

13 MS. MAHONEY: I don't know the answer to that,
14 Your Honor. I can say, though, that in *Amerada Hess*
15 recently, the Court did note that even though there were
16 rather explicit obligations to pay compensation, it did
17 not create a cause of action that was enforceable in
18 United States courts because it didn't say that. And I
19 don't think that there -- there is any language in the --
20 in the protocol that would suggest that there is an
21 independent cause of action. It would be so contrary to
22 the whole history of our immigration laws.

23 I mean I would point out, for instance, that
24 under the Immigration and National Act even persons
25 outside the United States who claim to be citizens are not

1 permitted to bring an action in United States courts.
2 That's because Congress has determined that the only way
3 to bring that challenge is to get a certificate from the
4 consular office in the foreign locality that you,
5 basically, have probable cause to present a claim of
6 citizenship, in which case they will permit you to come to
7 the United States to make that challenge, but you cannot
8 do it from outside the United States.

9 QUESTION: Ms. Mahoney, does -- does that mean
10 that if, say, a Haitian appears at the American consulate
11 in Port-au-Prince and makes a case for political asylum
12 and the consul simply misunderstands the law and says
13 there is no case, does that person then have no remedy in
14 the United States courts unless --

15 MS. MAHONEY: That's correct, Your Honor. In
16 fact, there's absolutely nothing in the statute that would
17 provide any rights of review for persons who think that
18 they have been unfairly denied, whether it be refugee
19 admission or any of the other preferences that are
20 established by the immigration laws.

21 And in the -- in one APA action that this Court
22 decided, *Brownell v. Tom We Shung*, the Court found that
23 the APA could be used for an alien child who came to the
24 borders of the United States and claimed a right to enter
25 under the War Brides Act, but it noted in -- in the course

1 of reaching that conclusion that, of course, aliens
2 outside the United States who have never reached our
3 borders couldn't possibly maintain a claim under the APA.

4 But even the result that this Court reached in
5 Brownell was overruled by Congress. And the legislative
6 history indicated it was a fallacious doctrine to suggest
7 that aliens outside the United States could come into U.S.
8 courts under the APA.

9 QUESTION: Why wouldn't they have a claim under
10 the APA? Is the APA also territorial only?

11 MS. MAHONEY: No, Your Honor, I don't believe
12 that the APA is territorial only, but the INA precludes
13 review. It's very much like -- the provisions of the INA
14 show that preclusion is intended. It's very much like
15 Block v. Community Nutrition where there is a class of --
16 of applicants or claimants, and here it's aliens outside
17 the United States, those who have no connection to our
18 country or our territory, who are not given any rights --
19 any rights of access to the courts.

20 And to construe the APA to nevertheless provide
21 them access with the courts when it historically has never
22 been done, seems to me to be a grave departure from our
23 law, particularly in the circumstances of this case where
24 it's aliens outside the United States who are threatening
25 to migrate en masse and, in fact, were migrating en masse,

1 and they wish to come into the courts of the United States
2 to challenge the action of the President in responding to
3 that.

4 It seems to me that even if the Court were to
5 think that an APA action might be appropriate, equitable
6 relief under these circumstances certainly is not. The
7 President has determined that the national interest here
8 is to pursue the procedures which he has established, and
9 to suggest that the persons who wish to avoid the 207
10 processing in Haiti so that they can seek more beneficial
11 asylum procedures or what they might view to be more
12 beneficial asylum procedures in the United States, does
13 not strike us as equitable relief.

14 As this Court noted in Webster v. Doe, the
15 Court, when exercising powers under the APA, must
16 determine whether the relief requested is appropriate
17 equitable relief, and continues to have authority to
18 dismiss relief, whether declaratory or injunctive, that
19 does not represent an appropriate exercise of judicial
20 power.

21 This is certainly such a case, where the
22 President has determined that to adopt the procedures that
23 the court of appeals has required will result in mass
24 migration and the loss of hundreds and possibly thousands
25 of lives at sea. This is just not a sensible way to

1 construe our laws, and certainly not one that we think
2 Congress intended.

3 QUESTION: Does 1253(h) rest on the assumption
4 that the -- the powers over the very subject matter that
5 you are describing, or the executive power over the very
6 subject matter that you are describing will be exercised
7 only by the attorney general, and is that why 1253(h) is
8 addressed only to the attorney general?

9 MS. MAHONEY: No, Your Honor, I think that
10 1253(h) is addressed only to the attorney general because
11 it is only addressed to the removal of aliens within our
12 territory and that is done only by the attorney general.

