Maryland Journal of International Law

Volume 18 | Issue 1 Article 3

The Haitian Refugee Litigation: a Case Study in Transnational Public Law Litigation

Harold Hongju Koh

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mjil

 Part of the International Law Commons

Recommended Citation

Harold H. Koh, *The Haitian Refugee Litigation: a Case Study in Transnational Public Law Litigation*, 18 Md. J. Int'l L. 1 (1994).
Available at: http://digitalcommons.law.umaryland.edu/mjil/vol18/iss1/3

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

ARTICLES

THE HAITIAN REFUGEE LITIGATION: A CASE STUDY IN TRANSNATIONAL PUBLIC LAW LITIGATION

HAROLD HONGJU KOH*

In reading about the history behind this lecture series, I was struck by how Lawrence I. Gerber is described: as a man "born in New York City of immigrant parents" who went on to attend City College and NYU Law School, who "loved the law and remained faithful to it through 60 years of practice." His, in short, was the story of the American dream, a dream that all of us have shared—of a nation of immigrants and law, of hope, struggle, and ultimately, promise fulfilled.

I could not read about Mr. Gerber without also thinking about my own parents. I, too, was born of immigrant parents, not in New York, but in Boston. My father, the late Kwang Lim Koh, was a Korean international law professor. In 1960, he was appointed Deputy Chief of Mission at the Embassy of the Republic of Korea in Washington, D.C., and served the first freely elected democratic government in that nation's history. But his time in office was short. Less than a year later, his government was overthrown by military coup. After my father became a political exile, we took refuge in New Haven, Connecticut, where my parents began teaching at the Yale Law School. With a few detours, that is where I have been ever since.

Like Lawrence Gerber, my father's life was both marked by pain and guided by a dream. His pain came from knowing that America is a racist society; that this country's legal traditions include *Korematsu v.*

---

* Gerard C. and Bernice Latrobe Smith Professor of International Law and Director of the Orville H. Schell, Jr., Center for International Human Rights, Yale University; Counsel of Record for the Haitian refugees in Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993) and 823 F. Supp. 1028 (E.D.N.Y. 1993).

This paper was prepared for delivery as the annual Gerber Memorial Lecture, presented on September 29, 1993 at the University of Maryland School of Law. I have edited and adapted it in small respects. In preparing this lecture, I have drawn upon earlier writings, notably *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994) [hereafter Koh, *Reflections*], and *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483 (1993).

United States,[1] *Dred Scott*,[2] the *Chinese Exclusion Case*[3] and *Plessy v. Ferguson*;[4] that this is a land where people of color have been denied equal opportunity and equal justice, and where aliens have been shunned as outsiders. But while he lived, I rarely heard my father talk about the pain. Instead, he spoke of the dream, his dream of equal justice, of a world under law. Like Lawrence Gerber, he "loved the law and tried to remain faithful to it."

Two vignettes capture my father's immigrant faith in the law. I remember the day when his government was overthrown and we realized that he might never return home. We were inconsolable, but he said to us, "Don't worry. This is a nation of refugees, a nation built by immigrants. What it says on the Statute of Liberty are not just words, but a sacred promise, and that promise will protect us." Fourteen years later, when I was a college student, visiting Korea for the summer, Richard Nixon resigned and Gerald Ford became President. At the same time, someone tried to assassinate Korea's President, the President's wife was killed, martial law was declared, and tanks rolled in the streets. I called home, terrified, and asked, "How is it that the most powerful country in the world can pass power from one leader to another without incident, while this tiny country cannot do the same without violence and bloodshed?" To which my father responded: "Now you understand the difference between the United States and Korea. In the United States, if you are President, then you control the military. But Korea is a place where if you control the military, then you are President. That is the difference between a government of laws and a government of men." When I became a law professor, my father reminded me that lawyers should be servants of principle and not politics. "If you can remember that," he seemed to say, "your existence will be proof that the dream is stronger than the pain."

What I have just recounted is the story of two families, the Gerbers and my own. But over the last two years, as I have litigated on behalf of Haitian refugees, I have come to see their story as the same: the same dashed hope of democracy, the search for refuge, the struggle between principle and power, the difference between a rule of law and a rule of individuals.

---

1. 323 U.S. 214 (1944) (allowing confinement of Japanese-American citizens in World War II internment camps).

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (persons can be property within the meaning of the Constitution).

3. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (suggesting that Congress has power, without constitutional limit, to control immigration).

4. 163 U.S. 537 (1896) (approving "separate but equal" doctrine).

I. THE LOWENSTEIN CLINIC

For me the story began in 1991 at Yale Law School, where I teach international law, international human rights, Foreign Affairs and the Constitution, and civil procedure. I had just published an article in the Yale Law Journal that posited a theory about the growing convergence of domestic and international law. In that article, called *Transnational Public Law Litigation*,[5] I argued that a transnational analog is emerging to the now-familiar domestic phenomenon of "public law litigation." We all know how civil rights lawyers have invoked principles of American public law against government officials to seek judicial reform of prisons, hospitals, and school systems.[6] These cases—typified by Thurgood Marshall's great struggle in *Brown v. Board of Education*[7]—are also part of the American dream. My modest contribution was to suggest that such suits are no longer limited to domestic problems. Increasingly, private litigants are turning to U.S. courts to enforce international human rights norms against government officials: both foreigners who commit torture, genocide, and terrorism at home,[8] and U.S. government officials when they act in violation of internationally recognized standards.[9] In closing, I argued that transnational public law litigation represents a positive development, designed to further the protection of international human rights and to return U.S. courts to their proper, but neglected role, as guardians of international law in a "new international legal process." The success of this kind of litigation, I argued, will be measured not by judgments or damage awards, but by political results—the norms that are declared, the political pressure that these suits generate, the government practices that are established and abated, and ultimately, by the human lives that are positively affected.

