

HAROLD HONGJU KOH

## The Enduring Legacies of the Haitian Refugee Litigation

61 N.Y.L. SCH. L. REV. 31 (2016–2017)

ABOUT THE AUTHOR: Professor Koh is the Sterling Professor of International Law at Yale Law School. He first began teaching at Yale Law School in 1985 and served as its fifteenth Dean from 2004 to 2009. From 2009 to 2013, he took leave as the Martin R. Flug '55 Professor of International Law to join the U.S. State Department as Legal Adviser, service for which he received the Secretary's Distinguished Service Award. From 1998 to 2001, he served as U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor. He was Counsel of Record in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) and *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). This is a footnoted, edited version of a keynote address delivered at the *Storming the Court* symposium held at New York Law School on October 16, 2015. It draws heavily upon a number of earlier articles and book chapters cited throughout the footnotes, including remarks delivered at a prior symposium on the Haitian litigation at Yale Law School in March 2014, and shares thoughts with a forthcoming article, *The Emerging 21st Century Law of War* in the *Emory Law Review*.

Professor Koh adds:

I thank the editors of the *New York Law School Law Review* for the opportunity to discuss the Haitian refugee litigation and Brandt Goldstein for telling the world a memorable story that might otherwise have gone largely untold. I can never adequately thank my remarkable co-counsel—Lucas Guttentag, Joe Tringali, Robert Rubin, Jennifer Klein, and Susan Sawyer—and the extraordinary group of students and lawyers who gathered at New York Law School, described *infra* note 9, to remember the Haiti case. I remember with special affection one of the first volunteer attorneys who went to Guantánamo on behalf of our Haitian clients, my late Yale Law School colleague Professor Carroll Lucht, who passed away on July 3, 2016. I also thank Christina Frohock for her help securing materials from the Cuban American Bar Association (CABA), which recently celebrated the twentieth anniversary of the Cuban refugee litigation. *See infra* text accompanying notes 78–91. I am grateful to Sophia Chua-Rubenfeld and Nathaniel Zelinsky of Yale Law School for excellent research assistance.

I dedicate this article to my incomparable friend and co-counsel, Michael Ratner, who left us on May 11, 2016. Michael was a friend and colleague to treasure. When you were in a fight, there simply was no one better or more generous. He never gave up; he always had an idea; he was always in a good mood; and he always had stunning perspective on every issue that tormented us during the Haitian refugee litigation. When we were the target of a Rule 11 motion by the U.S. government, I was aghast. Rule 11's were motions I had only heard of in my nightmares. But Michael said, "Think of it as a badge of pride. I can never remember *not* being Rule 11'ed." During the Haitian case, we had an endless series of conference calls among co-counsel. One night when we proposed to set one for eleven o'clock the next morning, Michael asked, "Can we do it at noon? I'm scheduled to get arrested at eleven!" We will never see another like him. *See generally* Harold Hongju Koh, *Michael Ratner: The Leading Progressive Lawyer of a Generation*, JUST SECURITY (May 12, 2016, 8:05 AM), <https://www.justsecurity.org/31010/michael-ratner/>.

## THE ENDURING LEGACIES OF THE HAITIAN REFUGEE LITIGATION

Why still talk about the “Haitian Refugee Litigation,”<sup>1</sup> *Haitian Centers Council, Inc. v. Sale*, twenty-five years later? After all, fine books have been written about the litigation: Brandt Goldstein’s gripping nonfiction novel, *Storming the Court*,<sup>2</sup> and the accompanying Civil Procedure teaching materials expertly assembled by Brandt Goldstein, Rodger Citron, and Molly Beutz Land.<sup>3</sup> The episode has been used as a case study for Procedure classes at Yale, Columbia, Touro Law School, University of Connecticut, and New York Law School, just to name a few. The episode has spawned many articles.<sup>4</sup> And symposia held over the last few years have commemorated the litigation as a paradigm for human rights advocacy, not just here at New York Law School,<sup>5</sup> but also at Yale,<sup>6</sup> Columbia,<sup>7</sup> and Howard University Law Schools.<sup>8</sup>

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1. I use the term Haitian refugee litigation to describe the complex set of cases known as *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (direct return case); *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (Guantánamo detention case) (permanent injunction), *vacated by settlement*; and *Haitian Centers Council, Inc. v. McNary*, No. 92 CV 1258, 1992 WL 155853, at \*1 (E.D.N.Y. Apr. 6) (Guantánamo detention case) (preliminary injunction), *aff’d in part, vacated in part*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale*, 509 U.S. 155. For a summary of how the various pieces of the litigation unfolded, see generally Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement*, in *HUMAN RIGHTS ADVOCACY STORIES* 385 (Deena R. Hurwitz et al. eds., 2009).
  2. BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF LAW STUDENTS FOUGHT THE PRESIDENT—AND WON* (First Scribner trade paperback ed. 2006).
  3. BRANDT GOLDSTEIN ET AL., *A DOCUMENTARY COMPANION TO STORMING THE COURT* (2009).
  4. See, e.g., Raymond H. Brescia, *Through a Glass, Clearly; Reflections on Team Lawyering, Clinically Taught*, 61 N.Y.L. SCH. L. REV. 87 (2016); Harold Hongju Koh, *America’s Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1995) [hereinafter Koh, *Refugee Camps*]; Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. 1 (1994); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) [hereinafter Koh, *The “Haiti Paradigm”*]; Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT’L L. 483 (1993); Koh & Wishnie, *supra* note 1; Michael Ratner, *How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187 (1998); The Lowenstein Int’l Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993); Victoria Clawson et al., *Essay, Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994); Andrew G. Pizor, *Comment, Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 FORDHAM INT’L L.J. 1062 (1994).
  5. For a collection of the speeches delivered at the New York Law School symposium, see *Storming the Court: 25 Years After H.C.C. v. Sale: Program*, N.Y.L. SCH. L. REV., <http://www.nylslawreview.com/storming-the-court-program/> (last visited Nov. 7, 2016).
  6. For a collection of the papers presented at the Yale symposium, see Harold Hongju Koh, *YLS Sale Symposium: Sale’s Legacies*, OPINIO JURIS (Mar. 17, 2014, 11:54 AM), <http://opiniojuris.org/2014/03/17/yls-sale-symposium-sales-legacies/>.
  7. In 2013, Columbia Law School’s Human Rights Institute hosted a series of symposia discussing the Haitian refugee litigation. See *The Legal Legacy of Sale v. Haitian Centers Council*, HUM. RTS. INST., [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/sale\\_series.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/sale_series.pdf) (last visited Nov. 7, 2016).
  8. On January 23, 2014, Howard University School of Law hosted a symposium regarding the Haitian refugee litigation. See *20 Years After “Storming the Court”: A Living Room Discussion*, HOW. U. SCH. L., <http://www.law.howard.edu/1756> (last updated Jan. 15, 2014).

Perhaps the case still resonates because of the extraordinary public interest engagement by the litigation's graduates, who formed the group we called "Team Haiti."<sup>9</sup> Maybe the story inspires today's law students because of the astonishing

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9. Looking only at the "alumni" of the case who attended the New York Law School symposium, Michelle Anderson became Dean of City University of New York School of Law, and is now President of Brooklyn College. See *Storming the Court: 25 Years After H.C.C. v. Sale: Speakers*, N.Y.L. SCH. L. REV., <http://www.nylslawreview.com/storming-the-court-speakers/> (last visited Nov. 7, 2016). Michael Barr, a professor at the University of Michigan Law School, served as Assistant Secretary of the Treasury for Financial Institutions. *Id.* Graham Boyd was founding director of the American Civil Liberties Union's (ACLU) Drug Law Reform Project, an area in which he continues to work. *Id.* Ray Brescia is a professor and Director of the Government Law Center at Albany Law School. *Id.* Tory Clawson is Associate Vice President for Strategic Operations at Save the Children. *Id.* Chris Coons is a U.S. Senator from Delaware. *Id.* Lisa Daugaard is Policy Director of the Public Defender Association of Seattle. *Id.* Catherine Powell is a professor at Fordham Law School and former staff member of the Obama National Security Council and the State Department's Office of Policy Planning. *Id.* Paul Sonn is General Counsel at the National Employment Law Project. *Id.* Joe Tringali, Of Counsel at Simpson Thacher & Bartlett LLP, has litigated and won numerous significant pro bono cases, including the trial of the Haitian refugee case. *Id.* Mike Wishnie is William O. Douglas Professor of Clinical Law, Deputy Dean for Experiential Education, and Director of the Jerome N. Frank Legal Services Organization at Yale Law School. *Id.*

Those who could not attend the New York Law School forum have made comparably extraordinary accomplishments. To name just a few, Anupam Chander is a professor at the University of California Davis School of Law. *Anupam Chander Biography*, UCDAVIS SCH. L., <https://law.ucdavis.edu/faculty/chander/> (last visited Nov. 7, 2016). Rodger Citron is an Associate Dean for Academic Affairs and a professor at Touro Law School. *Rodger Citron Biography*, TOURO L., <http://www.tourrolaw.edu/AboutTouroLaw/bio.aspx?id=7> (last visited Nov. 7, 2016). Sarah Cleveland is Louis Henkin Professor of Human and Constitutional Rights and Co-Director of the Human Rights Institute at Columbia Law School, former Counselor of International Law at the State Department, and U.N.-elected U.S. member of the Human Rights Committee. *Sarah H. Cleveland Biography*, COLUM. L. SCH., [http://www.law.columbia.edu/fac/Sarah\\_Cleveland](http://www.law.columbia.edu/fac/Sarah_Cleveland) (last visited Nov. 7, 2016). Elizabeth Detweiler is a law clerk to a leading federal judge in Houston, Texas. Margareth Etienne is a professor at the University of Illinois School of Law. *Margareth Etienne Biography*, ILL. L., <https://www.law.illinois.edu/faculty/profile/margarethetienne> (last visited Nov. 7, 2016). Eric Falkenstein is a leading Broadway producer. Some of his great plays include *The Color Purple*, *Clybourne Park*, *The Norman Conquests*, and *The History Boys*. See *Erik Falkenstein Biography*, IBDB, <https://www.ibdb.com/broadway-cast-staff/eric-falkenstein-92601/#broadway> (last visited Nov. 7, 2016). Henry Fernandez is the founding Executive Director of LEAP and a former Deputy Mayor of New Haven, Connecticut. *Henry Fernandez Biography*, FERNANDEZ ADVISORS, <http://www.fernandezadvisors.net/henry-fernandez.html> (last visited Nov. 7, 2016). Lucas Guttentag is Senior Counselor to the Secretary of Homeland Security. *Lucas Guttentag Biography*, SLS, <https://law.stanford.edu/directory/lucas-guttentag/> (last visited Nov. 7, 2016). Anthony K. (Van) Jones is a well-known commentator on CNN. *Van Jones Biography*, CNN, <http://www.cnn.com/profiles/van-jones-profile#about> (last visited Nov. 7, 2016). Christy Lopez is Deputy Chief in the Special Litigation Section of the Civil Rights Division at the U.S. Department of Justice. *Christy E. Lopez Biography*, GEO. L., <http://www.law.georgetown.edu/faculty/lopez-christy-e.cfm#> (last visited Nov. 7, 2016). L. Song Richardson is a professor at the University of California Irvine School of Law. *L. Song Richardson Biography*, U. CAL. IRVINE SCH. L., <http://www.law.uci.edu/faculty/full-time/richardson/> (last visited Nov. 7, 2016). Margo Schlanger is a professor and former official of the Department of Homeland Security who directs the Civil Rights Litigation Clearinghouse at the University of Michigan Law School. *Margo Schlanger Biography*, MICH. L., <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=mschlan> (last visited Nov. 7, 2016). Cecilia Wang is the Director of the ACLU Immigrants' Rights Project and incoming Deputy Legal Director of the ACLU. *Biography of Cecilia Wang*, ACLU, <https://www.aclu.org/biography-cecilia-wang> (last visited Nov. 7, 2016). And these are only some of the many who helped. Let me take this moment to thank all of them,

