Preventing Maritime Mass Migration Crises

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Abstract

This article examines the legal and policy foundations of U.S. maritime interdiction and repatriation practices aimed at preventing mass migration crises by sea. Focusing on Haitian migration precedents, executive orders, Supreme Court jurisprudence, and the 1993 Office of Legal Counsel memorandum, it argues that the United States may lawfully repatriate migrants intercepted not only on the high seas but also in U.S. territorial waters without first adjudicating asylum or withholding claims. The article concludes that extending interdiction authority would reduce incentives for dangerous voyages and strengthen crisis prevention.

Keywords: maritime interdiction; mass migration; asylum law; territorial waters; repatriation

Introduction

The United States' policy of interdicting vessels on the high seas containing migrants seeking to enter illegally and repatriating those aliens – without the roadblock of first having to adjudicate claims for asylum or withholding of removal – was first initiated in 1992 by President George H.W. Bush.[1] The rationale for the policy is made evident by the insight of the former Fifth (now Eleventh) Circuit Court of Appeals in 1982 in *Haitian Refugee Center v. Smith* that "[i]t is highly likely that [the former Immigration and Naturalization Service's] INS' inaction provided the greatest inducement to the ultimate swollen tide of incoming, undocumented Haitians."[2] The court explained that "a large percentage of the aliens bought passage … from promoters … whose best sales pitch was the large number of the prospect's

[1] Bush, George H.W., President of the United States. Executive Order 12807 (*Interdiction of Illegal Aliens),* May 24, 1992, 57 FR 23133 (June 1, 1992). https://www.govinfo.gov/content/pkg/FR-1992-06-01/pdf/FR-1992-06-01.pdf.

[2] *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), CaseMine, https://www.casemine.com/judgement/us/591490f9add7b0493457fee0.

countrymen who … had reached Florida and were residing there undisturbed. Protestations by INS of the illegality of such operations could hardly be expected to prevail … [when] Haitians who reached southern Florida were living, working and earning in the United States."[3]

This repatriation policy has been upheld by the U.S. Supreme Court.[4] Not only should the policy be continued, it can and should be bolstered by extending its reach to vessels interdicted in U.S. territorial waters. A very strong case was made for the legality of such expanded interdictions/repatriations, and it was made by the administration of President Bill Clinton.

I will discuss both how the interdiction/repatriation policy on the high seas was established and the basis for extending it to U.S. territorial waters.

Past Haitian flotilla crises

In September 1981, President Ronald Reagan issued a proclamation in which he found that "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" was a "particularly difficult aspect" of the "serious national problem" of illegal migration, "severely strain[ing] the law enforcement resources of the [INS] and … threaten[ing] the welfare and safety of communities in that region".[5] Relying on a president's power under § 212(f) of the Immigration and Nationality Act (INA) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" when he "finds that the entry of … [such] aliens into the [U.S.] would be detrimental to the interests of the [U.S.]",[6] President Reagan suspended "[t]he entry of undocumented aliens from the high seas", which was to be "prevented by the interdiction of … vessels carrying such aliens." An accompanying Executive Order (EO) charged the Coast Guard with carrying out the interdiction (but only outside the U.S.'s territorial waters) and "return[ing] the vessel[s] and [their] passengers to

[3] Ibid.

[4] *Sale v. Haitian Ctrs. Council,* 509 U.S. 155. United States Supreme Court, *1993.* https://www.supremecourt.gov/opinions/boundvolumes/509bv.pdf.

[5] Reagan, Ronald, President of the United States. Presidential Proclamation 4865 (*High Seas Interdiction of Illegal Aliens),* September 29, 1981, 46 FR 48107 (October 1, 1981). https://www.govinfo.gov/content/pkg/FR-1981-10-01/pdf/FR-1981-10-01.pdf.

[6] 8 U.S.C. § 1182 (1994), "Excludable Aliens". https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partII-sec1182.pdf.

the country from which [they] came".[7] The EO provided that "no person who is a refugee will be returned without his consent."