13 In fact, if we look at the language of 1253(h),
14 I mean not only is it contained in two chapters that
15 pertain just to exclusion and deportation procedures --

16 QUESTION: Well, may I -- just because time is
17 short --

18 MS. MAHONEY: Certainly.

19 QUESTION: -- May I interrupt you with another
20 question. If, in fact, we were to construe 1253(h)
21 differently from the way you want us to do, and if we were
22 to conclude that, in fact, 1253(h) does not have the
23 territorial limitation for which you argue, then would it
24 follow that the statute was -- was enacted on the
25 assumption that the authority over the subject matter --

1 that the executive power over the subject matter would be
2 exercised only through the attorney general?

3 MS. MAHONEY: If I understand your question,
4 Your Honor, you're saying that we should conclude that the
5 President's authority was circumscribed or that he did not
6 have authority to do this.

7 QUESTION: That -- that it was circumscribed and
8 it's a circumscription which, at least as a Constitutional
9 matter, is not presently before us.

10 MS. MAHONEY: No, Your Honor, I don't think we
11 could construe it to circumscribe the President's
12 authority in that -- in that light, especially since in
13 Knauff v. Shaughnessy itself, the President suspended
14 exclusion hearings which were required by statute for an
15 alien bride who was entitled to admission so that she
16 could be with her husband, if she was otherwise
17 admissable.

18 So to say that -- that the -- the President's
19 powers could suspend those kinds of procedures in Knauff
20 but nevertheless not permit the President to adopt
21 procedures that are necessary to protect our sovereignty
22 and to protect against a humanitarian tragedy at sea seems
23 to me to be an inappropriate way to construe Congressional
24 intent. Particularly when we're dealing with areas of
25 foreign affairs powers where, as this Court noted in

1 Curtis Wright, Congress is expected to grant extremely
2 broad authority so that the President will be able to act
3 in the national interest without the kinds of limitations
4 that you might have in the domestic setting.

5 I'd further underscore that if we were to look
6 to the -- the protocol to which certainly this Court has -
7 - has reference to inform the interpretation of 1253(h),
8 one of the key concerns of the negotiators was that they
9 have the ability and the flexibility to prevent mass
10 migrations. Because no country can readily give up that
11 kind of sovereign power so that it subjects itself
12 essentially to an invasion of foreigners.

13 QUESTION: Was -- was that concern expressed by
14 others than the Dutch and the Swiss?

15 MS. MAHONEY: Well, it -- it was responded to by
16 the President, I believe in July -- in the July 11th
17 negotiating session as well, saying that there was no
18 great -- he was responding to concerns that it might be
19 applied extraterritorially and pointed out that the second
20 paragraph specifically refers to where the alien is and
21 that that was a territorial limitation.

22 And, in fact, if article 33 is looked at in
23 context, it's in a chapter called Administrative Remedies.
24 And article 32 refers to persons within the territory who
25 are entitled to some limited protections from removal and

1 --excuse me, 32 is expulsion, those who were lawfully
2 admitted.

3 31 is people who are entitled to a lesser level
4 of protection, and 33 is readily read to simply describe
5 the procedures that can be used to remove those people
6 from the territory and not creating some sort of
7 freestanding obligation to undertake obligations outside
8 the territory, particularly in light of the fact that this
9 would create a mandatory duty of asylum which this Court
10 in Cardoza-Fonseca and in Stevic recognized no one agreed
11 to.

12 I'd like to save the remainder of my time for
13 rebuttal.

14 QUESTION: Well, before you sit down, a couple
15 of irrelevant questions. Have you ever been in Haiti?

16 MS. MAHONEY: No, Your Honor, I have not.

17 QUESTION: Are you familiar with a book called
18 The Comedians by Graham Greene?

19 MS. MAHONEY: No, Your Honor, I'm sorry, I'm
20 not.

21 QUESTION: I recommend it to you.

22 MS. MAHONEY: Thank you.

23 QUESTION: Thank you, Ms. Mahoney.

24 Mr. Koh, we'll hear now from you.

25 ORAL ARGUMENT OF HAROLD HONGJU KOH

1 ON BEHALF OF THE RESPONDENTS

2 MR. KOH: Mr. Chief Justice, and my it please
3 the Court.

4 You've heard the Government's case. But,
5 unfortunately, that case differs from the one that's
6 before in four crucial respects.

7 First, the right we claim is not a right of
8 entry. It's simply the right not to be returned to Haiti,
9 a country where our clients face political persecution.
10 These interdictions are going on over 700 miles away from
11 the United States. They are going on right outside Haiti.
12 People are fleeing from Haiti to anywhere they can get to.