Fine academic thoughts, but as I subsequently learned, when you talk enough, someone will ask you to put your money where your mouth is. In my case, those who asked were Yale law students, who wondered whether I would be willing to teach an international human rights clinic that would actually do transnational public law litigation. In time-honored professorial fashion, I told them I was too busy and

---

5. 100 YALE L.J. 2347 (1991).

6. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

7. 347 U.S. 483 (1954).

8. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

9. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986).

that they should go away.

But they persisted and soon thereafter, the Allard K. Lowenstein International Human Rights Clinic was born. We named it after Al Lowenstein, a political activist and Yale Law graduate who had served as U.S. Ambassador to the U.N. Human Rights Commission in the Carter Administration.[10] I agreed to teach the course along with Michael Ratner, a superb, seasoned human rights lawyer from the Center for Constitutional Rights in New York. In our first semesters together, we filed lawsuits against the former Defense Minister of Guatemala, Hector Gramajo, for his actions against Kanjobal Indians in the Western highlands[11] and *amicus curiae* briefs in a Ninth Circuit case involving Ferdinand Marcos[12] and in several human rights cases at the Supreme Court.[13]

Our very first suit was brought in the Southern District of Florida, against Prosper Avril, the former dictator of Haiti.[14] Under the auspices of the United States government, Avril had fled Haiti and come to Florida, and was living there in a large house and with several bank accounts. After we sued him, he fled and apparently defaulted. But before doing so, he filed defensive pleas of head-of-state immunity and foreign sovereign immunity. To surmount these claims, we contacted the newly elected democratic government of Haiti, led by President Jean-Bertrand Aristide, which had just been elected with 67% of the vote, and persuaded it to file a formal waiver of Avril's immunities.

In that moment, I saw how similar this democratically elected Haitian government was to the Korean government my own father had served. The intense excitement that the Haitians felt about their new republic was matched only by their intense heartbreak in the fall of

---

10. For a recent biography, see WILLIAM H. CHAFE, NEVER STOP RUNNING: ALLARD LOWENSTEIN AND THE STRUGGLE TO SAVE AMERICAN LIBERALISM (1993). The Clinic originated as an arm of the Allard K. Lowenstein International Human Rights Project, a student-run organization founded at Yale Law School in 1981 to educate and inspire law students, scholars, practicing attorneys, and policy makers in the defense of international human rights. For the Clinic's account of the Haitian litigation, written while the case was still proceeding, see The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993).

11. Xuncax v. Gramajo, No. 91-11564WD (D. Mass. filed June 6, 1991).

12. Trajano v. Estate of Marcos, 978 F.2d 493 (9th Cir. 1992); *Trajano*, 878 F.2d 1439 (9th Cir. 1989).

13. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993); United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); Jaffe v. Snow, No. 93-241 (reviewing 610 So.2d 482 (1992)).

14. Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993).

1991 when Aristide's government was overthrown by military coup. Shortly thereafter, boatloads of refugees began to come. Following an executive order issued by President Ronald Reagan in 1981,[15] the Coast Guard "interdicted" fleeing Haitians on the high seas and summarily interviewed them, initially bringing to the United States those "screened-in" Haitians who could demonstrate a "credible fear" of political persecution, while returning the rest to Haiti. As more boats came, however, the government began taking all screened-in Haitians to the U.S. Naval Base in Guantanamo, Cuba and detained them in military camps behind razor barbed wire without due process rights of any kind.

In November 1991, the Haitian Refugee Center (HRC) brought suit in the Southern District of Florida challenging the government's practice of returning screened-out Haitians.[16] During the frenzy of litigation that ensued, some of our students volunteered to do research for the understaffed plaintiffs. In February 1992, the case culminated in a denial of HRC's petition for certiorari by the Supreme Court, with only Justice Blackmun dissenting.[17] Little did we realize that vote foreshadowed events still to come.

II. Phase One: Right To Counsel

At that moment, some 3,000 Haitians were being held incommunicado behind barbed wire at the U.S. Naval Base in Guantanamo Bay, Cuba. Virtually all had been found to have credible fears of political persecution and some had already established full-fledged claims of political asylum. In early March, we learned from sources on Guantanamo that the Immigration and Naturalization Service (INS) was planning to reinterview the Haitians held there and to send those who failed the test of political asylum back to Haiti to face possible persecution and death. These brief adversarial confrontations would be conducted without lawyers present. Thus, the Haitians were expected to defend themselves without documentary proof of their refugee status (for most had fled with only the clothes on their backs), without lawyers, in a foreign language, and under a legal system that they simply did not understand.

Our case began as a simple application of the principles of *Gideon*

---

15. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).

16. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir., 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

17. Haitian Refugee Ctr. v. Baker, 112 S. Ct. 1245 (1992).

v. Wainwright,[18] that a client has a right to a lawyer in what is essentially a capital case. We prepared papers and filed for a temporary restraining order (TRO) before Judge Sterling Johnson, Jr., in the Eastern District of New York. As co-counsel, we recruited Joseph Tringali, a talented antitrust lawyer from the firm of Simpson, Thacher & Bartlett; Lucas Guttentag, the gifted Director of the Immigrants' Rights project at the ACLU in New York; and Robert Rubin, an experienced refugee lawyer from the San Francisco Lawyers' Committee for Civil Rights. At the heart of the clinic was a group of Yale Law students that ultimately numbered about seventy, a multicultural coalition that included Asians, Hispanics, African-Americans, Jews, gays, straights, and white Southerners—Americans of every extraction. During the next year and a half, these students logged more than 28,000 hours for people that they had never met.

We sued initially for principle: the simple notion that lawyers and clients have a right to talk to each other before the clients are sent back to possible persecution and death in Haiti. But calling this claim "frivolous," the government filed for Rule 11 sanctions against us,[19] at the same time demanding that we post a $10 million bond, the largest bond ever requested on a TRO in the history of the New York federal courts.[20] We suddenly realized that we were not in Kansas anymore. Until then, our clinic had never litigated a contested case; our cases had consisted of *amicus* briefs and default judgments. If we would be subject to Rule 11 sanctions if we lost, we decided, we had no choice but to win.

Three days after the Rule 11 sanctions motion was filed, Judge Johnson awarded us a temporary restraining order and set a date five days hence for a hearing on the preliminary injunction.[21] During those five days, we were to complete all preliminary discovery. We immediately sent a group of students to Miami with Lucas Guttentag to interview Haitian refugees and depose INS officials. We sent another team to Washington, D.C. with Michael Ratner and Joe Tringali to take depositions of INS and State Department officials. A third team of lawyers, translators, court reporter and students, headed by Robert Rubin, flew to Guantanamo to interview our named plaintiffs and to take their depositions. Finally, a group that stayed behind processed

---

18. 372 U.S. 335 (1963) (requiring right to counsel in criminal cases).

19. FED. R. CIV. P. 11.

20. By way of comparison, the court required only a $1 million TRO bond in Texaco, Inc. v. Pennzoil, Co., 626 F. Supp. 250 (S.D.N.Y. 1988), the case that concluded with the largest civil settlement in history.

21. 789 F. Supp. 541 (E.D.N.Y. 1992).

the information we were learning and wrote a one-hundred page preliminary injunction brief. Four days later, we gathered in New York and argued the preliminary injunction motion before Judge Johnson. The government sent the Deputy Associate Attorney General to argue for their side. After a hearing that lasted more than four hours, we won a preliminary injunction granting screened-in Haitians at Guantanamo a right to counsel before being reinterviewed and returned to Haiti.[22]

But that was only the beginning. During the next two weeks, the government unsuccessfully sought stays of Judge Johnson's ruling at the district court, at the Second Circuit, at the district court and at the circuit court again. Then incredibly, less than two weeks after the suit began, the government won a stay of our preliminary injunction at the Supreme Court by a vote of five to four.[23] The next morning, the government returned some eighty-nine of our "screened-in" clients to Haiti because they would not participate in asylum hearings without lawyers present.

The pace of this first litigation phase was unbelievably intense. My last oral argument had been in law school moot court fifteen years earlier. But over the next year and a half that changed, as our case went to the Second Circuit six times and the Supreme Court eight times. Several times, we filed pleadings at the district, circuit and Supreme Court on the same day. On one occasion, I argued a stay motion by conference call, while standing at a maitre d's station at a hotel near Grand Central Station, while Michael Ratner participated by mobile phone from the bleachers at Shea Stadium.

Round one ended in the early summer of 1992, when the Second Circuit affirmed our preliminary injunction granting the Haitians access to counsel.[24] The government petitioned the Supreme Court for certiorari and summary reversal.

How did these rulings affect our clients? One of our named plaintiffs, "Mr. Bertrand" (a pseudonym), had found his mother killed in Haiti because of his political work. He fled on a boat and was stopped by the Coast Guard. The Coast Guard burned the boat and his possessions and took him to Guantanamo, where he was held for months behind barbed wire. There, he became the leader of a group that called itself "The Association for Haitian Political Exiles." When he learned

---

22. Haitian Ctrs. Council v. McNary, No. 92 CV-1258, 1992 WL 155853 (E.D.N.Y. Apr. 6, 1992).

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

24. Haitian Ctrs. Council v. McNary, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot*, 113 S. Ct. 3028 (1993).

of our lawsuit and our preliminary injunction granting him a right to counsel, he refused to submit to INS interviews without a lawyer present. But when the Supreme Court stayed our injunction in April 1992, the U.S. government ordered him to undergo an interview without a lawyer present. When he refused, he was put on a boat and sent back to Haiti. When he arrived at Port-au-Prince, he was forced off the boat with a fire hose, fingerprinted and photographed by the Haitian police. That night, several soldiers appeared at his house, beat him savagely, and broke his shoulder and collarbone. He fled into hiding, where he remains. But had the United States not returned him, he would have won the benefit of our later court rulings, been paroled into the United States in June 1993, and would be living here today.