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idealism and dedication of the Yale students.<sup>10</sup> By today's standards, it seems almost impossible to imagine young law students litigating a case that went to the Second Circuit five times and the Supreme Court eight times in fifteen months, in an era without laptops, Internet, iPads, or cellphones.<sup>11</sup> Maybe it is because of the attention the lawsuit attracted from such famous public figures as Jonathan Demme, Reverend Jesse Jackson, Tim Robbins, and Susan Sarandon.<sup>12</sup> Or maybe it's just because it was

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as well as Ethan Balogh, Wade Chow, Anthony Cichello, Mercer Givhan, Carl Goldfarb, Adam Gutride, Thomas Hammack, Laura Ho, Laurie Hofer, Serge Learsy, Christine Martin-Nicholson, Feisal Naqvi, Stephen Roos, Jonathan Ross, Veronique Sanchez-Scalzo, Jeannie Su, Jessica Weisel, Jonathan Weissglass, and so many other deeply committed members of "Team Haiti" for their incredible contributions to the Haitian refugee litigation. See David Cole, *Michael Ratner's Army*, N.Y. REV. BOOKS (May 15, 2016, 1:45 PM), <http://www.nybooks.com/daily/2016/05/15/michael-ratner-army-fight-against-guantanamo/> (providing information about Team Haiti and the significance of the Haitian refugee litigation as a human rights achievement).

Even our opposing counsel, who were deeply affected by their role in the litigation, deserve sincere thanks: Bob Begleiter and Scott Dunn attended the *Storming the Court* symposium and Paul Cappuccio sent money and worked behind the scenes to support individual Haitian immigrants. When I was being blocked for Senate confirmation as State Department Legal Adviser, former Solicitor General Ken Starr, then President of Baylor University, sent an unsolicited letter to the Senate Foreign Relations Committee backing my candidacy. I remain touched by each and every one of these acts of kindness.

10. I remember, for example, working in my office at three o'clock in the morning on the day that our first Second Circuit brief was due at noon. Our litigation manager, Ray Brescia, then a third-year law student, stuck his head in and asked urgently whether I was planning to have the brief cite checked before it was filed. Exhausted, I grunted that we could not do so without at least ten cite checkers. An hour later, I heard noises in the hallway and emerged to find ten sleepy students—wearing glasses, pajamas, and sweatpants—waiting outside my office. Ray had gone down the dormitory hallway, banging on the doors of sleeping students who had little or nothing to do with the case, demanding that they “save the Haitians by getting up to cite check part of this brief.” As I watched the students disappear down the hall heading to the all-night library, I began to think that maybe we might have a chance after all.
11. See generally Clawson et al., *supra* note 4 (discussing the Haitian refugee litigation). Back in those days, our highest level of technology was the fax machine, which was relatively new at the time. Students compiled their research and drafts on three-and-a-half-inch diskettes, which we merged together to create long, ungainly documents. Our computers had green screens and took minutes to boot up. In a world without cellphones, every time I went somewhere, I had to call back to our makeshift office to make sure that something disastrous hadn't happened. On one occasion, I got off a train at Grand Central Station and called our office only to be told that Judge Johnson had just summoned us for a telephone hearing on an emergency motion. I ran to the Grand Hyatt Hotel next to Grand Central and talked my way into a maitre d's station at a nearby restaurant to gain access to a speakerphone. When Michael Ratner came on, I could hear cheering in the background. When I asked him where on earth he was, he said, “I'm under the bleachers at a Mets game, speaking to you on something called a ‘mobile phone.’” This was the first time I was ever on a cellphone call. And even as the conference call with the judge proceeded and I was making my oral argument, customers kept coming up and asking, “Table for four?” as I tried to wave them away.
12. See Ratner, *supra* note 4, at 216–17 (describing civil disobedience by Jackson, Demme, and Sarandon on the first day of trial, and statements by Sarandon and Robbins made as presenters at the Academy Awards). I will never forget traveling to Guantánamo with Jesse Jackson and Michael Ratner on Valentine's Day, 1993. We learned that for one day, we could rent a propeller plane for \$7,500, a charge I put on my overextended credit card. The administrative head of Reverend Jackson's group, the Rainbow PUSH Coalition, called and asked, “Professor, are you going to Guantánamo on a jet?” I said, “No, a jet costs \$20,000 for a day, which we can't afford.” In pitying tones, she replied, “Oh, Professor, don't you know?”

the first time most of us ever heard of Guantánamo.<sup>13</sup>

Whatever the reason, even a quarter of a century later, people love to talk about the Haitian refugee litigation. But what are the litigation's enduring legacies? Let me mention just four.

First, looking back, the Haitian refugee litigation was the first time most of us ever heard arguments urging the recognition of “legal black holes”—geographic zones or issue areas to which the law supposedly does not apply<sup>14</sup>—with respect to mass migrations, high seas interdictions, armed conflict zones, the extraterritoriality of human rights treaties, and Guantánamo. Second, the Haitian case revealed the rise of transnationalism and “transnational legal process”<sup>15</sup>: the complex process by

You get *two* jets: one for Reverend and the other for the press. I'll fax you a list of journalists who normally travel with Reverend. You call them up and tell them the price is \$5,000 per seat and you will pay for *both* jets.” And that, my friends, was how we got to Guantánamo.

At one point, during our plane ride down, someone asked Reverend Jackson, “What would you like to say about race in America?” He looked at me and a light went on. He asked, “Does anybody know that Harold Koh, the man representing the black Haitians, is a Korean man?” Then his voice rose, and he was off on a huge rhyming speech, which he repeated many times as he crisscrossed America over the next few months. Every day for weeks afterward, I would get voicemails from friends saying, “Jesse Jackson was just here,” or “just spoke at our graduation,” or “was on *The Arsenio Hall Show*,” each time asking rhetorically, “If you want to know the real story of race in America, does anybody know that the lawyer representing the black Haitians is a Korean man, Harold Koh?”

When we landed in Guantánamo on Valentine's Day, 1993, the U.S. military commandant initially would not let us enter the base. I was arguing with the commandant, when Reverend Jesse Jackson called me over. He said, “Harold, let's not argue with the mailman” (a phrase that later became a trope in my household). Grabbing his cellphone, Jesse said, “I'm going to call Sandy Berger” who was Deputy National Security Advisor at the time. A few moments later, the commandant waved us into the base. The lesson I took away: “Let's not argue with the mailman.” Always call the actual decisionmaker.

13. I first heard of Guantánamo in the song “Guantanamera,” a story of a girl from Guantánamo, dating back to the 1920s, with lyrics attributed to José Martí, music by Joseíto Fernández, and popularized by American singer, Pete Seeger. See David Cheal, *The Life of a Song: 'Guantanamera'*, FIN. TIMES (Mar. 13, 2015), <https://www.ft.com/content/2a530e04-c407-11e4-a02e-00144feab7de>. Since then, Guantánamo has become part of our popular culture, most famously in the 1992 Academy Award-nominated Rob Reiner film, *A Few Good Men*, written by Aaron Sorkin, which featured Jack Nicholson telling Tom Cruise, a JAG officer defending a Guantánamo court-martial, “You can't handle the truth!” *A Few Good Men*, IMDB, <http://www.imdb.com/title/tt0104257/> (last visited Nov. 7, 2016). For other examples of Guantánamo in popular culture, see *Harold & Kumar Escape from Guantánamo Bay*, IMDB, <http://www.imdb.com/title/tt0481536/> (last visited Nov. 7, 2016), and *Camp X-Ray*, IMDB, <http://www.imdb.com/title/tt2994190/> (last visited Nov. 7, 2016).
14. See Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1029 (2015) (defining “legal black holes” as “domains where legal protections did not exist for certain people”); see also *id.* at 1030 n.4 (attributing the term “legal black holes” to Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004) (U.K.)).
15. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 196–99 (1996) [hereinafter Koh, *Transnational Legal Process*] (discussing the transnational legal process that initiated the extraterritorial return of Haitian and Cuban refugees). See generally Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1 (1994) [hereinafter Koh, *Haitian Refugee Litigation*] (discussing transnational legal process in the context of the Haitian refugee litigation).

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which international norms infiltrate domestic law.<sup>16</sup> Third, the Haitian refugee litigation illustrated the evolution of modern-day Civil Procedure, which explains why the case is still being used, decades later, as a teaching tool in Procedure classes.<sup>17</sup> Fourth and finally, the case teaches enduring lessons about human rights advocacy, as taught through clinical legal education.<sup>18</sup>

### I. HOW THE LITIGATION EVOLVED

The story of the Haitian refugee litigation has often been told.<sup>19</sup> In broadest outline, the evolving case echoed first *Gideon v. Wainwright*,<sup>20</sup> then *Korematsu v. United States*,<sup>21</sup> and then the tale of the *S.S. St. Louis*.<sup>22</sup>

When the democratically elected government in Haiti was toppled by a military coup in 1991, thousands of Haitians started fleeing on the high seas.<sup>23</sup> The U.S. Coast Guard interdicted their makeshift boats beyond U.S. territorial waters and initially “processed” them on Coast Guard cutters, until the volume of cases forced their transfer to Guantánamo Bay Naval Base, on the eastern tip of Cuba, for “screening”—or preliminary assessment—of their claims of political persecution.<sup>24</sup>

After an initial lawsuit failed in the Florida federal courts,<sup>25</sup> Yale Law School’s Lowenstein Human Rights Clinic filed a successor action in the U.S. District Court for the Eastern District of New York that argued, essentially, that the U.S.