13 There are some 700 islands, if you refer to a
14 map, between here and Haiti. People coming from
15 Port-au-Prince could go to the Bahamas. They could go the
16 Caymans. They can go to Mexico, Cuba, the Virgin Islands,
17 Honduras, Turks and Caicos, the Dominican Republic, but
18 they cannot because we've erected a floating Berlin Wall
19 around Haiti which keeps people in.

20 Secondly, our claim is --

21 QUESTION: Mr. Koh, uh, uh, Ms. Mahoney says
22 that the order is directed just at Haitians who are
23 leaving Haiti for the United States.

24 MR. KOH: Your Honor, they are not interdicting
25 people and asking them: Are you going to the United

1 States? They are interdicting everyone, without regard
2 and without asking them where they're going. And that's
3 precisely the problem.

4 QUESTION: Well, then, are -- are they -- are
5 they out of compliance with the President's order?

6 MR. KOH: Your Honor, if someone was coming from
7 700 miles away and past many countries, it would be quite
8 a while before we were sure what their ultimate
9 destination was. And there's no way that we can establish
10 exactly where they are going.

11 Our own clients -- uh -- in another part of the
12 case who are being held at Guantanamo, all intended to go
13 elsewhere. Nevertheless, the interdiction order is not
14 designed to keep Haitians out of the United States. If
15 that were the case, the interdiction could be set up 13
16 miles outside the United States. Instead, it's set up 13
17 miles outside of Haiti.

18 QUESTION: Well, if you set up an interdiction
19 order 13 miles outside the United States you turn people
20 back for what may be a very perilous hundreds of miles of
21 -- of journey.

22 MR. KOH: I understand that, Your Honor, but if
23 you refer to the Government's brief, on page three, they
24 point out that under the old interdiction program, the one
25 that operated under President Reagan and President Bush

1 for more than 10 years, where there was minimal screening
2 applied, that that program was very effective, and that it
3 saved thousands of lives.

4 They have not explained why a program which now
5 dispenses with the screening and returns people directly
6 to their persecutors is somehow safer. This is not
7 rescue. This is aiding and abetting their persecutors by
8 delivering refugees directly into the hands of those
9 people that they are fleeing from.

10 Now, the Defendant in this case is not the
11 President. We have not sued him and he is not here. And
12 we do not challenge his constitutional authority to direct
13 foreign and military policy. The President has issued no
14 national emergency order. He has not issued a new
15 proclamation. Indeed, that's a core -- uh -- point of
16 their case.

17 QUESTION: You -- you have joined the commandant
18 of the Coast Guard and the Commandant of Guantanamo?

19 MR. KOH: That's right, Your Honor.

20 Miss Mahoney conducted her entire argument
21 without reference to the order which is at issue here.
22 And if you refer to pages 378 to 379 of the joint
23 appendix, what you will see is that the President has not
24 ordered that people be returned to Haiti. Indeed, on the
25 joint appendix, at 327, and I will read it to you, the

1 press release that was issued on the day the Kennebunkport
2 order issued: "President Bush has issued an executive
3 order which will permit the Coast Guard to begin returning
4 Haitians to Haiti."

5 And if you look at the order itself, he says
6 that the secretary -- the Department of Transportation
7 shall issue appropriate instructions -- he does not say
8 what makes them appropriate. And then in 2(c)(3) -- I'm
9 sorry -- 2 -- uh -- (c)(3) "to return the vessel" -- in
10 other words, there is no despot -- dispute that what he's
11 -- uh -- suggesting are instructions about return -- "when
12 there is reason to believe that an offense is being
13 committed against the U.S. immigration laws."

14 In other words, the Coast Guard here is supposed
15 to be enforcing the immigration laws, and as Justice
16 Souter pointed out, that brings them firmly under 14
17 U.S.C. 89(b).

18 And then, "provided, however, that the attorney
19 general, in his unreviewable discretion, may decide that a
20 person who is a refugee will not be returned without his
21 consent."

22 That is the target of 243(h). The attorney
23 general does not have unreviewable discretion to decide
24 whether someone who is a refugee may be returned. That
25 discretion was removed from him by 1253(h), which says in

1 unambiguous terms, "The attorney general shall not return
2 any alien" --

3 QUESTION: Yes, but, Mr. Koh, that's the issue.
4 I mean, if -- if the statute doesn't apply outside the
5 United States, then he does have unreviewable discretion.
6 And that's what we have to decide.

7 MR. KOH: Well, Your Honor, the point that we
8 have made in our brief is that you must look to the
9 broader purposes of this statute. If what the Government
10 says is --

11 QUESTION: Yes, I understand. But do -- would
12 you not agree that if 243(h) -- and neither the statute
13 nor the treaty applies outside the United States, then
14 there's nothing wrong with giving him unreviewable
15 discretion?