III. PHASE TWO: THE RIGHT OF NON-RETURN

The second phase of the case began on Memorial Day, 1992, when President George Bush changed the interdiction policy and began forcibly returning all Haitians to Haiti without any hearings whatsoever.[25] By this time, we had organized ourselves into an *ad hoc* law firm, prepared to deal with almost any eventuality. We had divided the students into a procedural team, to handle stays, injunctions, and other procedural motions; a case management team to handle document discovery, electronic file management, and E-mail; several research teams, each responsible for a different substantive legal count of the complaint; a document discovery team, to handle attorney-client privilege and work-product issues; and a "spin-control" team to handle press and lobbying.

When the new executive order was issued from President Bush's vacation home, our spin-control team immediately dubbed it the "Kennebunkport Order." We decided to label the new policy "the Floating Berlin Wall," to convey that its purpose was not to prevent people from coming to the United States, but to prevent Haitians from leaving Haiti by boat.[26] The new policy reminded us not of *Gideon v. Wainwright*,

---

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

26. We continued to press this point all the way to the Supreme Court. *See* Transcript of Oral Argument in No. 92-344, Sale v. Haitian Ctrs. Council (Mar. 2, 1993) at 11 (Oral Argument of Harold Hongju Koh on Behalf of the Respondents) [hereafter Transcript]:

> [T]he right we claim is not a right of entry. It's simply the right not to be returned to Haiti, a country where our clients face political persecution. These interdictions are going on over 700 miles away from the United States. They are going on right outside Haiti. People are fleeing from Haiti to anywhere they can get to.
>
> There are some 700 islands, if you refer to a map, between here and

but of the voyage of the *St. Louis*, a boat that came in 1939 from Nazi Germany and sought refuge in the United States.[27] It was turned away from New York and Miami, and then returned to Europe, where many of its passengers later died in the gas chambers. As we watched with disbelief, our president went one step further. He ordered the return of Haitians directly to their persecutors, thereby making our Coast Guard *de facto* agents of a Haitian regime that we had ourselves called illegitimate.

The Kennebunkport Order came down on Yale's graduation day. Our student leaders literally took off their graduation robes, and went back to work on another temporary restraining order. Three days later we were back before the district court, this time opposed by the Solicitor General of the United States.[28] Within a month, we had once again prevailed before the Second Circuit, our second circuit court victory in this "frivolous" case.[29] This time the Second Circuit held that the new Bush policy violated Section 243(h) of the Immigration and Nationality Act, part of the Refugee Act of 1980, which directs in plain language that "the Attorney General shall not deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of [his] . . . political opinion."[30] That directive, the court found, mirrors the language of the 1951 U.N. Refugee Convention, which mandates in Article 33 that "[n]o Contracting State shall expel or return ("*refouler*") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his . . . political

---

Haiti. People coming from Port-au-Prince could go to the Bahamas. They could go to the Caymans. They can go to Mexico, Cuba, the Virgin Islands, Honduras, Turks and Caicos, the Dominican Republic, but they cannot because we've erected a floating Berlin Wall around Haiti which keeps people in.

27. *See* GORDON THOMAS & MAX MORGAN WITTS, VOYAGE OF THE DAMNED (1974).

28. Judge Johnson ruled against our request for injunctive relief, but wrote, "[t]his court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so." Haitian Ctrs. Council v. McNary, No. 92 CV-1258, 1992 U.S. Dist. LEXIS 8452, at *5 (E.D.N.Y. June 5, 1992).

29. Haitian Ctrs. Council v. McNary, 969 F.2d 1350 (2d Cir. 1992). Shortly after winning our second Second Circuit victory, we advised the Justice Department that if it did not drop its Rule 11 motion against us, we would move for Rule 11 sanctions against it, for filing a frivolous Rule 11 motion. After negotiations, the Department dropped its motion.

30. 8 U.S.C. § 1253(h)(1) (1988) (emphasis added).

opinion."[31]

The day after we won at the Second Circuit, presidential candidate Bill Clinton issued a statement praising the Second Circuit for making the

> right decision in overturning the Bush administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing. The Bush administration is wrong to deny Haitian refugees the right to make their case for political asylum. We respect the right of refugees from other parts of the world to apply for political asylum, and Haitians should not be treated differently.[32]

Suddenly, we had hope. If we could just keep the case alive until Clinton was elected, we could preserve our circuit court wins in both halves of the case.

But in January 1993, to our utter disbelief, President-elect Clinton

---

31. 19 U.S.T. 6259, 6275, 189 U.N.T.S. 150, done July 28, 1951 (emphasis added). The United States became a party to the Refugee Convention by virtue of its 1968 accession to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, *done*, Jan. 11, 1967; *entered into force* Oct. 4, 1967.

32. *Statement by Bill Clinton on Decision by U.S. Court of Appeals: Bush Administration Policy is Illegal*, U.S. Newswire, July 29, 1992, *available in* LEXIS, Nexis Library, Currnt File. That statement echoed Governor Clinton's declaration only three days after the Kennebunkport Order issued:

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

Statement of Governor Bill Clinton on Haitian Refugees, U.S. Newswire, May 27, 1992, *available in* LEXIS, Nexis Library, Currnt File (emphasis added). While the government's petition for certiorari was pending, Governor Clinton issued another statement "reaffirm[ing] my opposition to the Bush administration's cruel policy of returning Haitian refugees to their oppressors in Haiti without a fair hearing for political asylum." *Governor Clinton Reaffirms Opposition to Bush Administration's Policy on Haiti*, U.S. Newswire, Sept. 9, 1992, *available in* LEXIS, Nexis Library, Currnt File. Moreover, Bill Clinton's & Al Gore's PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA clearly stated the incoming Administration's intent to "Stop the Forced Repatriation of Haitian Refugees—Reverse Bush Administration policy, and oppose repatriation." *Id.* at 119 (1992).

reneged on both promises and chose to defend in court both Bush policies—the return of the Haitians directly to Haiti and the continued imprisonment of the Guantanamo Haitians without counsel.[33] Even more shocking, he adopted the Bush Administration's briefs and legal rationale: that Haitians outside the United States have no legal rights against the United States government, even though our government had seized them, taken them into custody, and had held them behind barbed wire in some cases for more than a year.