16. See Koh, *Transnational Legal Process*, *supra* note 15, at 183–84 (“Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”).
17. See *supra* notes 2–3 and accompanying text.
18. See Koh & Wishnie, *supra* note 1, at 426 (“Finally, the story of the [Haitian] litigation reveals important lessons for human rights litigation and for contemporary social justice campaigns.”); see also *id.* at 430 (“[T]he [Haitian] litigation offers important lessons to clinical legal education, especially as conducted by the rapidly growing number of human rights clinics.”).
19. See sources cited *supra* note 4.
20. 372 U.S. 335 (1963).
21. 323 U.S. 214 (1944).
22. The tragic story of the *S.S. St. Louis* is told in the 1974 book, *Voyage of the Damned*, by Gordon Thomas and Max Morgan Witts. See generally GORDON THOMAS & MAX MORGAN WITTS, *VOYAGE OF THE DAMNED* (1974).
23. For a description of the 1991 military coup in Haiti, see Brandt Goldstein, *Introduction*, 61 N.Y.L. SCH. L. REV. (forthcoming Nov. 2016). See also Howard W. French, *Haiti Pays Dearly for Military Coup*, N.Y. TIMES (Dec. 24, 1991), <http://www.nytimes.com/1991/12/25/world/haiti-pays-dearly-for-military-coup.html> (describing “thousands of poor Haitians risking their lives on overcrowded boats to flee repression and hardship” in the aftermath of the 1991 military coup).
24. See *Alien Migrant Interdiction*, U.S. COAST GUARD, <https://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp> (last modified Jan. 12, 2016).
25. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992) (denying application for stay of mandate and petition for certiorari).

government must allow clients to talk to their lawyers and lawyers to talk to their clients.<sup>26</sup> We challenged the absence of lawyers in repatriation proceedings as violations of due process and freedom of political speech. By analogy to *Gideon*,<sup>27</sup> we argued that it violated due process to repatriate potential refugees back to possible political persecution or death, depriving them of liberty, and possibly life, without any legal representation whatsoever.

As the lawsuit accelerated and the camps expanded, the case increasingly echoed *Korematsu*<sup>28</sup>: challenging the illegal, indefinite detention of HIV-positive refugees, based on their race and nationality, in an offshore prison camp under unconstitutional conditions of detention.<sup>29</sup> But while that issue was heading to trial, in May 1992, President George H.W. Bush signed the “Kennebunkport Order,”<sup>30</sup> mandating the direct return of all Haitians intercepted on the high seas, regardless of their refugee claims. To us, this recalled America’s tragic decision before World War II to turn away the *S.S. St. Louis*, the “Voyage of the Damned,” eventually causing the illegal, deliberate, and ultimately fatal, *refoulement* of Jewish refugees.<sup>31</sup>

In our view, such actions violated the plain language of the 1951 Refugee Convention<sup>32</sup> and the 1980 Refugee Act,<sup>33</sup> which had been adopted precisely to prevent such tragedies from recurring. But for our litigation team, the timing of this outrage could hardly have been worse. President Bush signed the Kennebunkport Order the night before Yale Law School’s graduation, just before the third-year

26. Koh, *Haitian Refugee Litigation*, *supra* note 15, at 5–6.

27. In *Gideon*, the petitioner successfully challenged the trial court’s ruling denying him assistance of counsel as a violation of the rights guaranteed him by the Constitution and the Bill of Rights. *Gideon v. Wainwright*, 372 U.S. 335, 337–45 (1963). *See generally* ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964).

28. In *Korematsu*, petitioner unsuccessfully challenged his detention at a Japanese-American internment camp during World War II. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944).

29. About 300 Haitian men, women, and children remained interned on Guantánamo, all with credible claims of political persecution, and some with established full-fledged claims of political asylum. Koh & Wishnie, *supra* note 1, at 410. They were nevertheless barred from entering the United States because most had the HIV virus. *Id.* Title VIII, § 1182(a)(1)(A)(i) of the U.S. Code granted the government authority to exclude from admission into the United States persons “determined . . . to have a communicable disease of public health significance.” 8 U.S.C. § 1182(a)(1)(A)(i) (1994).

30. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992). The Kennebunkport Order called for the U.S. Coast Guard to send all Haitian people interdicted beyond the waters of the United States back to Haiti, without the opportunity for INS refugee screening. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1033 (E.D.N.Y. 1993).

31. *See generally* THOMAS & MORGAN WITTS, *supra* note 22.

32. Convention Relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 (entered into force Nov. 1, 1968) (“No Contracting State shall expel or return (*‘refouler’*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion.”) (emphasis added). The United States became a party to the Refugee Convention when it acceded to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

33. 8 U.S.C. § 1253(h)(1) (1994) (“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.”).

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students who had started the case were about to leave town. Michael Ratner and I wondered, “Under these circumstances, should we challenge the order?” But after intensive team discussions, we soon concluded that we had little choice: Our country was now launching deliberate acts of *refoulement* after signing a treaty that firmly announced that *refoulement* was prohibited. So if not now, when? If not us, who? And if not this, then what?<sup>34</sup> No other litigation group was in position to place the *refoulement* issue before a receptive judge as quickly. And if we didn’t challenge this as part of our ongoing case, the issue was already lost. We had to send the message that someone was ready to fight. Finally, even if we lost in court, at least we would have kept the issue alive in the public eye long enough to catalyze other kinds of political advocacy.<sup>35</sup>

After merciless, round-the-clock litigation, we won both halves of the case before the Second Circuit.<sup>36</sup> The litigation bifurcated, with the “illegal detention” phase of the case (*Haitian Centers Council, Inc. v. McNary*) proceeding back to trial before the courageous Judge Sterling Johnson, Jr.<sup>37</sup> Meanwhile, the “direct return” phase of the case (*Sale v. Haitian Centers Council, Inc.*) went on expedited review to the U.S. Supreme Court, where we lost 8–1.<sup>38</sup> Over Justice Harry A. Blackmun’s powerful

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34. Years later, as Dean of Yale Law School, I recalled this moment when the question arose whether military recruiters could come on our campus and interview everybody except the LGBTQ (lesbian, gay, bisexual, transgender, questioning) students. We knew that if we challenged that law, Yale University could potentially lose millions in government funding. But in a decision strongly urged by my late beloved faculty colleague, Robert “Bo” Burt, we nevertheless decided to sue the U.S. government for what we thought was illegal conduct and government-compelled speech. *See Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004). Again we said, “If not now, when? If not us, who? And if not this, then what? If we permit this, could employers come on our campus and announce that they will interview Christian, but not Jewish students, or white, but not black students? And even if we lose, people will remember who was on the right side of history.” Although the companion challenge lost unanimously at the Supreme Court, *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 70 (2006), today the U.S. military has abandoned its “Don’t Ask, Don’t Tell” policy and the Supreme Court has embraced the government-compelled speech rationale in a different case. *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013) (holding that the federal government may not condition federal funding for HIV prevention on restrictions that require recipients of government funds to adopt and express the government’s viewpoint on prostitution as their own). So there is no doubt now that we chose the right side of history. As controversial as these decisions may have seemed at the time, in retrospect, they were clearly the right thing to do.

35. *See generally* Ratner, *supra* note 4 (discussing political advocacy initiatives in the Haitian refugee litigation).

36. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

37. In the years since, Judge Johnson has become a friend to all of us. He and his law clerk, Tawana Davis, matched us hour for hour during what became a landmark case for all of us. While Judge Johnson maintained scrupulous objectivity during the lengthy litigation, it has since become clear—most recently, in his stirring presentation at the New York Law School *Storming the Court* symposium—that the case stands out in his memory as perhaps the most memorable of his storied judicial career.

38. 509 U.S. 155, 158–59 (1993).

dissent, the Court held that the *nonrefoulement* provisions of the Immigration and Nationality Act and the Refugee Convention did not apply on the high seas.<sup>39</sup>

But following a trial skillfully masterminded by Joe Tringali and Lucas Guttentag, we won a sweeping due process ruling and a permanent injunction in the detention case from Judge Johnson, which to this day remains the strongest opinion ever written about the due process rights of alien detainees on Guantánamo.<sup>40</sup> Judge Johnson wrote: “Although the defendants euphemistically refer to [the] Guantánamo operation as a ‘humanitarian camp,’ the facts disclose that it is nothing more than an HIV prison camp presenting potential public health risks to the Haitians held there.”<sup>41</sup> The Clinton administration, which had inherited the Guantánamo detention center with visible discomfort, declined to appeal Judge Johnson’s permanent injunction and chose to close the facility.<sup>42</sup>

Remarkably, after nearly two years of frantic activity, both wings of the case ended on the same day.<sup>43</sup> On June 21, 1993, the day the Supreme Court disposed of both wings of the Haitian case, the government admitted about 205 HIV-positive Haitians on Guantánamo into the United States. As the military airplane carrying the Haitians appeared over LaGuardia Airport, Michael Ratner and I hugged each other on the tarmac, shouting, “The law made this happen!” As the Haitians disembarked, they hugged us as we welcomed them to their new country.

A quarter-century later, two moments stick in my memory. First, inside the terminal, one refugee approached me with his name scrawled on a napkin. He pointed to the bar-coded “detainee bracelet,” that encircled his wrist like a bar-coded piece of meat at a grocery store. He said, “Mon avocat [my lawyer], this is not my name.” I realized that the immigration authorities must have misspelled his name when he was first picked up on the Coast Guard cutter. “*This* is my name”—he said, pointing vigorously to the name written on the napkin—“Please fix,” he pleaded. I turned toward the nearby immigration agents to request the change, when suddenly I realized that yes, the law had made this happen. All his legal rights to live in America keyed off of Judge Johnson’s court order, which relying on the official U.S. immigration records, had similarly misspelled his name. It was just too risky to change all that now. So I turned back to my client and said, “This is your Ellis Island. This is your name now.” He seemed puzzled and asked, “So what is *your* name?” I paused and answered, “When we first came here, they spelled it ‘K-O-H.’” He looked at me blankly for a moment, then brightened. “So *this* is my name!” he

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39. *Id.* at 159.

40. *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

41. *Id.* at 1038–39.

42. For a discussion of how the trial judgment came to be vacated, see GOLDSTEIN, *supra* note 2, at 298–301, and *infra* text accompanying notes 176–186.

43. *See Sale*, 509 U.S. 155.

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announced to everyone, and as my own parents had done, he went off to start his new life in America.<sup>44</sup>

Like so many of the lawyers and law students in the case, I have stayed in touch with some of those Haitians who finally made it to the United States (including Wadson Fortune, who attended the New York Law School symposium). I have seen Guantánamo refugee children grow up to serve in the U.S. armed forces, raise U.S. citizen families, and make extraordinary contributions to American life. Their odysseys always remind me of my own Korean family's journey to citizenship and membership in what Reverend Martin Luther King, Jr. called America's "Beloved Community."<sup>45</sup> I will not forget attending one graduation ceremony for a "Guantánamo graduate" at a high school in Mattapan, Massachusetts. Our former client, now fully Americanized, swaggered across the stage to get his diploma, baggy pants and basketball shoes showing below his graduation robes. Perturbed, the woman sitting next to me muttered: "What on earth will become of that boy?" I touched her arm and said, "Ma'am, I'll bet you that someday, he becomes the Dean of Yale Law School."