16 MR. KOH: Well, that's a further point of our
17 contention. The Government suggests that what we are
18 arguing here is somehow that 243(h) applies worldwide, and
19 to any chance encounter between Haitians and the attorney
20 general. That is not what we're contesting.

21 What we are contesting is that in the
22 unprecedent --

23 QUESTION: It -- it'd really help me if I -- I
24 understood what your answer to my question was.

25 MR. KOH: Your Honor, what we're saying is that

1 the question here is when the attorney general takes the
2 immigration laws out onto the high --

3 QUESTION: Let me just state my question, so you
4 understand it clearly. If you agree, which I know you
5 don't, that neither the treaty nor the statute applies
6 outside the territory of the United States, then would you
7 not also agree that the attorney general has unreviewable
8 discretion to return someone who is apprehended outside
9 the United States?

10 MR. KOH: If the issue were posed that way, yes,
11 I would agree, Your Honor. But the question is not that.
12 The question is: When the attorney general takes the
13 immigration laws out onto the high seas, as he has done
14 here, then do the restraints of the statute travel with
15 him?

16 Now, as the Government points out, the authority
17 that they claim is from 212(f) and 215(a). Those
18 provisions also, by the way, are not extraterritorial.
19 There is nothing that gives them an extraterritorial
20 scope. What takes them extrator -- territorially is that
21 the attorney general has taken them out onto the high
22 seas. But they want the power without the restraint that
23 goes along with it.

24 And our point is simply that when U.S.
25 officials, themselves, choose to exercise their

1 authorities, their immigration authorities, on the high
2 seas, they must follow the statute that they invoke as the
3 basis of their authority. They can't have it both ways.
4 They can't have the power without the constraint.

5 And understand, Your Honors, that the motive,
6 the humanitarian motive that is raised repeatedly in the
7 Government's position, is irrelevant. Because if, as
8 Justice Stevens has pointed out -- uh -- the attorney
9 general's discretion were unreviewable, then the attorney
10 general could simply shoot everyone on the high seas. His
11 motive would be irrelevant.

12 If this were in fact the case in the current
13 day, the attorney general could send the Coast Guard out
14 to apprehend fleeing Nazis and deliberately return them to
15 their pre -- persecutors.

16 If Chinese students were outside the United
17 States or Salman Rushdie was outside the United States,
18 they could be returned to China and Iran, respectively,
19 for the worst of motives, because there would be no law
20 governing their conduct.

21 And, indeed, Your Honor, if President Aristide
22 himself were coming from Haiti, someone who undeniably has
23 a fear of political persecution, he would be returned, no
24 questions asked, directly into the hands of his
25 persecutors.

1 This has a broader worldwide implication. If
2 this interpretation is true, the Germans, facing a flow of
3 refugees from Bosnia, could take to the high seas,
4 apprehend Bosnians, and deliberately return them to
5 Serbian death camps, because they are under no constraint
6 of law.

7 QUESTION: Since it is good for it to be that
8 way, it must be that way. Is -- is that your argument? I
9 mean, well, it seems that we have a statute in front of
10 us, in the text in front of us, one can create horrors
11 -- all sorts of horrors, but simply to acknowledge it is
12 a horror is not necessarily to acknowledge that there is
13 a law against it, is it?

14 MR. KOH: Justice Scalia, there is a law against
15 it. It says that the attorney general --

16 QUESTION: Well, let's talk about the law. Uh
17 -- in -- in -- in -- in Stevic, we discussed the prior
18 version of 1253, which we said complied with article 33
19 and the protocol -- substantially conformed with it. And
20 we said that the later amendment made some changes, but
21 not substantial ones.

22 And that prior version, which we said complied
23 with -- uh -- the protocol, that prior version read very
24 explicitly the attorney general was authorized to
25 withhold, disporz -- disportation -- uh -- deportation of

1 any alien within the United States to any country in
2 which, in his opinion, the alien would be subject to
3 persecution.

4 MR. KOH: Justice --

5 QUESTION: That one contained explicitly a
6 territorial limitation. And in Stevic we thought that
7 complied with article 33 and with the protocol.

8 MR. KOH: Justice Scalia, I would -- uh --
9 differ with your interpretation of the case. The holdings
10 in the earlier determinations or the earlier
11 determinations or the earlier cases of this Court
12 regarding 243(h) did not address the question of -- uh --
13 the Refugee Act of 1980 and what it did to the previous
14 version of the statute.