Wearily, we put together our effort at the Supreme Court. We divided the issues in the case and developed twelve *amicus* briefs in support of our claims. Among those who filed on our side were former Secretary of State Cyrus Vance; former Attorneys General Nicholas Katzenbach, Griffin Bell, and Ben Civiletti; every major international human rights and refugee group; the Association of the Bar of the City of New York; the United Nations High Commissioner on Refugees; the members of Congress who had drafted the Refugee Act of 1980; and the NAACP.[34] Our position before the Supreme Court was simple: plain language and the object and purpose of the treaty. In essence, both the statute and the treaty said, "thou shalt not *return* any aliens to their persecutors." Neither required that the United States let the Haitians in, but once our government took them into custody, the United States could not return them to those they were fleeing.

Our government responded that these laws did not apply on the high seas. But if that were true, then if the United States had seen the Jews coming on the *St. Louis* in 1939, it could have picked them up on the high seas and intentionally returned them to the Nazi gas chambers. The German government, by this argument, could intercept fleeing Bosnians on the Adriatic and deliberately return them to Serbian death camps. And if he came here by boat, President Aristide—by any measure a political refugee—could be forcibly and summarily returned into the hands of the Haitian military.

---

33. Remarkably, even after his election, the President-elect had stated:

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

I Intend to Look Beyond Partisanship . . . to Help Guide Our Nation, WASH. POST, Nov. 13, 1992, at A10 (emphasis added).

34. For a description of each of these briefs, see Koh, *Reflections*, *supra* note *, at 10-13.

IV. PHASE THREE: AN HIV-CONCENTRATION CAMP

On March 2, 1993, I argued the non-return phase of the case before the Supreme Court. Six days later we moved to phase three: a two-week bench trial before Judge Johnson on whether our preliminary injunction granting a right to counsel should be made permanent. At that point, the number of screened-in Haitians held on Guantanamo had dwindled to little more than 300. Even without legal representation, most of them had developed well-founded fears of political persecution. Nevertheless, they continued to be held because our government believed them to have the HIV virus, based on what we thought were inadequate medical tests.

By March, the group had been there for nearly a year and a half, living in squalid conditions without toilets, beds, or any semblance of privacy. The group included several dozen children, including unaccompanied minors who were wandering about the camp without supervision. It included babies who had lived their entire lives behind U.S. barbed wire, people with T-cell counts below 200 whose immune systems were effectively destroyed, and a man with both infectious tuberculosis and pneumonia, who was "too sick to be moved," but hence left in the company of hundreds of other immuno-suppressed people. The group included pregnant women who were at risk of premature delivery because of their HIV-status, and husbands deliberately separated from their wives who had been evacuated for emergency medical care.

When I first met these people, what struck me was that they could all fit in a large lecture hall. They could have been brought out on a single airplane at any time through the exercise of the Attorney General's parole power. But instead they were being guarded, by some two hundred soldiers, at a cost of millions of dollars to the American taxpayer. When the press asked the INS why it would not release these prisoners, the INS spokesman answered, "they're going to die anyway, aren't they?"[35] By March 1993, the Guantanamo Haitians had become desperate. They went on a hunger strike that lasted more then forty days. They began to attempt suicide through hanging, throwing themselves on the barbed wire, and other devices. Nearly every day, someone would collapse from food deprivation or heat exhaustion, or attempt suicide. After the Branch Davidian disaster in Waco, some Haitians threatened a mass suicide, which we believed to be an entirely credible threat.

We realized that publicizing the Haitians' plight was crucial to

---

35. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1038 (E.D.N.Y. 1993) (quoting statements attributed to INS spokesman Duane "Duke" Austin).

mobilizing public support. Our students began a hunger strike that was later picked up by more than twenty law schools across the country.[36] Reverend Jesse Jackson and other African-American activists began organizing mass arrests in various cities. Producer Jonathan Demme and singer Harry Belafonte held press conferences. Actors Susan Sarandon and Tim Robbins even mentioned the Haitians before a worldwide audience while announcing an award at the Academy Awards.

We soon realized that it was no longer enough simply to pursue the right-to-counsel claim. The Haitians did not need lawyers; they needed to be released. And so, on the eve of trial, we amended the complaint directly to attack the legality of the conditions of the camp. In short, we were prepared to try our own version of *Korematsu v. United States*,[37] the legality of the world's first HIV-concentration camp.

In June, following a brilliant two-week trial masterminded by Joe Tringali and Lucas Guttentag, we won a permanent injunction ordering the release of the Guantanamo Haitians. Rejecting the government's claims, Judge Johnson wrote:

> If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.[38]

The Clinton administration did not seek a stay of Judge Johnson's order.