Over the following years, the CG interdicted about 25,000 Haitians. Those who were identified as economic migrants were repatriated, while those making a credible showing of refugee status were brought to the U.S. to be able to file asylum applications.[8] Then, in September 1991, Haitian President Jean Bertrand Aristide was deposed by a military coup. Over the next half year the CG interdicted over 34,000 Haitians, who were sent to the U.S. Naval Base in Guantanamo, Cuba, for the processing of asylum claims. In May 1992, the Navy determined that the base could not safely accommodate additional migrants.[9]

President Bush was faced with a dilemma. As the Supreme Court put it, he "had to choose between allowing Haitians into the [U.S.] for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees."[10] Further, Bush's advisers believed that "the first choice not only would have defeated the original purpose of ... controlling illegal immigration ... but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft."[11]

President Bush agreed with his advisors and issued an EO superseding and strengthening President Reagan's, clarifying that the Attorney General "in his unreviewable discretion, **may decide** that a person who is a refugee will not be returned without his consent" and that the EO should not "be construed to require any procedures to determine whether a person is a refugee".[12]

Bush's EO stated that "[t]he international legal obligations ... under the United Nations Protocol Relating to the Status of Refugees[13] ... to apply Article 33 of the

[7] Reagan, Ronald, President of the United States. Executive Order 12324 (*Interdiction of Illegal Aliens*), September 29, 1981, 46 FR 48109 (October 1, 1981). https://www.govinfo.gov/content/pkg/FR-1981-10-01/pdf/FR-1981-10-01.pdf.
[8] See *Sale v. Haitian Ctrs. Council,* 509 U.S. 155, 161–62.
[9] See ibid, 162–63.
[10] Ibid, 163.
[11] Ibid, 163–64.
[12] Bush, George H.W. Executive Order 12807 (emphasis added).
[13] United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, 1967. https://www.unhcr.org/us/media/convention-and-protocol-relating-status-refugees.

United Nations Convention Relating to the Status of Refugees[14] do not extend to persons located outside the territory of the [U.S.]". Article 33 provides 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 race, religion, nationality, membership of a particular social group or political opinion."

Litigation of course ensued. Litigants sought a temporary restraining order to prevent the EO's implementation,[15] contending that it violated § 243(h) of the INA, the "withholding of removal" provision mandating that the Attorney General "shall not deport or return any alien [with the exception of certain criminal or otherwise dangerous aliens] to a country if the Attorney General determines that such alien's life or freedom would be threatened [essentially, it being more likely than not that they would be persecuted] in such country on account of race, religion, nationality, membership in a particular social group, or political opinion"[16] – and similarly violated Article 33. The case reached the Supreme Court, and in its 1993 decision in *Sale vs. Haitian Centers Council*,[17] the Court rejected these claims and affirmed by a vote of 8-1 the federal government's ability to repatriate aliens interdicted on the high seas without having to screen them for eligibility for withholding, ruling that "neither § 243(h) nor Article 33 ... applies to action taken by the [CG] on the high seas" (i.e., beyond the territorial waters of the U.S.).[18] The Court also noted that "[t]t is perfectly clear that ... the President [has] ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores."[19]

As the Court observed, "[a]fter assuming office, President Clinton decided not to modify [President Bush's] order"[20]. A former colleague of mine worked at the U.S. State Department (DOS) at the time. He told me that he witnessed the Clinton

[14] United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, 1951. https://www.unhcr.org/us/media/convention-and-protocol-relating-status-refugees.

[15] *Sale v. Haitian Ctrs. Council,* 509 U.S. 155, 167.

[16] Immigration and Nationality Act: § 243(h)(1), United States Code: 8 U.S.C. § 1253(h)(1). 1994. https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partV-sec1253.pdf. (Unlike withholding, the decision to grant asylum to an eligible claimant is within the government's discretion. See Immigration and Nationality Act: § 208(a)(1), United States Code: 8 U.S.C. § 1158(a)(1), 2023. https://www.govinfo.gov/content/pkg/USCODE-2023-title8/pdf/USCODE-2023-title8-chap12-subchapII-partI-sec1158.pdf.)

[17] *Sale v. Haitian Ctrs. Council,* 509 U.S. 155.

[18] Ibid, 159 (footnote omitted).

[19] Ibid, 188.

[20] Ibid, 164–65.

presidential campaign's attacks against President Bush's "inhumane" Haitian policy. When President Clinton decided to keep the policy despite his campaign's statements, my colleague queried officials within the Clinton administration. Their response: Yes, we have the same policy, but we feel bad about it.