15 In -- there were three important changes made.
16 May -- or in the discretionary power in the attorney
17 general was made mandatory -- the word "return" was added,
18 and the words, "within the United States" were dropped.
19 In other words, it's now made, "shall not return any
20 alien," where before it was, "may return an alien."

21 Now, what's Stevic held, and this was also the
22 burden of -- of the long footnote in Justice Stevens'
23 opinion in Cardoza-Fonseca is that the -- uh --
24 conformance of the United States to article 33 compelled
25 the discretion of the attorney general under the old

1 243(h) and all that the Refuge Act did in 1980 was to make
2 it mandatory.

3 What is -- is going on here is that lower
4 executive officials, operating pursuant to discretion,
5 supposedly given by an executive order, have rewritten the
6 statute back to the way it was. Instead of saying "may,"
7 it now says -- instead of saying "shall," it now says
8 "may." Instead of saying "any aliens," they would read it
9 to say "any aliens within the United States." And instead
10 of saying "deport or return," they would eliminate the
11 word "return."

12 QUESTION: Well, here's what we said in Stevic.
13 We said there were of course differences between the
14 protocol and the text of domestic law. The most
15 significant difference was that article 33 gave the ref --
16 refugee an entitlement to avoid deportation to a country
17 in which his life or freedom would be threatened, whereas
18 domestic law merely provided the attorney general with
19 discretion.

20 The attorney general, however, could naturally
21 accommodate the protocol -- and so -- and it mentions a
22 few other -- uh -- differences. You would think --

23 MR. KOH: But --

24 QUESTION: That if one of the differences was no
25 extraterritorial application, that would have been --

1 would have been a prominent one that -- that we would have
2 mentioned.

3 MR. KOH: But, Your Honor, if you read on, what
4 you will see is that it was suggested that the attorney
5 general honored the dictates of article 33, and thereby
6 exercised his discretion in conformity with it.

7 QUESTION: Yes, but we mention nothing about
8 extraterritoriality.

9 MR. KOH: Your Honor, that's because no
10 extraterritorial interceptions and returns were going on
11 at the time.

12 QUESTION: But -- but that language leaps out at
13 you, "within the United States," in the earlier version.

14 MR. KOH: Your Honor --

15 QUESTION: And if we had thought that that was a
16 difference from the protocol and from article 33, we would
17 certainly have noticed it.

18 MR. KOH: Your Honor, we cite here simply plain
19 language. It used to say "any alien within the United
20 States," and that's precisely the language that they
21 removed. And Cardoza-Fonseca says that nothing is clear,
22 that language that was removed should be not be sub
23 silentio added into another provision.

24 QUESTION: Well, but we acknowledge that even
25 with that language, before it was removed, it was in

1 conformity with article 33 and the protocol. And we also
2 say in the opinion that the changes were not meant to make
3 any substantial changes, but were to conform the law with
4 what the practice had been.

5 MR. KOH: But that illustrates, Justice Scalia,
6 is the point that was raised by Justice Kennedy. Article
7 33 is self-executing, so that the attorney general could
8 not exercise his discretion, under the statute, to deport
9 people from within the United States back to their
10 persecutors.

11 What happened was that the discretion was being
12 exercised in conformity with article 33. The revision in
13 1980 brought the two into line explicitly by using the
14 same language, "shall not return any aliens." And the
15 only way that this can be avoided is to read those words
16 out to read "within the United States" back in.

17 QUESTION: Mr. Koh, what did the 11th Circuit
18 think the statute meant, and determine that it meant, in
19 the case that was brought there in the 11th Circuit?

20 MR. KOH: Your Honor, the 11th Circuit accepted
21 in dictum the assertion which is now being made by the
22 Government. Which is that the removal of the words
23 "within the United States" was meant to encompass
24 deportables, as well as excludables.

25 QUESTION: Now, are you going to address any

1 question of collateral estoppel in your comments today?

2 MR. KOH: Yes, I will.

3 As we pointed out in our brief, collateral
4 estoppel requires the same parties, the same issue, in an
5 issue that was actually litigated and necessarily
6 determined. Our people were not there. That's as simple
7 as that. They were different parties.

8 These are screened in Haitians who have credible
9 fears of persecution. And they were not adequately
10 represented by --

11 QUESTION: Well, if you read the court's
12 description of the class, it certainly is broad enough to
13 include the people that you have -- uh -- that you're
14 representing today.

15 MR. KOH: We would challenge that, Your Honor,
16 as the 2nd Circuit pointed out below. The class
17 definition was people who have been detained or will be
18 detained on cutters and Guantanamo. We concede that that
19 was part of it.