I will not forget June 21, 1993, the day the last of the Guantanamo Haitians were released into the United States. Michael Ratner and I met some of the Haitians at LaGuardia Airport in New York, and escorted them through the immigration process. One of the Haitians came to me and said, "Monsieur Harold, my lawyer. My name is wrong! My name is wrong!" It turned out that when the Coast Guard had picked him up months earlier, it had misspelled his name on his identity bracelet. Now the INS was finally processing him into the United States, still using the wrong name. My first instinct was to complain and correct the spelling of his name, until I realized that all of his

---

36. *See* Nadine Brozan, *A Fast in Support of Haitian Refugees Moves from Yale to Harvard*, N.Y. TIMES, Mar. 12, 1993, at B6.

37. 323 U.S. 214 (1944).

38. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993).

legal rights under the court order keyed off of his "new" name. I told him, "This is your Ellis Island. This is your name now." He listened quietly, then brightened. He said, "Yes! *This* is my name!," and went off happily.

V. THE SUPREME COURT'S DECISION

June 21, 1993 did not end in total victory. On the same day, by a vote of eight to one, the Supreme Court upheld the legality of the forced-return policy and accepted the government's position that neither the Refugee Act nor the Refugee Convention required that the policy be terminated. Much as I admire Justice John Paul Stevens, his opinion in *Sale v. Haitian Centers Council*[39] ranks among the least persuasive I have read.[40]

Justice Stevens first denied that the Government was circumventing legal prohibitions against forced "return," claiming that the government was doing something other than "returning" Haitian refugees.[41] Unfortunately, the Kennebunkport Order itself made explicit that the Coast Guard was "[t]o return" Haitian vessels and their passengers to Haiti,[42] precisely the act that the law forbade. Justice Stevens similarly denied the relevance of the French version of the Refugee Convention,[43] which barred state actions to "refouler" Haitian refugees, even though French newspapers were reporting that "[L]es Etats-Unis ont decide de *refouler* directement les refugies recueillis par la garde cotiere."[44]

Second, Justice Stevens concluded that since the statute was directed to the Attorney General, it did not bind the President.[45] In fact, the Attorney General is the President's chief immigration officer, and Congress had by statute removed the discretion of the Attorney General and her agents—including the Coast Guard—to use the method of summary return.[46]

---

39. 113 S. Ct. 2549 (1993).

40. For a fuller elaboration of this critique, see Koh, *Reflections*, *supra* note *.

41. 113 S. Ct. at 2552.

42. *See* Executive Order No. 12,807, sec. 2(c)(3), 57 Fed. Reg. 23,133 (1992) (appropriate directives will be issued "providing for the Coast Guard . . . [t]o return the vessel and its passengers to the country from which it came.").

43. See 113 S. Ct. at 2563-64.

44. *Le bourbier haitien*, LE MONDE, June 1, 1992 [The United States has decided to directly *return* refugees collected by the coast guard.] (emphasis added).

45. 113 S. Ct. at 2559-60.

46. *See* 14 U.S.C. § 89(b) (1988) which states:

The officers of the Coast Guard insofar as they are engaged . . . in enforcing

Third, Justice Stevens presumed that Congress had not legislated extraterritorially to protect refugees on the high seas, even though Congress had enacted the Refugee Act specifically to implement an international human rights treaty that governs the movement of refugees across borders.[47] Moreover, if Congress had intended the statute to operate extraterritorially to *authorize* interdiction of the Haitians, why should a court presume that Congress did not intend the statute's *protections* to operate extraterritorially as well?

Finally, and most troubling, Justice Stevens recognized that the drafters of the U.N. Refugee Convention "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; *such actions may even violate the spirit of Article 33.*"[48] Yet instead of construing the statute's words consistently with that spirit, Justice Stevens construed them deliberately to *offend* the spirit of the treaty the statute was meant to execute.[49] Ironically, Justice Stevens' impassioned dissent in the Mexican kidnapping case[50] had argued that a bilateral extradition treaty which did not explicitly prohibit kidnapping must bar it, because such actions plainly violate the object and purpose of the treaty. Yet one year later, he argued that a refugee treaty that did not explicitly prohibit extraterritorial *refoulement* must permit it, even though such actions similarly offend the treaty's object and purpose.[51]

VI. LESSONS

Looking back, one could hardly be surprised that we lost at the Supreme Court. After all, since 1991, the Supreme Court had voted against the Haitians on five separate occasions.[52] The Court's August

---

any law of the United States shall . . . be deemed to be acting as agents of the particular executive department . . . charged with the administration of the particular law . . . and . . . be subject to all the rules and regulations . . . with respect to the enforcement of that law.

47. *See* 113 S.Ct. at 2560-62.

48. *Id.* at 2565 (emphasis added).

49. Article 31 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340, T.S. No. 58 (1980), *entered into force*, Jan. 27, 1980, states the hornbook principle that treaties must first be construed according to both their ordinary meaning and their object and purpose.

50. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2201-02 (1992) (Stevens, J., dissenting).

51. *See* 113 S. Ct. 2549.

52. In February 1992, the Court, by an identical 8-1 vote, had denied *certiorari* to the Haitian Refugee Center's earlier challenge to the previous Bush Administration policy toward Haitian refugees. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th

1992 vote staying our Second Circuit ruling effectively guaranteed that the summary return policy would continue until final Supreme Court resolution. Eleven months later, how could the Justices declare that the policy that they had allowed to continue for nearly a year had been illegal all along? Once Bill Clinton broke his promise, the swing Justices—Justices Stevens, Kennedy, Souter and O'Connor—must have thought, "If Bill Clinton can live with this, so can we."