In *Sale*, the Supreme Court's reasoning was as follows. First, it concluded that withholding only binds the Attorney General, writing that that "[w]e cannot say that the interdiction program created by the President, which the [CG] was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone."[21] However, the Court's conclusion is no longer applicable, as the "Homeland Security Act of 2002" (HSA) not only transferred most of the Department of Justice's (DOJ) immigration functions to the newly created Department of Homeland Security (DHS), thus placing the withholding obligation on the Secretary of Homeland Security, but also transferred the CG to DHS![22]

Second, the Court concluded that withholding only applies to actions taken where deportation or exclusion proceedings can be conducted, that is, within the U.S.: "The reference to the Attorney General in the [withholding provision] . . . suggests that it applies only to the Attorney General's normal responsibilities under the INA[, t]he most relevant ... [being] deportation and exclusion hearings in which requests for asylum or for withholding ... are ordinarily advanced."[23] The Court concluded that "[s]ince there is no provision in the [INA] for the conduct of such proceedings outside the [U.S.] ... we cannot reasonably construe 243(h) to limit ... actions in geographic areas where ... such proceedings [are not authorized]."[24]

This conclusion seemingly still stands because these proceedings (now based on grounds of deportability or inadmissibility) are still authorized to take place only within the U.S. However, intriguingly, the HSA did not transfer the immigration courts to DHS, but kept them within DOJ. Thus, DHS's "normal responsibilities" under the INA do not include the conduct of removal proceedings.

Third, the Supreme Court relied on "the presumption that Acts of Congress do not ordinarily apply outside our borders",[25] concluding that there was not "a scintilla

[21] Ibid, 172 (footnote omitted).

[22] § 441 of subtitle D and § 451(b) of subtitle E of title IV, and § 888(b) of subtitle H of title VIII, of the Homeland Security Act of 2002: P.L. 107-296. https://www.congress.gov/107/statute/STATUTE-116/STATUTE-116-Pg2135.pdf.

[23] *Sale v. Haitian Ctrs. Council,* 509 U.S., 173.

[24] Ibid (footnote omitted).

[25] Ibid.

of evidence”[26] to be found in the legislative history of the “Refugee Act of 1980”[27] (which amended § 243(h)) that Congress “intended to provide for the statute’s extraterritorial application”, noting that “[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect.”[28]

The Court concluded that “all available evidence … leads unerringly to the conclusion that [§ 243(h)] applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the [U.S.].”[29]

Territorial waters

The Supreme Court was not called upon to address whether DHS has the same latitude to repatriate migrants intercepted at sea without withholding screening if they have made it to U.S. territorial waters (generally within 12 miles of the coast[30]).

There is strong evidence that DHS does indeed have the same latitude in U.S. territorial waters. First, the INA’s asylum provision states that “[a]ny alien who is physically present in the [U.S.] or who arrives in the [U.S.] (whether or not at a designated port of arrival and including an alien who is brought to the [U.S.] **after having been interdicted in** international or **[U.S.] waters**) ... may apply for asylum ...”[31] The obvious meaning here is that an alien who has been interdicted in either international or U.S. territorial waters and NOT brought to the U.S. is NOT entitled to apply for asylum, as the alien is not present in the U.S.

[26] Ibid, 176.
[27] § 203(e) of title II of the Refugee Act of 1980: P.L. 96–212. https://www.congress.gov/96/statute/STATUTE-94/STATUTE-94-Pg102.pdf.
[28] *Sale v. Haitian Ctrs. Council,* 509 U.S., 176.
[29] Ibid, 177.
[30] “The territorial sea of the [U.S.] . . . extends to 12 nautical miles from the baselines of the [U.S.] determined in accordance with international law.” Reagan, Ronald, President of the United States. Presidential Proclamation 5928 (Territorial Sea of the United States of America) (Dec. 27, 1988), 54 FR 777 (Jan. 9, 1989). https://www.govinfo.gov/content/pkg/FR-1989-01-09/pdf/FR-1989-01-09.pdf.
[31] Immigration and Nationality Act: § 208(a)(1), United States Code: 8 U.S.C. § 1158(a)(1), 2023. https://www.govinfo.gov/content/pkg/USCODE-2023-title8/pdf/USCODE-2023-title8-chap12-subchapII-partI-sec1158.pdf (emphasis added).