### II. LEGAL BLACK HOLES?

The Haitian case asked a simple, chilling legal question: "Are there legal 'black holes,' law-free zones, to which no law applies?" With respect to Guantánamo, in the detention phase of the case, Judge Johnson concluded "no."<sup>46</sup> "If the Due Process Clause does not apply to the detainees at Guantánamo," he wrote, the government "would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin."<sup>47</sup>

But Justice John Paul Stevens' opinion for eight Justices in the Haitian case gave a startlingly different answer: The statutory and treaty obligations of *nonrefoulement* do not apply on the high seas.<sup>48</sup> But if this were literally true, why couldn't refugees

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44. For a more expansive discussion about the months that preceded the Supreme Court's decision, and the difficult conditions faced by refugees held in the Guantánamo camp during that time, see Koh, *Haitian Refugee Litigation*, *supra* note 15, at 12–14.

45. See *The King Philosophy*, KING CTR., <http://www.thekingcenter.org/king-philosophy#sub4> (last visited Nov. 7, 2016) ("The Beloved Community" is a term that was first coined in the early days of the 20th Century by the philosopher-theologian Josiah Royce, who founded the Fellowship of Reconciliation. However, it was Dr. Martin Luther King, Jr., also a member of the Fellowship of Reconciliation, who popularized the term and invested it with a deeper meaning which has captured the imagination of people of goodwill all over the world.").

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

47. *Id.* The court also held that the U.S. government had violated American lawyers' First Amendment rights by denying them access to the Haitians for the purpose of counseling, advocacy, and representation, *id.* at 1040–41, and that the defendants had abused their statutory authority under the Administrative Procedure Act by conducting unauthorized asylum interviews on Guantánamo and denying parole to the screened-in Haitians. *Id.* at 1045–49.

48. *Sale*, 509 U.S. at 158–59.

also be tortured or summarily executed on the high seas without violating human rights law? Clearly troubled by his own ruling, Justice Stevens acknowledged the “moral weight” of the Haitians’ claim.<sup>49</sup> Still, he concluded: “Although the human crisis is compelling, there is no solution to be found in a judicial remedy.”<sup>50</sup>

Justice Blackmun’s powerful dissent replied that the refugee treaty and statute must apply extraterritorially if they were to achieve their object and purpose: that “[v]ulnerable refugees shall not be returned.”<sup>51</sup> If the high seas were truly a black hole, he suggested, the U.S. government could repatriate aliens from the high seas operating outside the law altogether. Choosing a black hole approach thus implicates the profound question of whether we are governed by a rule of law at all.

Although I greatly admire Justice Stevens, I have set forth at length elsewhere why his opinion is full of legal errors.<sup>52</sup> As Justice Blackmun’s dissent carefully chronicles, the majority ignored the text, object, purpose, and negotiating and legislative history of the treaty.<sup>53</sup> The Court began the elevation of a canon of statutory construction—the presumption against extraterritoriality—to near-iconic status.<sup>54</sup> The majority unduly deferred to executive power.<sup>55</sup> And it effectively created a black hole in international refugee law with regard to refugees seized on the high seas.<sup>56</sup>

In the end, the majority reached its result by flatly ignoring the double plain meaning of the statute and treaty, thereby articulating an unprecedented domestic

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49. *Id.* at 178–79.

50. *Id.* at 188 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987)).

51. *Id.* at 190 (Blackmun, J., dissenting).

52. See Koh, *The “Haiti Paradigm,”* *supra* note 4, at 2416–23.

53. *Sale*, 509 U.S. at 188–98 (Blackmun, J., dissenting).

54. See *id.* at 173–88 (majority opinion). The Court’s obsession with the presumption against extraterritoriality has continued. See, e.g., William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687 (2011); William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC’Y INT’L L. PROC. 396 (2011); William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AM. J. INT’L L. 45 (2016); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998); William S. Dodge, *International Comity Run Amok*, JUST SECURITY (Feb. 3, 2015, 9:22 AM), <https://www.justsecurity.org/19640/international-comity-run-amok/>; William S. Dodge, *The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), <http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/>; William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM), [opiniojuris.org/2016/07/01/32658/](http://opiniojuris.org/2016/07/01/32658/); William S. Dodge, *Will Filartiga Survive?*, JUST SECURITY (Sept. 15, 2015, 1:00 PM), <https://www.justsecurity.org/26064/filartiga-survive/>.

55. *Sale*, 509 U.S. at 187–88 (“That presumption [against extraterritoriality] has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.” *Id.* at 188).

56. Mark S. von Sternberg, *Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection*, 2 J. ON MIGRATION & HUM. SECURITY 329, 333 (2014) (“The damage done by the *Sale* decision is difficult to assess. One of its chief effects was to create a legal ‘black hole’ with respect to interdiction on the high seas where there was, according to the court, no law, and hence refugees could have no rights.”).

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rule of “territorial *nonrefoulement*.”<sup>57</sup> Most striking about Justice Stevens’ opinion is its agonized tone,<sup>58</sup> which strongly suggests that he was assigned to write the opinion as the least persuaded Justice.

To learn the backstory of Justice Stevens’ opinion, Mike Wishnie and I dug into the official papers of our late boss, Justice Harry A. Blackmun, now housed at the Library of Congress. In the case file, we found a remarkable memo by the late Justice Antonin Scalia, announcing: “I object to the Court’s mention of the moral weight of the Haitians’ claim. For my taste, that comes too close to acknowledging that it is morally wrong to return these refugees to Haiti, which I do not believe.”<sup>59</sup> Justice Stevens responded: “I think it is undeniable it has *some* moral weight and I think it would be unfortunate for us to imply that we think it may have none.”<sup>60</sup>

But Justice Blackmun did not give up. Shortly after authoring the *Sale* dissent, he essentially invited other global juridical bodies to reconsider the ruling. In a speech to the American Society of International Law, he said: “To allow nations to skirt their solemn treaty obligations and return vulnerable refugees to persecution simply by intercepting them in international waters is . . . to turn the Refugee Convention into a ‘cruel hoax.’”<sup>61</sup> “We perhaps can take some comfort in the fact that although the Supreme Court is the highest court in the land, its rulings are not necessarily the final word on questions of international law.”<sup>62</sup>

More than two decades later, the international legal community seems to have accepted Justice Blackmun’s invitation and rejected the holding of the Haitian case. Other human rights groups pressed arguments similar to those urged by the *Sale* plaintiffs in challenging the U.S. government’s policy before the Inter-American

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57. As Justice Blackmun’s law clerk Andrew Schapiro (later President Obama’s ambassador to the Czech Republic) wrote in his pre-argument bench memo:

The longer I work on this case, the more convinced I become that the Gov[ernment’s] statutory interpretation argument may not even pass the “straight-face” test . . . There is nothing at all ambiguous about the [statutory] language: it clearly and explicitly forbids the Gov[ernment] from returning any alien to his persecutors. Is that what the Gov[ernment] is doing here? Unquestionably. That should be the end of the case, on the merits.

Bench Memorandum from Andrew Schapiro to Justice Harry A. Blackmun 35 (Feb. 27, 1993) (on file with Library of Congress). To hold otherwise, the majority had to assume the impossible:

that Congress did not mean what it said when it ratified a mutually reinforcing statute and treaty: that the negotiating parties intended, through floor debate, to undercut the treaty’s explicit object and purpose and that Congress had enacted universal human rights obligations governing trans-border activities with an exclusively territorial focus.

Koh & Wishnie, *supra* note 1, at 405–06.

58. See *supra* notes 48–49 and accompanying text.

59. Letter from Justice Antonin Scalia to Justice John Paul Stevens 1 (May 20, 1993) (on file with author).

60. Letter from Justice John Paul Stevens to Justice Antonin Scalia 1 (May 20, 1993) (on file with author).

61. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *YALE L.J.* 39, 44 (1994) (citation omitted).

62. *Id.* at 42.

Commission on Human Rights. That body declared: “The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.”<sup>63</sup> The United Nations High Commissioner for Refugees in turn decided that he considered the Court’s decision in the Haitian case a “setback to modern international refugee law,” because “the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders.”<sup>64</sup> Later, in an advisory opinion issued in January 2007, the High Commissioner expressly rejected the Supreme Court’s argument, stating: “UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention.”<sup>65</sup> In stating this conclusion, the High Commissioner followed Justice Blackmun’s dissenting reading of the text and negotiating history of the Refugee Convention.<sup>66</sup>

63. Haitian Ctr. for Human Rights v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 157 (1997); see also *Petitioners Release Resolution of the Inter-American Commission on Human Rights Concerning U.S. Program of Haitian Refugee Interdiction*, 32 I.L.M. 1215 (1993) (discussing Case 10.675).

64. *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215, 1215 (1993).

65. U.N. High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶ 24 n.54 (Jan. 26, 2007), <http://www.refworld.org/pdfid/45f17a1a4.pdf>.

66. The High Commissioner added:

UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.

....

Thus, an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party . . . would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR’s position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State.

*Id.* ¶¶ 24, 43.

Far from being irrelevant to U.S. judicial interpretation, the UNHCR’s interpretation of its own treaty has been found by the U.S. Supreme Court to “provid[e] significant guidance in construing the [1951 Refugee] Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (discussing U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979)).

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In the intervening years, other courts have largely rejected the Haiti case as inconsistent with human rights principles.<sup>67</sup> To be sure, a few national courts have sided with *Salé*<sup>68</sup>: But most courts have prudently taken a different view. In *M70/2011 v Minister for Immigration and Citizenship*, the High Court of Australia ruled that asylum seekers interdicted off of Australia could not be sent to Malaysia for off-shore processing.<sup>69</sup> In *Jamaa v. Italy*, the European Court of Human Rights held that it followed from Italy's "de facto control" over Libyan migrants that the Italian authorities should have known that the migrants would be exposed in Libya to treatment in breach of the European Convention, namely *refoulement* to persecution.<sup>70</sup> The court also held that the Convention's prohibition on collective expulsion applies to removal undertaken outside a state's territory.<sup>71</sup> The European Court similarly ruled in *M.S.S. v. Belgium & Greece*.<sup>72</sup> And a consensus seems to be developing in the European courts that the high seas are not legal black holes. *Medvedyev v. France* ruled in 2010 that "the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system . . . ."<sup>73</sup> In *Khlaifia v. Italy*, the European Court further held that the detention of Libyan migrants on Lampedusa was unlawful because the migrants had not been notified of the reasons for the detention, there was no statutory basis, they were unable to challenge it, and the conditions of the detention facility had diminished their human dignity.<sup>74</sup> In sum, over time the arguments that the Supreme Court's *Salé* ruling rejected have largely prevailed elsewhere.<sup>75</sup>

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67. See *infra* notes 69–75 and accompanying text; see also Koh & Wishnie, *supra* note 1, at 424 ("The Haitian interdiction program was almost uniquely discriminatory, in which the Coast Guard stopped Haitian boats on the high seas pursuant to the 1981 United States–Haiti Accord, a rare agreement that provided no general authority for the Coast Guard to intercept and return refugees from other countries for whom no such accord exists.").
68. These include the UK House of Lords in the *Roma Rights* case, *R v. Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1 (HL) (appeal taken from Eng.), the Federal Court of Australia in the *Tampa* case, *Ruddock v Vadarlis* (2001) 110 FCR 491 (Austl.), and the Spanish Tribunal, Tribunal Supremo, in the 2010 *Marine I* case, S.T.S., Feb. 17, 2010 (J.T.S., No. 833) (Spain).
69. (2011) 244 CLR 144 (Austl.).
70. 2012-II Eur. Ct. H.R. 97.
71. *Id.* ¶¶ 70–82, 186.
72. 2011-I Eur. Ct. H.R. 255 (establishing standards for the treatment of asylum seekers, including an obligation for Member States to ensure that human rights are respected even when transferring an individual to another Member State).
73. 2010-III Eur. Ct. H.R. 259, ¶ 81.
74. App. No. 16483/12, ¶¶ 83–84, 91–94, 135 (Eur. Ct. H.R. Sept. 1, 2015), <http://hudoc.echr.coe.int/eng?i=001-157277>.
75. "These rulings increasingly treat *Salé* as isolated state practice, due little deference, based on an unexplained asymmetry of authority: that somehow, national governments need not take the bitter with the sweet. They can claim a legal right to exercise governmental authority extraterritorially without any accompanying extraterritorial legal constraint." Koh, *supra* note 6.