20 But the second provision was, who are
21 interdicted pursuant to the -- the U.S. interdiction
22 program. At the time there was a lawful program of
23 interdiction and screening. Now, there is an illegal
24 program of interdiction without screening. Those are
25 different programs.

1 Third, the claim was that were challenging --
2 that the class includes people who were challenging a
3 violation of their procedural rights. Those people who
4 were screened in and found to have credible fears of
5 persecution claimed no challenge or no violation of their
6 procedural rights, because they had benefitted by those
7 procedures. So we were not encompassed in the class.

8 Even assuming arguendo that we were encompassed
9 in the class, we were not adequately represented by the
10 people who were there. They were all screened out. And
11 they were neither adequate nor typical of our class.

12 And, for that reason, different parties were
13 there. Your Honor, this is similar to -- uh -- the
14 opinion in the Falcon case, General Telephone v. Falcon,
15 where a conclusion was made that an employee could not
16 adequately represent the class that consisted of both
17 employees or applicants for employment, because they are
18 different groups.

19 Or, to give another example, Martin v. Wilkes,
20 whether the white fire fighters are precluded by the black
21 fire fighters. Again, here, they are both Haitians, but
22 one group is a group without credible fears of
23 persecution, who are therefore economic migrants, and our
24 class are those who have the most fear of all.

25 And that's precisely the point. This is not a

1 polite, bloodless process which is going on. Our clients,
2 our named Plaintiff, Mr. Bertrand and Mr. Remy, who my own
3 co-counsel counseled, these people were interdicted on the
4 high seas. Their boats were destroyed by the Coast Guard.
5 They were taken to Guantanamo, where they were held behind
6 barbed wire in U.S. captivity for months. And then, when
7 they asked for lawyers, before they had an asylum hearing,
8 they were forced back onto the boats and returned to
9 Haiti.

10 I am -- uh -- I will point you out the trial
11 affidavits, on pages 51 to 65 of our joint appendix, at
12 Port-au-Prince, Mr. Bertrand was driven off the boat with
13 fire hoses. He was fingerprinted, identified by the
14 Haitian military. That night he was -- uh -- taken from
15 his bed, beaten, his left arm was fractured, and he fled
16 into hiding. And he would now flee again, but for this
17 program. He has a credible fear of persecution. He would
18 be screened in, but for this policy, which does not
19 recognize a legitimate distinction between political
20 refugees and economic migrants.

21 Now, the point --

22 QUESTION: Mr. Koh, do you agree with Ms.
23 Mahoney that if a Haitian makes an application for
24 political at the consultant in Port-au-Prince, and the
25 consul does not follow applicable law in processing it,

1 that Haitian, nonetheless, does not have a remedy in the
2 United States courts.

3 MR. KOH: Yes, we do, and this comes back to the
4 point that I was making with Justice Stevens. We are not
5 talking about whether 243(h) applies to any random
6 encounter between an alien and a U.S. official outside the
7 United States. What we are talking about is a case where
8 the United States, in an unprecedented move, intentionally
9 goes out on the high seas, takes people into their
10 custody.

11 It is the act of taking them into their custody
12 outside the United States that brings them within the
13 control of the attorney general, and it is that act which
14 then, authorizing them to be returned, makes the Coast
15 Guard an agent of the attorney general for the returned.

16 Now, Justice O'Connor raised the question, could
17 they have been referring, when they withdrew the words
18 "within the United States," to excludables as well as
19 deportables. The short answer to that, Your Honor, is had
20 they intended merely to reach deportables and excludables,
21 they could have said shall not return any alien physically
22 present in the United States.

23 If you examine the Government's reply brief, you
24 will see that on page 14 the Government concedes this
25 point. It says, "The essential characteristic shared by

1 those in exclusion and deportation proceedings are both
2 are physically present in the United States."

3 In other words, there was no need for Congress
4 to delete the words "within the United States" altogether.
5 And there is no valid claim that what was actually going
6 on here is that they -- the pen slipped, because at the
7 same time that they deleted the words "within the United
8 States," they added the words "physical present within the
9 United States" into 208. That was part of the procedure
10 that was going on at the same time.

11 In short, what happened in 1980 was that
12 Congress was creating three statutory classes of aliens.
13 First, aliens within the United States, those lawfully
14 admitted, who are subject to deportation proceedings.
15 Secondly, those physically present in the United States
16 who are either deportable or excludable. And third, any
17 aliens, those -- wherever they are taken a hold of.

18 And that's precisely the point. Someone becomes
19 a refugee not when they make it to the United States, they
20 become a refugee when they flee the -- when they clear
21 their own borders. Then they have escaped their
22 persecutor. And the question is not whether we need to
23 let them in, the question is why do we at that point take
24 them back to their persecutor.