Second, Walter Dellinger, President Clinton's Acting Assistant Attorney General responsible for "provid[ing] legal advice to the President and all executive branch agencies" and in charge of DOJ's Office of Legal Counsel (OLC), which "drafts legal opinions of the Attorney General and provides its own written opinions and other advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and other [DOJ] components",[32] concluded in 1993 that the same rules do indeed apply in U.S. territorial waters. Mr. Dellinger, a liberal icon, made a very compelling case.

Dellinger authored an OLC opinion in 1993 "respond[ing] to requests made by" DOJ and the INS "for our views on the consequences under the [INA] of an undocumented alien's arrival in [U.S.] territorial waters."[33] OLC was specifically asked "whether undocumented aliens who have been interdicted within the [U.S.'s] territorial waters are entitled to an exclusion hearing"[34] in which they could raise asylum claims and seek withholding of removal. He noted that "resolution of th[is] issue[] is of some urgency because the [U.S.] has been interdicting, within its territorial waters, vessels transporting large numbers of undocumented aliens seeking admission into the [U.S.] from various foreign countries."[35]

Mr. Dellinger concluded that the INA's withholding mandate "does not limit the President's power to order the [CG] to turn back undocumented aliens interdicted within [U.S.] territorial waters"[36] and that an alien "intercepted within ... territorial waters is not entitled to an exclusion hearing".[37] He explained that his conclusion was "primarily [based] on an examination of the text of the [INA] – most importantly, its explicit requirements for exclusion proceedings."[38] He also "examine[d] [the INA's] provisions for asylum and withholding ... and conclude[d] that these provisions are consistent with, and indeed support, our reading".[39] And he "reject[ed the] contention that th[e INA's] definition [of 'the United States'] ... compels the conclusion that the INA's procedural protections must apply to undocumented aliens who have entered the twelve mile zone."[40]

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[32] U.S. Department of Justice, "Office".
[33] U.S. Department of Justice, "Memorandum", 77 (footnote omitted).
[34] Ibid.
[35] Ibid.
[36] Ibid, 86
[37] Ibid, 79.
[38] Ibid (citation omitted).
[39] Ibid.
[40] Ibid. DOS's Foreign Affairs Manual (FAM) instructs that:
FAM guidance up until 1995 ... advised that persons born within ... the U.S. territorial sea were born "within the [U.S.]"... Analysis of this issue undertaken in 1994-1995 revealed, however, that

Mr. Dellinger noted that § 235(b) of the INA "provide[s] the jurisdictional basis for an exclusion hearing before an immigration judge".[41] At the time, the section provided that "[e]very alien ... who may not appear to the examining immigration officer **at the port of arrival** to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer."[42] Dellinger concluded that as this language makes clear, "it is a predicate for conducting exclusion proceedings that the alien seeking admission be examined '**at the port of arrival**' by an immigration officer."[43] Further, "[a]n alien interdicted at sea – even if within the territorial waters of the [U.S] – is not at any 'port.' Consequently, there is no jurisdiction to conduct an exclusion proceeding ..."[44]

Three years later, in 1996, Congress modified the INA to provide that "[a]n alien present in the [U.S.] who has not been admitted or who arrives in the [U.S.] (whether or not at a designated port of arrival and **including an alien who is brought to the [U.S.] after having been interdicted in** international or **[U.S.] waters**) shall be deemed ... an applicant for admission" and that as to an "applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding ..."[45]

Thus, Dellinger's argument is no longer applicable as the "port of arrival" language he relied on has been removed. However, in 1996, Congress added the language that an alien who arrives in the U.S. "including an alien who is brought to the [U.S.] after having been interdicted in ... [U.S.] waters" shall be deemed an applicant for admission. The INA's clear meaning is that an alien interdicted

there is a substantial legal question whether persons born outside the internal waters of the United States but within the territorial sea are in fact born "within the United States" for purposes of the 14th Amendment and the INA. U.S. Department of State, "Foreign Affairs".

41 U.S. Department of Justice, "Memorandum", 81 (quoting U.S. Department of Justice, *Matter of Waldei*).

42 Immigration and Nationality Act: § 235(b), United States Code: 8 U.S.C. § 1225(b). 1994. https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partIV-sec1225.pdf (emphasis added by DOJ).

43 U.S. Department of Justice, "Memorandum", 81 (citing Immigration and Nationality Act: § 243(h)(1), United States Code: 8 U.S.C. § 1253(h)(1). https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partV-sec1253.pdf.) (emphasis added by DOJ).