If the courts have largely rejected the claim that the high seas are a legal black hole, what about Guantánamo? During the Haitian case, Judge Johnson firmly rejected that notion in a ruling later vacated by settlement in order to secure the release of the hostages from Guantánamo.<sup>76</sup> Given that all manner of federal law applies on Guantánamo, from environmental regulation of iguanas to the federal Anti-Slot Machine Act,<sup>77</sup> it would truly be bizarre if the Bill of Rights had no application to human beings who are held in the exact same place.

But less than a year later, a circuit split arose.<sup>78</sup> As the Haitian refugee crisis was winding down, in July 1994, Fidel Castro responded to popular protests by allowing more than 30,000 Cuban refugees to flee toward America on makeshift rafts, relying on longstanding U.S. refugee policy granting asylum (and eventually permanent residence and citizenship) to such individuals under the Cuban Adjustment Act of 1966.<sup>79</sup> In September 1994, pursuant to an unusual accord with Fidel Castro, President Bill Clinton “ordered that illegal refugees from Cuba will not be allowed to enter the United States [and instead] will be taken to our naval base at Guantánamo.”<sup>80</sup> A group of prominent Cuban-American attorneys, again assisted by Yale’s Lowenstein International Human Rights Clinic, sued the Clinton administration in Miami federal court, seeking to enjoin the U.S. government from involuntarily repatriating Guantánamo detainees back to Cuba.<sup>81</sup>

At the hearing on the temporary restraining order, I was stunned to hear a U.S. government lawyer baldly assert that the Cubans who are in safe haven at Guantánamo are *without rights* under our Constitution or any other U.S. laws.<sup>82</sup> So I argued in response that “the basic principles of our government are first, the government is limited [in] its power and second, persons have rights and what you

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76. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92 CV 1258, 1992 WL 155853, at \*6 (E.D.N.Y. Apr. 6) (“Although Guantánamo Naval Base is located in Guantánamo Bay, Cuba, it is subject to the exclusive jurisdiction of the United States pursuant to a lease and treaty agreement. Therefore, the First Amendment is applicable to United States conduct on Guantánamo.”), *aff’d in part, vacated in part*, 969 F.2d 1326, 1340 (2d Cir. 1992) (“The unique facts of this case—namely, the interdiction of plaintiffs by United States officials, the status of the territory upon which they are detained, and the ‘credible’ asylum claim they have already been found to possess—lead us to believe that the district court properly issued a preliminary injunction upon finding that there were serious questions going to the merits of the ‘screened in’ plaintiffs’ fifth amendment claims.”), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

77. 15 U.S.C. § 1175 (2012); *Installation of Slot Machs. on U.S. Naval Base, Guantánamo Bay*, 6 Op. O.L.C. 236, 242 (1982); Transcript of Oral Argument at 52, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (statement of Souter, J.) (“We even protect the Cuban iguana.”).

78. See *infra* note 86 and accompanying text.

79. Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2012)); Koh & Wishnie, *supra* note 1, at 417.

80. The President’s News Conference, 30 WEEKLY COMP. PRES. DOC. 1682, 1683 (Aug. 19, 1994).

81. *CABA v. Christopher*, No. 94-2183-CIV-ATKINS (S.D. Fla. Oct. 24, 1994). I served as counsel of record for the Cuban detainees in the *CABA* case.

82. Transcript of Hearing at R5:27-73, *CABA v. Christopher*, No. 94-2183-CIV-ATKINS (S.D. Fla. Oct. 26, 1994).

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heard today is that the government has limitless power and these people have no rights and that cannot be the law.”<sup>83</sup> Although the trial judge similarly rejected the government’s claims,<sup>84</sup> in *Cuban American Bar Ass’n (CABA) v. Christopher*, the Eleventh Circuit reversed, holding that “these [Cuban and Haitian] migrants are without legal rights that are cognizable in the courts of the United States.”<sup>85</sup> In so holding, the Eleventh Circuit expressly parted from the Second Circuit’s reasoning regarding the legal rights of noncitizens detained at Guantánamo.<sup>86</sup> Yet read literally, the Eleventh Circuit’s ruling that “the First Amendment does not apply to the migrants or to the lawyers at Guantánamo Bay”<sup>87</sup> would permit the U.S. government to bar American citizens on Guantánamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, and to punish Americans on Guantánamo for writing open letters, criticizing the president, or even engaging in religious worship.<sup>88</sup>

In contrast, the Haitian rulings acknowledged that “although Guantánamo Bay Naval Base lies outside the formal borders of the United States, in all other senses, it

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83. When I stood up, I said:

We hold these truths to be self-evident that all men are born with certain inalienable rights including [that] no person shall be deprived of life, liberty, or property without due process of law. It doesn’t say no citizen[,] it says no person and Congress shall make no law abridging the freedom of speech, the executive branch shall not . . . even at the request of Fidel Castro limit or abridge the freedom of speech of U.S. citizens who are trying to convey a viewpoint. Your honor, the basic principles of our government are first, the government is limited [in] its power and second, [that] persons have rights and what you heard today is that the government has limitless power and these people have no rights and that cannot be the law. And if they say to you that’s not your job, I would say to you, Your Honor, that’s exactly your job. Government power flows from the Constitution and can’t be exercised in violation of the Constitution so, all you have to do, Your Honor, is, do your job, which is not to tell them what they must do, but to tell them what they may not do: [namely,] violate the Constitution laws of the United States.

*Id.*; *CABA v. Christopher: 20th Anniversary of the Cuban Rafters in Guantánamo*, U. MIAMI LIBR.: MEDIASPACE, at 1:07:28 (Feb. 16, 2015), [https://umiami.mediaspace.kaltura.com/media/CABA+v.+ChristopherA+20th+Anniversary+of+the+Cuban+Rafters+in+Guantanamo/1\\_3qtht2dp/24745431](https://umiami.mediaspace.kaltura.com/media/CABA+v.+ChristopherA+20th+Anniversary+of+the+Cuban+Rafters+in+Guantanamo/1_3qtht2dp/24745431) (reciting this part of the hearing transcript).

84. See *CABA v. Christopher*, 43 F.3d 1412, 1420 (11th Cir. 1995) (citing Order Granting Plaintiffs’ Emergency Motion for Temporary Restraining Order, *CABA v. Christopher*, No. 94-2183-CIV-ATKINS (S.D. Fla. Oct. 31, 1994)).

85. *Id.* at 1430.

86. Compare *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (affirming the preliminary injunction because plaintiffs were likely to succeed on their constitutional claims), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), with *CABA*, 43 F.3d 1412 (denying that Cuban and Haitian migrants have rights).

87. *CABA*, 43 F.3d at 1429.

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

'feels' like America."<sup>89</sup> Over time, thousands of foreign nationals have been employed as laborers at Guantánamo—including Cubans, Jamaicans, and Filipinos—who would be left without legal recourse by the Eleventh Circuit's ruling.<sup>90</sup>

In effect, the *CABA* case ruling by the Eleventh Circuit invited the U.S. government to establish an offshore "rights-free zone" on Guantánamo. Although American detention camps are not a new phenomena, especially for refugees, after the *CABA* case, the probability grew that Guantánamo would be used as a long-term offshore detention facility, and treated as a legal black hole.<sup>91</sup> Throughout the 1990s, the U.S. government repeatedly used Guantánamo as a holding center for thousands of asylum seekers captured at sea from Haiti, Cuba, and even China.<sup>92</sup> In the spring of 1999, during the Kosovo Crisis, the Clinton administration briefly considered placing 20,000 Kosovar refugees on Guantánamo.<sup>93</sup> The administration ultimately

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89. Koh & Wishnie, *supra* note 1, at 418. "The United States provides the only law and is accountable there only to itself. Of all the U.S. overseas military bases, only Guantánamo lacks a Status of Forces Agreement that defines the allocation of civil and criminal jurisdiction over military and other personnel." *Id.* at 418–19; see also Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel*, ORLANDO SENTINEL, Dec. 22, 2003, at A1 (describing how Guantánamo has "assumed the look and feel of smalltown America"). "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities." Wayne S. Smith, *The Base from the U.S. Perspective*, in SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 97, 98–99 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988). In 2003, the base commander described it as "small-town America." Carol Rosenberg, *New Chief Brings Guantánamo up to Date*, MIAMI HERALD, Oct. 25, 2003, at 15A. There were detention facilities "hidden away in a restricted area, behind armed checkpoints, several ridgelines from downtown." Brown, *supra*. See generally CHRISTINA M. FROHOCK, SMALL-TOWN GTMO (2016).
90. Koh & Wishnie, *supra* note 1, at 419 (citing Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans*, COM. APPEAL (Memphis), Feb. 1, 2002, at A7 (noting presence of 1,000 foreign workers); *Filipino Residents Register to Vote*, 63 GUANTÁNAMO BAY GAZETTE 4 (2006) (noting that 700 Philippine nationals on Guantánamo registered to vote in their home country)). As I noted in an earlier work: "Historically, the parallel judicial treatment of the Panama Canal Zone and the Trust Territory of the Pacific Islands—both non-sovereign territories under the complete jurisdiction and control of the United States—also recognized the application of fundamental constitutional rights to foreign nationals within those territories." Koh & Wishnie, *supra* note 1, at 419. For a definitive account of these historical precedents, see Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 15–34 (2004).
91. Such camps include the infamous World War II internment camps into which more than 110,000 Japanese-Americans were relocated and detained. See Koh & Wishnie, *supra* note 1, at 419 n.136 (citing PETER IRONS, *JUSTICE AT WAR* (1983)). In the mid-1970s, the U.S. government employed several military bases within the United States as sites for emergency housing, processing, and resettlement of thousands of refugees fleeing Vietnam. *Id.* The 1980 Mariel "Freedom Flotilla" brought 125,000 Cubans to the United States. *Id.* (citing Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Federal Crisis Management*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1983)). Since the late 1980s, the INS has detained thousands of Central American refugees in border facilities and tent-shelters in rural areas in Arizona, California, South Texas, as well as in federal detention facilities in Louisiana and Florida. *Id.* (citing Koh, *Refugee Camps*, *supra* note 4, at 140).
92. See, e.g., *United States v. Li*, 206 F.3d 56, 69 n.1 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part) (noting the government's use of Guantánamo as an interim detention center for interdicted Chinese). I should disclose that during that period, I represented pro bono a Chinese refugee brought to Guantánamo on the Golden Venture.
93. Koh & Wishnie, *supra* note 1, at 419–20.