25 There are many other things we could do. We can

1 interdict and screen them, as was done for 10 years. We
2 could let them go to third country sites. We could just
3 let them sail on to the Bahamas and Caimans.

4 QUESTION: Mr. Koh, could I ask you another
5 question about the prior suit. If -- if, as you say,
6 the -- the prior suit involved only screened-out Haitians,
7 would not the screened-out class, at least, be bound by
8 that prior litigation?

9 MR. KOH: That's right, Your Honor, and we
10 represent no screened-outs here.

11 QUESTION: And pardon me?

12 MR. KOH: We represent no screened-outs here.

13 QUESTION: Okay. So -- so whatever decree would
14 come out of this litigation would not -- would not apply
15 to that group.

16 MR. KOH: It would affect those people who have
17 been screened in or who will be screened in.

18 And I should point out that the Government's --

19 QUESTION: How can this injunction apply to only
20 -- you know, only that class and not the other class. I
21 don't quite see how it would work.

22 MR. KOH: All that we're -- the Government has
23 no -- they claim to have a problem with the injunction.
24 What they have a problem with is the statute. The statute
25 says you shall not return any alien without screening.

1 If -- the point of our clients, the 150 who were screened
2 in and then returned, is they would flee again were
3 screening reinstituted.

4 To reinstitute screening, as was done for 10
5 years under President Reagan and President Bush, would not
6 create a massive inflow. Last year, over a 9 month period
7 with no serious attempt to restore the democratic
8 government of Haiti, in uncontrolled migration 37,000
9 people came of whom only something like 10,000 were
10 screened in.

11 And if you examine the amicus brief of the
12 American Jewish Committee, you will see that 900,000
13 Cubans have been admitted, that 200,000 Eastern Europeans,
14 that nations many times smaller than ours have shown much
15 more generosity. And we're not asking that they be
16 admitted. All we're asking is that they be given some
17 form of temporary safe haven outside of Haiti, the country
18 that they're fleeing from.

19 Our amicus briefs by Amnesty International and
20 Americas Watch and the two court rule applying to the
21 district court findings of fact and the Second Circuit's
22 affirmance of that, demonstrate that there's heightened
23 political repression currently occurring in Haiti, and
24 also evidence that specific plaintiffs who have been
25 returned have been abused, were tortured, and are in

1 hiding for fear of their lives.

2 So why return these people directly into the
3 hands of their persecutors? This is tantamount to being
4 accomplices to their persecution. And in the same way as
5 the rules against torture and genocide were set up to be
6 universal proscriptions, we cannot see any reason why a
7 country would have no power to send someone back to their
8 persecutors in their own territory where they're most
9 powerful, but then somehow have such power on the high
10 seas where they have no sovereignty.

11 And this also disproves the point about the
12 presumption against extraterritoriality. This is an
13 international statute. It controls refugee flows in and
14 out of the United States. It effectuates a treaty, an
15 international treaty. It effectuates an international
16 human rights norm. And most conclusively, our officials
17 have themselves taken these laws extraterritorially, and
18 now that -- they argue that this presumption against
19 extraterritoriality should somehow apply to rewrite the
20 statute to add words that were taken out previously.

21 Now, Ms. Mahoney has suggested that what is not
22 required is asylum screening, but the kind of screening
23 that went on before was preasylum screening. And you can
24 examine the joint appendix at 378; what was asked was
25 whether they had a credible fear of persecution. If you

1 lack such a fear, you could be returned.

2 This was a -- a nononerous procedural burden.

3 And the fact that the new policy is effective and has
4 terrified people so that they will not flee is not a
5 reason why it's legal. I'm sure that shooting them would
6 also -- or drowning them would also dissuade people from
7 coming, but that is our shame, that is not the reason why
8 it's a legal policy.

9 This also rebuts their point about
10 reviewability, for if it is true that the only way that an
11 alien outside the United States can get review of a
12 generally applicable Government policy is through habeas
13 or exclusion then, again, the attorney general could
14 simply order that all Haitians coming on the high seas be
15 shot and that would be unreviewable.

16 The Japan whaling case and Cardoza-Fonseca
17 both -- both made it absolutely clear that what's going on
18 here is immigration. It's a construction of an
19 immigration statute. Of course it touches on foreign
20 policy, immigration cases always do, but the Court can
21 construe the statutes in a manner which is consistent with
22 the plain language of the statute, the plain language of
23 the treaty which here is also "return." Return is return
24 is refolai is return.