44 Ibid, 81-82 (footnotes omitted).

45 § 302(a) of subtitle A of title III of division C of P.L. 104-208 (found at INA § 235(a)(1), (b)(2)(A), 8 U.S.C. § 1225(a)(1), (b)(2)(A) (2023)). https://www.congress.gov/104/statute/STATUTE-110/STATUTE-110-Pg3009.pdf. (emphasis added).

in U.S. territorial waters is not at that point within the U.S. or, consequently, amendable to a removal proceeding, but must still be "brought to the [U.S.]". So, while the INA's language has changed, the principle still stands that an alien at the point they are interdicted in U.S. territorial waters is not entitled to a removal proceeding ("for deciding the inadmissibility or deportability of an alien"[46]).

Dellinger argued that this conclusion as to the non-applicability of the withholding mandate within U.S. territorial waters "is consistent with the [INA's] definition of the 'United States'"[47]: "The term 'United States' ... when used in a geographical sense, means the continental [U.S.], Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the [U.S.]."[48] He pointed out that: "In numerous other statutes, Congress has specifically included a reference to the territorial waters when defining the 'United States.' For example, the Longshore and Harbor Workers Compensation Act defines ... 'United States' ... [to include] 'the several States and Territories and the District of Columbia, including the territorial waters thereof.'"[49] Congress did not do so in the INA. Additionally, Mr. Delinger pointed out that the INA's "only significant reference to the territorial waters occurs in ... section 287(a)(3) ... which authorizes the INS to conduct warrantless searches of vessels 'within the territorial waters of the [U.S.]'",[50] and he then argued that "[t]he absence of any other use in the INA of the terms 'territorial waters' or 'territorial sea' -- and particularly their absence in the detailed provisions governing the treatment of aliens seeking to enter the [U.S.] -- strongly suggests that an alien's arrival or presence in the territorial waters is simply not a relevant consideration for establishing or expanding the rights of aliens seeking entry."[51] And he argued that "[h]ad Congress wanted to make mere entry into the territorial waters sufficient to guarantee the entrant an exclusion hearing, it could easily have written such language".[52] Finally, he contended that "inasmuch as the

[46] Immigration and Nationality Act: § 240(a)(1), United States Code: 8 U.S.C. § 1229a(a)(1). https://www.govinfo.gov/content/pkg/USCODE-2023-title8/pdf/USCODE-2023-title8-chap12-subchapII-partIV-sec1229a.pdf.
[47] U.S. Department of Justice, "Memorandum", 88.
[48] Immigration and Nationality Act: § 101(a)(38), United States Code: 8 U.S.C. § 1101(a)(38). https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapI_2-sec1101.pdf.
[49] U.S. Department of Justice, "Memorandum", 88 n.25 (citing 33 U.S.C. § 902(9). https://www.govinfo.gov/content/pkg/USCODE-1994-title33/pdf/USCODE-1994-title33-chap18-sec902.pdf).
[50] Ibid, 93-94 (citing Immigration and Nationality Act: § 287, United States Code: 8 U.S.C. § 1357. https://www.govinfo.gov/content/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partIX-sec1357.pdf).
[51] U.S. Department of Justice, "Memorandum", 94.
[52] Ibid.

only usage of ... 'territorial waters' appears in section 287's description of INS's authority to search vessels in order to **thwart** aliens attempting illegal entry, there is reason to view the territorial waters as a buffer zone, rather than as a safe harbor, in the overall scheme of the INA."[53]

Conclusion

The Secretary of Homeland Security should instruct the CG to expand the interdiction/repatriation policy to U.S. territorial waters in order to remove any inadvertent inducement of a new marine migration crisis, and, if necessary, to quickly resolve such a crisis. Acting Assistant Attorney General Dellinger's cogent arguments should assuage any concerns regarding the legality under the INA of such an expansion. The INA makes clear that an alien interdicted in U.S. territorial waters is not at such point within the United States, and, thus, the withholding of removal mandate is not applicable.

[53] Ibid (emphasis in original).

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U.S. Department of State. Foreign Affairs Manual 8 FAM 301.1-4(c) (*Birth in U.S. Internal Waters and Territorial Seas*), 2024. https://fam.state.gov/FAM/08FAM/08FAM030101.html#M301_1_4.