Was the case worth bringing? In my 1991 article, I had argued that the test of transnational public law litigation is not favorable judgments, but practical results: the norms declared, the political pressure generated, the government practices abated, and the lives saved. By this measure, we did pretty well.

On the negative side of the ledger, bad precedent was made, but one that should be restricted to this particular historical episode. The Haitian interdiction program is conducted pursuant to a unique executive agreement that permits our government to stop Haitian boats on the high seas.[53] The recent United States actions arguably constitute a material breach of that agreement.[54] Under Article 60(1) of the Vienna Convention of the Law of Treaties, "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." Thus, were the Government of Haiti now to declare the 1981 U.S.-Haiti Agreement either terminated or sus-

---

Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992). The Court had twice denied stay requests from Haitian refugee groups, Haitian Refugee Ctr. v. Baker, 112 S. Ct. 1073 (1992); 112 S. Ct. 1245 (1992), and thrice intervened to stay lower court rulings favoring the Haitians. Baker v. Haitian Refugee Ctr., 112 S. Ct. 1072 (1992); McNary v. Haitian Ctrs. Council, 112 S. Ct. 1714 (1992); 113 S. Ct. 3 (1992).

53. Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241.

54. Article 60(3) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, U.N. Doc. A/CONF. 129/15 (1986), 25 I.L.M. 543 (1986), *entered into force*, Mar. 21, 1986, declares that "A material breach of a treaty, for the purposes of this article, consists in . . . a repudiation of the treaty . . . [or] the violation of a provision essential to the accomplishment of the object or purpose of the treaty." The stated purpose of the U.S.-Haiti Agreement was "the establishment of a cooperative program of interdiction and *selective return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241, 3559. The U.S. Government's summary repatriation policy, as conducted since May 24, 1992, has unilaterally substituted a program of interdiction and *blanket return* to Haiti of all Haitian migrants. This policy not only exceeds the scope of Haitian consent under the 1981 agreement, but also plainly violates the object and purpose of the agreement.

pended, that act would deprive the United States of any justification under international law for stopping, boarding, inspecting, and returning Haitian vessels to Haiti.[55]

On the positive side of the precedential ledger, we won a district court opinion ruling that aliens, even when they are held outside the United States, retain due process rights to adequate medical and living conditions and to assistance of counsel before being returned to their persecutors.[56] Although the Supreme Court ruling settles the legality of the interdiction policy under domestic law, it in no way forecloses rulings by international bodies that the policy violates international law. Thus, our arguments provided a basis for future condemnation of the government's policy by both the Inter-American Commission on Human Rights and the U.N. High Commissioner on Refugees.[57] Moreover, our suit kept political pressure on two Administrations to make good on their promise to restore democracy in Haiti. The Haitian refugees became a grassroots political issue about which ordinary citizens became exercised.[58] Had the case died in the courts in February 1992, there would have been no focal point around which such political pressure could coalesce. Finally, and most important, we won the freedom of the 310 Haitians held on Guantanamo. Most of them have now be-

---

55. Article 2(1) of the 1958 Convention on the High Seas, 13 U.S.T. 2312, and Article 87 of the 1982 U.N. Convention on the Law of the Sea, U.N. Doc. A/CONF 62/122; 21 I.L.M. 1261 (1982) (which the United States has accepted as customary international law) guarantee all state's vessels freedom of navigation on the high seas.

> *Except where acts of interference derive from powers conferred by treaty*, a warship which encounters a foreign merchant ship on the high seas is *not justified in boarding her* unless there is reasonable ground for suspecting: (a) that the ship is engaged in piracy; or (b) that the ship is engaged in slave trade; or (c) that, though flying a foreign flag or refusing to fly its flag, the ship is, in reality, of the same nationality as the warship.

Art. 22(1) of the 1958 Convention (emphasis added). The same legal principle is stated in Art. 110 of the 1982 Law of the Sea Convention and § 522(2) of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986).

56. 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993). We also won a preliminary injunction, later affirmed by the Second Circuit, to the same effect, which was later vacated by the Supreme Court on other grounds. *See* Haitian Ctrs. Council v. McNary, 969 F. 2d 1326 (2d Cir. 1992), *vacated as moot*, 113 S. Ct. 3028 (1993).

57. At this writing, the Inter-American Commission is considering a petition challenging the Haitian interdiction program as a violation of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, OAS Treaty No. 36. In March 1993, the Commission issued an interim Resolution adopting Precautionary Measures and noting that the U.S. policy prevents the exercise by the Haitians of the right to seek refuge. A final resolution is expected in the spring of 1994.

58. *No more nice guy; Lani Guinier nomination*, THE NATION, June 28, 1993, at 891.

gun new lives in America, filing asylum claims, beginning jobs, and pursuing their education.

What did I learn from this experience? First, a lesson about courage. Imagine yourself a Haitian, your relatives killed, your life shattered, fleeing in a boat, captured, held under military guard for eighteen months, living with people you have never met, then suddenly finding out that you have an incurable disease. Would you have had the strength to hold on in captivity for nearly two years, to band together, to organize political activity, to demonstrate, to engage in hunger strikes, and finally to come to the United States to start life again, not knowing how much life you might have left?