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withdrew the plan, largely on the basis of opposition from those of us working in the U.S. government who had lived through the Haitian refugee debacle.<sup>94</sup> In the early days of the Bush administration, the Justice Department's Office of Legal Counsel presciently concluded, after a review of existing case law, that "[a] detainee could make a non-frivolous argument that [habeas] jurisdiction does exist over aliens detained at [Guantánamo Bay, Cuba], and we have found no decisions that clearly foreclose the existence of habeas jurisdiction there."<sup>95</sup>

Still, soon after the terrorist attacks of September 11, 2001, President George W. Bush chose to bring more than 700 alleged Al Qaeda detainees held in Afghanistan to Guantánamo, with no apparent exit strategy.<sup>96</sup> Guantánamo then became a subject of heated international debate about America's commitment to human rights.<sup>97</sup> Many of the lawyers who first learned of Guantánamo during the original Haitian cases stepped forward to protest the post-9/11 use of Guantánamo.<sup>98</sup>

In three plenary cases regarding such detainees that went to the U.S. Supreme Court, the Bush administration unsuccessfully denied that noncitizen detainees have meaningful legal rights on Guantánamo.<sup>99</sup> In 2002, when the Bush administration started bringing Al Qaeda detainees to Guantánamo, Michael Ratner filed *Rasul v. Bush*, the first lawsuit challenging President Bush's wartime detentions on Guantánamo.<sup>100</sup> In 2004, the Supreme Court ruled for the detainees, holding that noncitizen detainees on Guantánamo have a right to file statutory writs of habeas corpus to challenge their detention.<sup>101</sup> Writing for the *Rasul* Court, Justice Stevens stated that "the United States exercises exclusive jurisdiction and control" at Guantánamo.<sup>102</sup> In his concurring opinion, Justice Anthony Kennedy agreed that

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94. *Id.*; Philip Shenon, *U.S. Chooses Guantánamo Bay Base in Cuba for Refugee Site*, N.Y. TIMES (Apr. 7, 1999), <http://www.nytimes.com/1999/04/07/world/crisis-balkans-haven-us-chooses-guantanamo-bay-base-cuba-for-refugee-site.html>.

95. Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'ys Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba 1 (Dec. 28, 2001).

96. Koh & Wishnie, *supra* note 1, at 420; *see, e.g.*, Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 267 (2004).

97. Koh & Wishnie, *supra* note 1, at 420. For arguments opposed to the U.S. detention policy in Guantánamo, *see* JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); MICHAEL RATNER & ELLEN RAY, *GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW* (2004); and DAVID ROSE, *GUANTÁNAMO: THE WAR ON HUMAN RIGHTS* (2004).

98. This group included Michael Ratner, Lucas Guttentag of the ACLU, Professors Sarah Cleveland of Columbia, Mike Wishnie and myself from Yale, Gerry Neuman of Harvard, and many others.

99. Koh & Wishnie, *supra* note 1, at 420–22 (discussing *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Rasul v. Bush*, 542 U.S. 466 (2004)).

100. *See* Cole, *supra* note 9.

101. *Rasul*, 542 U.S. 466. I served as counsel on an amicus brief filed in support of the detainees in *Rasul*. *See* Brief Amici Curiae of Former U.S. Gov't Officials in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96757.

102. *Rasul*, 542 U.S. at 476.

“Guantánamo Bay is in every practical respect a United States territory.”<sup>103</sup> And Justice Stevens ruled that the presumption against extraterritoriality of U.S. law did not apply at Guantánamo because petitioners were being “detained within ‘the territorial jurisdiction’ of the United States.”<sup>104</sup> Thus, the Supreme Court, led, ironically, by the Justice who had authored the direct return decision against the Haitian boat people, had finally ruled that noncitizen detainees do in fact have legal rights on Guantánamo.

Two years later, the Court decided *Hamdan v. Rumsfeld*,<sup>105</sup> and again ruled, on jurisdiction and on the merits, in favor of an alleged “enemy combatant” held at Guantánamo.<sup>106</sup> The *Hamdan* Court rejected the administration’s effort to characterize Hamdan as a person outside the law, following its insistence in *Rasul*<sup>107</sup> that Guantánamo must be treated as a place subject to law.<sup>108</sup> *Hamdan* flatly denied that Hamdan’s detention on Guantánamo rendered him a person held in an extralegal zone, who could be subjected to the jurisdiction of a noncourt military commission.<sup>109</sup> While acknowledging that Hamdan might have committed serious crimes, the Court declared, “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.”<sup>110</sup> Thus, the Court rebuffed the government’s core premise that 9/11 had created a black hole requiring that ordinary legal rules be jettisoned in Hamdan’s case.<sup>111</sup>

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103. *Id.* at 487 (Kennedy, J., concurring in the judgment).

104. *Id.* at 480 (majority opinion) (citation omitted).

105. 548 U.S. 557 (2006).

106. Koh & Wishnie, *supra* note 1, at 421. Justice Stevens, again writing for the Court, “found the President’s Nov. 2001 Military Commissions Order unauthorized by either his constitutional Commander-in-Chief power or the September 2001 Authorization of Use of Military Force Resolution.” *Id.* The Court also “ruled that the Order violated the Uniform Code of Military Justice . . . , which calls for military commissions to be [as similar as] ‘practicable’” to statutory courts-martial “and Common Article 3 of the Geneva Conventions of 1949, which set minimum universal standards for treatment of detainees, including trials before ‘regularly constituted courts.’” *Id.*

107. *Rasul*, 542 U.S. 466. The Court refused to accept the Bush administration’s extreme claim regarding the authority of the Executive under the Constitution and invalidated a military proceeding against a noncitizen detainee on Guantánamo as unauthorized by law, calling President Bush’s military commission an “extraordinary measure raising important questions about the balance of powers in our constitutional structure.” *Hamdan*, 548 U.S. at 567.

108. Koh & Wishnie, *supra* note 1, at 421.

109. *Hamdan*, 548 U.S. at 574–76.

110. *Id.* at 635.

111. Koh & Wishnie, *supra* note 1, at 421. Justice Kennedy stated in concurrence, “a case that may be of extraordinary importance is resolved by ordinary rules,” *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring in part), and described the most relevant rules as “those pertaining to the authority of Congress and the interpretation of its enactments.” *Id.* He argued that “[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.” *Id.*; Koh & Wishnie, *supra*, at 421 n.150.

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Following the Court's decision in *Hamdan*, Congress quickly passed the Military Commissions Act of 2006 (MCA),<sup>112</sup> which renewed the President's authority to try "alien unlawful combatants," including those held on Guantánamo, before military commissions.<sup>113</sup> But in *Boumediene v. Bush*, the Supreme Court again ruled against the government, acknowledging the long history of judicial precedent regarding Guantánamo, and holding that fundamental constitutional limitations, particularly the Suspension Clause, apply to foreign nationals detained there.<sup>114</sup> Writing for the Court, Justice Kennedy definitively rejected the notion that Guantánamo is a black hole.<sup>115</sup> If noncitizens would have a constitutional right to the writ of habeas corpus only on the sovereign territory of the United States, he wrote, it would effectively grant the political branches "the power to switch the Constitution on or off at will," depending on where noncitizen detainees were moved.<sup>116</sup> Instead applying a "functional approach" based on "practical concerns, not formalism,"<sup>117</sup> Justice Kennedy reasoned that provisions of the Bill of Rights—such as the Suspension Clause—should apply to Guantánamo unless it was proved "impracticable or anomalous" to apply them.<sup>118</sup> Going forward, then, Guantánamo cannot be a legal black hole; instead, *Boumediene's* "impractical or anomalous" test should determine which constitutional rights aliens should enjoy there.

The Supreme Court's ruling territorially limiting an apparently universal human rights treaty, namely the Refugee Convention, raised a further question: whether such an "extraterritorial black hole" would apply to other universal human rights treaties. Two decades later, I again faced this issue during my time as Legal Adviser of the State Department during the Obama administration. Although the United States had ratified the Convention Against Torture (CAT or "Torture Convention") more than twenty years earlier, when asked in 2006 if all provisions of the torture treaty applied without exception, the Bush administration had answered, in effect, "no, some provisions do not apply either outside U.S. territory or in times of armed conflict."<sup>119</sup> As Charlie Savage of the *New York Times* recounts, when I left the State

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112. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

113. Koh & Wishnie, *supra* note 1, at 422. The MCA provides that  
[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(1) (2012).

114. 553 U.S. 723, 770–71 (2008).

115. *See id.* at 771.

116. *Id.* at 765.

117. *Id.* at 726–27.

118. *Id.* at 770.

119. Harold Hongju Koh, *America's "Unequivocal Yes" to the Torture Ban*, JUST SECURITY (Nov. 18, 2014, 9:52 AM), <https://www.justsecurity.org/17551/americas-unequivocal-yes-torture-ban/>.

Department in January 2013, I left behind two detailed memorandum opinions that challenged that conclusion.<sup>120</sup> Those opinions explained why, notwithstanding the Haitian refugee case, both the Torture Convention and the International Covenant for Civil and Political Rights (ICCPR) have extraterritorial application.<sup>121</sup> In preparing these detailed opinions, which amounted to more than 140 single-spaced pages, I worked closely with another member of Team Haiti, my counselor on international law, Sarah Cleveland (now a Columbia Law Professor and U.S. member on the Human Rights Committee of the ICCPR).

My Torture Convention opinion unequivocally declared that it simply was “not legally available to policymakers” to claim that the CAT did not apply outside the United States.<sup>122</sup> Yet the internal debate on this question within the administration continued for another two years, and the United States declined to change its position regarding the territorial application of the ICCPR.