25 In other words, you don't take people back, and

1 there should be no doubt as to what's going on here
2 because the executive order that's being invoked says,
3 "you shall not" -- that is what is being done is "return."
4 So even if there is some confusion as to what "return"
5 means, that is what the executive order authorizes.

6 The Government repeatedly cites the Knauff case,
7 but the Knauff case had to do with a claim of inherent
8 executive power over immigration. What is going on here
9 is a power which is purportedly being executed pursuant to
10 statute. And I would note Justice Jackson's powerful
11 dissent in that case, where he said security, like
12 liberty, is dangerous, for many other crimes that are
13 committed in its name. This is essentially what's going
14 on here, Your Honor.

15 In short, the plain meaning of the statute, the
16 mutually reinforcing plain meaning of the statute and the
17 treaty make it clear that lower executive officials shall
18 not return any aliens to conditions of persecution without
19 regard to their physical location. Once they have cleared
20 their own frontiers, they become subject to the statute.

21 Once they come under the attorney general's
22 control, he can do many things with them, and we do not
23 tell him what he must do with them, we only tell him that
24 he cannot return them. Ironically, the only option that
25 is forbidden is the one that has been chosen here.

1 QUESTION: Do you take the position that it's
2 irrelevant whether the treaty is self executing or not
3 self executing, because it's been executed through the
4 statute?

5 MR. KOH: We believe that that only reinforces
6 our result. It -- by the way, if the treaty is self
7 executing, as we assert, it eliminates any claim that the
8 Coast Guard or the President are not bound by the treaty.
9 And we believe it's absolutely clear, and we --

10 QUESTION: But it's -- you're -- you're -- it's
11 not fatal to your case to find that the treaty is not self
12 executing because of the statute, I take it.

13 MR. KOH: Because of the statute, which
14 expressly embodies the treaty. So we win either way, and
15 we direct you to the attention -- your attention to the
16 amicus brief of the Lawyers Committee which examines the
17 self executing question.

18 Your Honor, in closing, ours is a Nation of
19 refugees. Most of our ancestors came here by boat. If
20 they could do this to the Haitians, they could do this to
21 any of us. Because the Second Circuit correctly ruled
22 that blanket summary return violates the plain language of
23 the statute and the treaty, its judgment should be
24 affirmed. Thank you.

25 QUESTION: Thank you, Mr. Koh. Ms. Mahoney, you

1 have 2 minutes remaining.

2 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

3 ON BEHALF OF THE PETITIONERS

4 MS. MAHONEY: There's a basic principle in our
5 law that is reflected in Johnson v. Eisentrager, it's
6 reflected in the INA, it's reflected in the construction
7 of 243(h) that governed here for 30 years, that ordinarily
8 an alien's right to protection from a country only arises
9 when they arrive in the territory of the United States.
10 It is not at all unusual that aliens outside the United
11 States should not have rights under U.S. law or access to
12 its courts.

13 I'd like to emphasize that the removal of the
14 language "within the United States" is a direct response
15 to this Court's holding in Leng Ma May Ma v. Barber, that
16 that language meant it could not apply in exclusion
17 proceedings.

18 QUESTION: Then -- then why didn't it say so? I
19 mean why didn't it simply refer to exclusion rather than
20 return?

21 MS. MAHONEY: The word return, as Judge Walker
22 notes in his dissent, had been used as a reference in
23 statutes before to the manner in which you exclude people
24 from the United States. If the statute had read deport or
25 exclude to a country where they would be threatened with

1 persecution, it wouldn't make any sense.

2 So in order to respond to the concern that --
3 that the INS had that they'd like to go ahead and extend
4 it to exclusion proceedings, they need to add -- take out
5 "within the United States" and add another word. This was
6 done voluntarily by the INS when the '80 act was being
7 amended.

8 In fact, Stevic and Cardoza-Fonseca say that it
9 is important to look at how the act was being interpreted
10 in the 12-year period after accession to the protocol and
11 prior to the amendment, because we should conclude that
12 what we were doing during that 12-year period was
13 consistent with the protocol.

14 And contrary to what Mr. Koh has said, the INS
15 in fact, and the BIA took the position repeatedly that
16 243(h) had not been extended to exclusion proceedings. In
17 Matter of Pierre that was settled by the BIA, it still
18 during that period applied only to persons who were within
19 the United States, but we believed that we were in
20 compliance with the protocol and, in fact, we were.

21 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
22 Mahoney. The case is submitted.

23 (Whereupon, at 11:01 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Chris Sale, Acting Commissioner, Immigration and

Naturalization Service, et al., Petitioners v. Haitian
Centers Council, Inc., et al. Case No. 92-344

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lona M. May

(REPORTER)