I learned as much about courage from the Yale Law School students who worked on this case. During the course of the litigation, they testified before Congress, testified before the district court, prepared and examined witnesses, helped write briefs to all levels of the federal judiciary, took depositions, conducted document discovery, traveled to Guantanamo to counsel our clients, dealt with national and international media, negotiated with the INS and the military, all without pay and little regard to their grades or professional futures.

I will not forget the day when the government was supposed to produce important medical records from Guantanamo in New Haven, Connecticut. We expected to have several days to examine the records. On the day before the document production, a government lawyer called and said that they would produce the documents the next morning *in Miami*, but for only twelve hours. While I was arguing with the attorney, wondering how we could possibly deal with this situation, a student passed in a note saying, "We're leaving for the airport." Five students flew to Miami at their own expense, appeared the next morning and went through all the government documents. They uncovered several "smoking guns" that we later used at trial. None of these students had yet passed the bar, but nevertheless, they were honored by the American Immigration Lawyers' Association as co-recipients of its 1992 Human Rights Award. If this case accomplished nothing else, it has helped train some of the leading human rights lawyers of the next generation.

Second, I learned something about how history repeats itself. Not long ago, I wrote an article called *Why the President (Almost) Always Wins in Foreign Affairs*.[59] In it, I pointed to recurrent patterns of executive activism, congressional passivity, and judicial tolerance that push

---

59. 97 YALE L.J. 1255 (1988).

presidents successfully to press the limits of law in foreign affairs.[60] But it was not until I was sitting at counsel table during the argument before the Justices that the ironic truth of that analysis became clear. I heard our government assert claims of national security and national emergency in support of its demand for presidential power: the *Korematsu* argument being made against the Haitians. I heard the *Chinese Exclusion* argument about sovereignty and inherent power to protect our borders invoked against the Haitians. The Government cited *U.S. ex rel. Knauff v. Shaughnessy*, an egregious case that had declared that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[61]

As I read the Court's opinion months later, I began to wonder whether our Supreme Court is truly equipped to deal with the post-Cold War world. At a time when the rest of the world looks to international law to spur trade, commerce, migration, and democratization, why is our Supreme Court so fixated inward? Why does the Court reflexively defer to presidential prerogative, even when that power is wielded in the face of contrary statutory and treaty law and with bald disrespect for human rights?

Third, I finally understand what it means to be a discrete and insular minority. If you are a black Haitian with HIV, fleeing for your life, you are about as discrete and insular as one gets. Poor, black, sick Haitian aliens have scant support in the press, few powerful friends, and minimal representation in Congress. And so it was possible for the United States government to work a succession of human rights abuses upon that beleaguered group—due process violations, summary return, and arbitrary detention—without having to face the consequences.

Finally, I learned something about myself. When our case began, I was teaching international law, human rights, presidential power and civil procedure. As the litigation unfolded, each of these issues became prominent, and I began to wonder whether it was really a coincidence that I had become involved. As I prepared for the oral argument before the Court, it finally dawned on me that the Haitian saga is not someone else's saga. It is my story.

When the case began, I had never met a Haitian, and had known very few people with HIV. It was tempting to see the Haitians' experi-

---

60. I later expanded upon those themes. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990). *See also* David Cole, *Youngstown v. Curtiss-Wright*, 99 YALE L.J. 2063 (1990) (reviewing KOH, THE NATIONAL SECURITY CONSTITUTION).

61. 338 U.S. 537, 544 (1950), *cited in* Transcript, *supra* note 26, at 4 (oral argument of Deputy Solicitor General Maureen Mahoney).

ence as unconnected to my own experience as an Asian-American. But as the case unfolded, so many links emerged. Their dashed hope of democracy reminded me of my father's sadness in Korea. In the faces of the Haitian boat people, I saw Vietnamese boat people I had known. The Haitian exclusion evoked the Chinese exclusion, and their callous internment recalled the Japanese internment.

I realized that the Haitian story reduces to a story about "we" and "they." Our government was able to depersonalize the Haitians because Americans wanted to believe that the Haitians are not us. After all, if these sick people on Guantanamo or these desperate people in Port-au-Prince are somebody else, they are not our problem. And after all, don't we have enough problems?

But if you have ever been a refugee, or if your forbears were refugees, then, in fact, you are Haitian. If you ever lived in an internment camp or knew someone in an internment camp, then you are a Haitian. If you have ever known someone shunned because they have HIV, then you are Haitian. And if you ever believed—even for one second—that the words on the Statue of Liberty are not just words, but a sacred promise, then you are Haitian.

Of course, the Haitians are old news now. At this writing, our Coast Guard continues to return fleeing Haitians to a brutal regime that maintains its grip on power. Supporters of Aristide continue to be murdered on the streets of Haiti, even while our government grabs Chinese refugees in the Gulf of Mexico. As all of this happens, it is easy to say, "That's not me. That's not us. When they start doing it to 'our' people, then we'll worry about it."

At the close of my argument before the Supreme Court, I decided to say, "Your Honor[s], . . . ours is a Nation of refugees. Most of our ancestors came here by boat. If they could do this to the Haitians, they could do this to any of us."[62] By so saying, I wanted the Justices to remember that the Haitians *are* us. I wanted to remind them that by living this case, our nation has relived its past. I wanted to remember, as my father did, what it means to love the law and be faithful to it: never to forget that ours is a nation of refugees, a nation committed to the rule of law and not of individuals, a nation that still believes in principle, and not just politics.

---

62. Transcript, *supra* note 26, at 22.