But happily, in 2014, the Obama administration finally embraced the universal prohibition of torture in its presentation before the Committee Against Torture in Geneva. Assistant Secretary of State for Democracy, Human Rights, and Labor, Tom Malinowski, stated that the torture ban applies “in all places, at all times, with no exceptions.”<sup>123</sup> My former principal deputy, then Acting Legal Adviser for the U.S. Department of State, Mary McLeod, echoed the same notion, now embedded into U.S. law.<sup>124</sup> The Obama administration finally answered, as a legal matter, that: “There should be no doubt, the United States affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times in all places, and we remain resolute in our adherence to these prohibitions.”<sup>125</sup> So while in the Haitian refugee case, we could not close by judicial decision a black hole in the Refugee Convention, decades later, we succeeded in closing a parallel gap in the Torture Convention by executive interpretation. The United States finally

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120. Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES, Mar. 7, 2014, at A6; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict (Jan. 21, 2013) [hereinafter Koh, CAT Memo]; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010) [hereinafter Koh, ICCPR Memo].

121. Savage, *supra* note 120; Koh, CAT Memo, *supra* note 120; Koh, ICCPR Memo, *supra* note 120.

122. Koh, CAT Memo, *supra* note 120, at 6. When I left the State Department, I left behind a second memorandum that argued that the ICCPR also applied extraterritorially. Koh, ICCPR Memo, *supra* note 120; *see also* Savage, *supra* note 120; Marko Milanovic, *Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, EJIL: TALK! (Mar. 7, 2014), <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/>.

123. Tom Malinowski, Assistant Sec’y of State for Democracy, Human Rights, and Labor, U.S. Dep’t of State, Opening Statement Before the Committee Against Torture (Nov. 12–13, 2014).

124. Mary E. McLeod, Acting Legal Adviser, U.S. Dep’t of State, Opening Statement Before the Committee Against Torture (Nov. 12–13, 2014).

125. *Id.*

acknowledged, with regard to torture, that a human rights treaty applies anywhere under U.S. governmental authority, including Guantánamo.

Nor, finally, is there a black hole in these treaties to exempt counterterrorism or armed conflict situations. For legal purposes, it does not matter that Al Qaeda or other terrorist groups have not signed the Torture Conventions or the Geneva Conventions. I recall one meeting I had about ten years ago with a senator who said, “Professor, the last time I checked, Al Qaeda hadn’t signed either the Torture Convention or the Geneva Conventions.” I told him, “Senator, the last time I checked, the whales hadn’t signed the Whaling Convention either!”<sup>126</sup> My point was that this is not about contract or bilateral agreement, but rather, about the minimal standards of humane treatment we must obey unilaterally, whether or not there is a written agreement. Whether or not we are fighting terrorists, and whether or not the terrorists agree to follow it, the norm of humane treatment binds us, as a defining element of our national identity. Senator John McCain put it well when he said, “it’s not about them; it’s about us.”<sup>127</sup> America’s president-elect has recently argued that our government should return to waterboarding or “a hell of a lot worse than waterboarding.”<sup>128</sup> But to be clear: The Torture Convention expressly says that torture may not be justified by a state of war or a threat of war and that all acts of torture, wherever they can occur, must be criminalized.<sup>129</sup> So to return to “worse than waterboarding” would be illegal behavior, and if an elected president ordered it, after taking an oath to uphold the Constitution and laws of the United States, that order would probably constitute a high crime and misdemeanor, and hence, an impeachable offense.<sup>130</sup>

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126. I later repeated this point in my Senate testimony. *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 51 (2006) (statement of Harold Hongju Koh, Dean, Yale Law School) (“Some have said, well, terrorists have not signed Common Article 3. Well, whales have not signed the Whaling Convention. But it is about how we treat them and how we are obliged to treat them.”).

127. Foster Klug, *McCain: Torture Ban Protects U.S. Image*, WASH. POST (Nov. 14, 2005, 7:10 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111400247.html>.

128. Tom McCarthy, *Donald Trump: I’d Bring Back ‘a Hell of a Lot Worse Than Waterboarding,’* GUARDIAN (Feb. 7, 2016, 6:57 AM), <https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture>. Mr. Trump reaffirmed the sentiment months later. See Andrea Germanos, *Donald Trump Vows Torture (Again): ‘I Like Waterboarding a Lot,’* COMMON DREAMS (June 29, 2016), <http://www.commondreams.org/news/2016/06/29/donald-trump-vows-torture-again-i-waterboarding-lot>.

129. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 112.

130. U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); *Al Shimari v. CACI Premier Tech., Inc.*, No. 15-1831, 2016 WL 6135246, at \*10 (4th Cir. Oct. 21, 2016) (Floyd, J., concurring) (“While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful. . . . The fact that the President—let alone a significantly inferior executive officer—opines that certain conduct is lawful does not determine the actual lawfulness of that conduct. The determination of specific violations of law is constitutionally committed to the courts,

Nor does the United States' revised reading of the Torture Convention suggest that the existence of armed conflict creates a legal black hole for human rights treaties.<sup>131</sup> The George W. Bush administration had "articulated a complete displacement theory of *lex specialis*, taking the position that international humanitarian law (IHL) entirely displaced operation of the CAT in situations where IHL applies."<sup>132</sup> Under this theory, the Torture Convention's substantive provisions would not apply to U.S. activities in armed conflict, and the CAT Committee would have no jurisdiction to examine such activities.<sup>133</sup> Combined with the Bush administration's position that certain Torture Convention provisions did not apply extraterritorially, this position doubly insulated U.S. government activities outside the United States, including on Guantánamo, from CAT Committee oversight.<sup>134</sup> But the State Department's Acting Legal Adviser, Mary McLeod, revised this position for the government, responding to a question from the Committee by saying,

[T]he clear position of the United States is that torture and cruel, inhuman and degrading treatment or punishment are legally prohibited everywhere and at all times. *There can also be no question that these prohibitions continue to apply even when the United States is engaged in armed conflict.* These prohibitions exist under domestic and international law, including human rights law and the Law of Armed Conflict.<sup>135</sup>

Acting Legal Adviser McLeod stated: "Whether you are looking at human rights law or the [Law of Armed Conflict], the prohibition against torture and cruel treatment is categorical. There are no gaps."<sup>136</sup> By so saying, the Obama delegation explicitly changed the U.S. government's official position, pushed the Bush administration position aside, and made progress toward recognizing the application of the treaty both extraterritorially and in armed conflict.

In sum, since the Haitian refugee case, the United States had generally argued for strict territoriality in human rights treaties, without regard to their substance, while the rest of the world—without reaching consensus on what the precise legal test for geographic scope should be—had uniformly acknowledged some kind of extraterritorial reach for those same treaties. This stark difference in legal views had left the United States increasingly isolated from the rest of the human rights world.

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even if that law touches military affairs."); see also Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1148, 1156 (2006).

131. See Sarah Cleveland, *The United States and the Torture Convention, Part II: Armed Conflict*, JUST SECURITY (Nov. 19, 2014, 9:30 AM), <https://www.justsecurity.org/17581/united-states-torture-convention-armed-conflict/>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *CAT 53rd Session—United States of America*, UN TREATY BODY WEBCAST, at 16:38 (Nov. 12, 2014), [http://www.treatybodywebcast.org/cat-53rd-session-united-states-of-america/#podPressPlayerSpace\\_3](http://www.treatybodywebcast.org/cat-53rd-session-united-states-of-america/#podPressPlayerSpace_3) (emphasis added), quoted in Cleveland, *supra* note 131 (emphasis added).

136. Cleveland, *supra* note 131.

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The 2015 CAT presentation marked the first time in more than two decades that the United States had moved away from a strict territorial reading of a human rights treaty. Now that the United States has finally joined the rest of the world in acknowledging that *some* human rights treaty obligations must extend beyond our shores, we can finally engage with our treaty partners to seek consensus, with respect to our various human rights treaty obligations, on what the most legally correct interpretation of that geographic scope should be.<sup>137</sup> That engagement should lead to a sounder, more durable relationship between the United States and the rest of the international human rights system.

Stepping back a quarter century after the Haitian refugee case, what is today's report card on legal black holes? Despite the Haitian refugee case, the high seas are not a black hole. Guantánamo is not a black hole. The Torture Convention does apply extraterritorially, as well as to terrorists, and in situations of armed conflict. Obviously, there is more work to be done. But after a quarter century, that's not really such a bad report card after all.

### III. TRANSNATIONALISM AND TRANSNATIONAL LEGAL PROCESS

What is the Haiti case's legacy for transnationalism? One commentator has called "transnational legal theory" "the dominant theory of international law" since the 1990s.<sup>138</sup> The same commentator traces the rise of that theory to the Haitian refugee case.<sup>139</sup> He continues:

This theory combines a descriptive account of the nature and function of international law with a normative account of its justification. Descriptively, the fundamental move of transnationalism is to collapse the traditional distinction between domestic and international law. Normatively, transnationalism's basic tenet is that collapsing this distinction is desirable.

Transnationalism appeared with the end of the Cold War and to some extent partook in optimism about the "end of history." Its normative vision focuses on the enforcement of human rights. This focus has been important

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137. As Sarah Cleveland noted, the Bush "complete displacement" theory has finally been discarded:

Taken together, these various statements make clear that the U.S. is articulating a new and much narrower approach: CAT obligations "*remain applicable* in times of armed conflict and are *reinforced* by complementary prohibitions in the [Law of Armed Conflict]," and although "the more specialized laws of war . . . take precedence over the Convention *where the two conflict*, the laws of war *do not generally displace the Convention's application*." The United States therefore articulated a welcome and substantially refined vision of the relationship between IHL and the CAT, in which the terms of the CAT presumptively *apply*, except in the quite specific case of an express conflict between IHL and a particular CAT provision.

*Id.* (alteration in original) (citation omitted).

138. Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 HARV. INT'L L.J. 315, 315 (2013).

139. "For better or worse, Haiti provided a paradigm for international law in the next two decades. The model of law that came out of the Haiti affair, combining bilateral relations, a treaty, and a domestic court, later migrated outside of the United States." *Id.* at 328.

not only in producing scholarly insight but also in framing human rights policy considerations by governments.<sup>140</sup>

Conceptually, the notion of transnationalist law breaks into “transnational legal process”—the legal process of interaction, interpretation, and rule-internalization that breeds hybrid international-domestic law rules<sup>141</sup>—and “transnational legal substance,” the hybrid rules of law that emerge from that process. For several decades, I have argued that this transnational legal process enforces human rights law by creating pressure on nations that flout international law rules to come back into compliance with those rules over time. Because law-abiding states incorporate international law into their domestic legal and political structures, over time international law becomes an internal constraint.<sup>142</sup> Compliance becomes the political path of least resistance.<sup>143</sup> Thus, when a state violates international law, such violation creates frictions and contradictions that restrict and limit the state’s ongoing participation in the transnational legal process.<sup>144</sup> Transnational public lawsuits of the Haitian refugee litigation kind are designed to provoke judicial action that will create such frictions, helping to shift the normative direction of governmental policies toward legality.<sup>145</sup>

The aftermath of the Haitian case arguably proves this thesis. One legacy of the Haitian case was that the 205 HIV-positive Guantánamo detainees won, although as discussed further below, we traded away the judicial precedent in our favor as the price of settlement. Another legacy is that the boat people lost, but additional testing of the Supreme Court’s normative outcomes in other parts of the world have yielded a different governing rule that closed black holes elsewhere.<sup>146</sup> Despite the nationalism of the U.S. Supreme Court, the Haitian case gave new energy to transnational legal process by suggesting, as Justice Blackmun did, that the domestic court’s “rulings are not necessarily the final word on questions of international law.”<sup>147</sup> Put another way, “don’t get mad, litigate!”

The Supreme Court’s adverse Haitian ruling did not end, but rather, motivated the transnational legal process toward closing black holes that I have elsewhere described: It forced advocates to gain more legal and factual knowledge, to assemble transnational legal and advocacy networks to relitigate the same issue elsewhere, to argue in favor of a better norm, to search for better law-declaring fora, and to seek issue linkages and strategies of bureaucratic compliance that would promote

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140. *Id.* at 315–16 (footnotes omitted).

141. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997); see also Harold Hongju Koh, *Why Transnational Law Matters*, 24 *PENN ST. INT’L L. REV.* 745 (2006).

142. See Harold Hongju Koh, *Transnational Legal Process*, *supra* note 15, at 204.

143. *Id.*

144. *Id.* at 207.

145. *Id.*

146. See discussion *supra* Part II, pp. 15–19.

147. Blackmun, *supra* note 61, at 42.

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internalization of those norms over time.<sup>148</sup> While the migration of Haitian refugees into the United States led governments to seek new ways to create legal black holes, it equally inspired a generation of law students and human rights advocates to keep those black holes closed.<sup>149</sup> It did so by giving them legal arguments, strategic tools, and process insights that have helped them counter those arguments in other parts of the world.<sup>150</sup>

A shorthand term for the strategy that human rights advocates and scholars pursued during and since the Haitian refugee case is “LawFAIR.”<sup>151</sup> LawFAIR stands for “(1) crystallizing *Lawful* norms, claims, and precedent, before (2) a receptive *Forum*, aided by (3) coalitions that cleverly combine *Assets and Allies*; as well as (4) [creating] *Issue Linkages* between the human rights claim and related issues affecting the adversary, all in search of (5) achievable *Remedies and Relief*.”<sup>152</sup> What the Haitian refugee case teaches, looking back, is that well-crafted LawFAIR strategies may entail more than political compromises.<sup>153</sup> If committed advocates persist long enough, the better legal position should ultimately prevail. The international rulings reviewed above show that over the course of several decades, decisions by the highest national court “are no longer final stops, but only way stations, in the process of ‘complex enforcement’ triggered by transnational public law litigation.”<sup>154</sup> “European civil rights litigants have long understood that adverse national court decisions may be ‘appealed’ to and even ‘reversed’ by the European Court of Human Rights” or the Court of Justice of the European Union.<sup>155</sup>

Thus, all nations that regularly participate in transnational legal interactions will eventually come into greater compliance with international law.<sup>156</sup> Through this complex transnational legal process of rational self-interest and norm internalization—

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148. See Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998).

149. Koh, *supra* note 6.

150. *Id.*

151. By so saying, I describe a desirable human-rights promoting practice that is distinct from the pejorative term “Lawfare,” sometimes used by opponents of human rights litigation to describe advocacy efforts to require actors in wartime to follow norms of human rights and humanitarian law.

152. Koh, *supra* note 6.

153. *Id.* (“Advocates may learn the lessons of ‘repeat play’ to deploy tools of process to harness politics and promote global policies based on better human rights principle.”). *But see* Mann, *supra* note 138, at 365 (arguing that transnational legal process solutions tend to lead to political compromises, instead of clean human rights results).

154. See Koh, *The “Haiti Paradigm,” supra* note 4, at 2406; see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 263–64 (2d ed. 1993) (describing the European Court’s decision in the *Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) (1979), in which the European Court issued a ruling in favor of the Sunday Times, despite eight out of eleven English judges having ruled against the newspaper at various stages of the litigation)).

155. Koh, *The “Haiti Paradigm,” supra* note 4, at 2406.

156. See *id.* One implication of this argument is that “hermit nations,” rogue nations like North Korea, Cuba, and Burma, must be engaged and brought into the transnational legal process to socialize them into the processes of international law observance. See generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING*

spurred by transnational litigation—international legal norms become entrenched in domestic legal and political processes.<sup>157</sup> In this way, international law influences how national governments manage international relations.<sup>158</sup>

Closer to home, the Haitian case exposes an ongoing struggle within our Supreme Court between a group of Justices I call the “transnationalists” and another group of “nationalist” Justices. These groups exhibit very different judicial philosophies in their attitudes toward the world. As I have elsewhere enumerated:

- Transnationalist judges tend to look to U.S. interdependence, whereas nationalist judges tend to look to U.S. autonomy.
- Transnationalist judges tend to think about how U.S. law fits into a framework of transnational law, while nationalists see a rigid foreign and domestic divide.
- Transnationalist judges think that courts can domesticate international law, whereas nationalists think that only the political branches are legally empowered to do so.
- Transnationalist judges look to the development of a global legal system, while nationalists tend to focus more narrowly on the development of a national legal system.
- Transnationalist judges believe that executive power can be constrained by comity [doctrines and] courts, while nationalists believe acts of executive discretion should enjoy great deference.<sup>159</sup>

The strong and enduring transnational tradition in American jurisprudence runs through Chief Justices John Marshall and John Jay, who arguably wrote as many opinions about international as about domestic law; through Justice Horace Gray, who wrote the classic cases of the *Paquete Habana*<sup>160</sup> and *Hilton v. Guyot*;<sup>161</sup> through Chief Justices Melville Fuller and William Howard Taft, who helped to found the American Society of International Law; through Justice William O. Douglas, who traveled the world to an extent unmatched by any Justice in our history; through Justice William J. Brennan, Jr., the strongest internationalist on the Warren Court,

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STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013) (discussing how to encourage states to respect human rights through the transnational legal process).

157. Koh, *The “Haiti Paradigm,” supra* note 4, at 2406; Harold Hongju Koh, *International Law and International Relations: The State of the Dialogue* (1994) (unpublished manuscript) (on file with author) (expanding on the assertion made here); *see also* Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993) (providing a study of compliance issues).

158. *See* Koh, *The “Haiti Paradigm,” supra* note 4, at 2406; *see also* Chayes & Chayes, *supra* note 157, at 187.

159. Harold Hongju Koh & William Michael Treanor, *A Community of Reason and Rights*, 77 FORDHAM L. REV. 583, 596 (2008); *see also* HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 247–48 (2008) (discussing transnational jurisprudence).

160. 175 U.S. 677 (1900).

161. 159 U.S. 113 (1895).

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and Justice Byron White, who wrote the stirring transnationalist dissent in *Banco Nacional de Cuba v. Sabbatino*;<sup>162</sup> through the leader of transnationalism on the Burger Court, my old boss Harry A. Blackmun, who wrote the prescient dissent in the Haitian refugee case.<sup>163</sup> Today, Justice Stephen Breyer, in his judicial writings and recent book, *The Court and the World*,<sup>164</sup> has taken the lead among the current Justices on the Roberts Court in paying the “decent respect to the opinions of mankind” that our Declaration of Independence called for in 1776.<sup>165</sup>

Through the early days of the Roberts Court, as in so many other public law areas, the Justices generally split 4–1–4 on transnational issues, with Justice Kennedy providing the swing vote. But with the passing of Justice Antonin Scalia (and the obstructed nomination of Chief Judge Merrick Garland to fill his seat), it remains unclear in which direction our own Court will now move. At this writing, it can only be predicted that the Court’s future will depend critically upon who the forty-fifth president manages to seat on the Court. While the surprise election of Donald Trump leaves many questions unanswered, and a long way to go before his influence on the Court’s composition is fully felt, the Court now seems most likely to move in a more nationalist direction.

### IV. THE HAITI CASE AND THE EVOLUTION OF CIVIL PROCEDURE

The Haitian refugee litigation also signaled the twenty-first century evolution of Civil Procedure, now expressed through three different notions of adjudication: private, public, and transnational.<sup>166</sup> In first-year Civil Procedure class, we have traditionally studied the private law adjudication that characterized a simpler world, dominated by bipolar, adversarial, private law adjudication based on private claims, simple party structures, and passive judicial decisionmakers who focus less on announcing broad statements of public principle, than on resolving disputes of little public consequence by awarding retrospective damages.<sup>167</sup>

But over the last quarter-century, the world of Procedure has been buffeted by rapid changes in technology, the rise of interest group politics, regulation and the administrative state, the pervasiveness of alternative dispute resolution and the globalization of markets, rights, and communication. These changes have given rise to two newer types of complex litigation.

The first is domestic “public law litigation” of the kind that Abe Chayes celebrated and that Owen Fiss described as “structural reform litigation” or “institutional reform

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162. 376 U.S. 398, 439 (1964) (White, J., dissenting).

163. Koh & Treanor, *supra* note 159, at 596.

164. STEPHEN BREYER, *THE COURT AND THE WORLD* (2015).

165. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

166. See generally Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525 (2014), from which this discussion derives.

167. This traditional mode of adjudication is classically described in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

litigation.”<sup>168</sup> Domestic public law litigation, unlike private law adjudication, is prospectively focused, and characterized by complex claims and structures, as well as inquiring active judges who use injunctive powers to fix wrongful systems, with their goal being as much enunciation of public norms as it is resolution of private disputes.<sup>169</sup>

The Haitian refugee litigation exemplified a second kind of complex public litigation that now arises frequently in a globalizing world: “transnational public law litigation.”<sup>170</sup> As I have elsewhere described, in these kinds of cases, “transnational litigants bring a transnational party structure and a transnational claims structure into domestic court.”<sup>171</sup> The resulting complex litigation paradigms have tested core architectural assumptions about whether a single set of Federal Rules of Civil Procedure can still ensure “the just, speedy, and inexpensive determination of every action.”<sup>172</sup>

Since the late 1970s, human rights lawyers have used transnational public law litigation as a way to challenge systematic human rights violations and to seek enunciation of transnational norms. These lawyers, personified by my late friend Michael Ratner, have shrewdly deployed LawFAIR strategies<sup>173</sup> to invoke complex public claims and complex party structures to pursue injunctions in domestic court. Their ultimate aim has been less to win in private dispute resolution as it has been to give voiceless underdogs a voice in a U.S. court by creating a political bargaining chip, which can in turn be bargained in exchange for other kinds of meaningful relief. In this litigation setting, the role of the judge—the exemplar being Sterling Johnson, Jr. in the Haitian refugee case—is not passive and retrospective, but active and inquiring, focused on the future.

The endgame of the Haitian refugee litigation graphically illustrated transnational legal process in action. After a bench trial, Judge Johnson declared the HIV camp unconstitutional and entered a permanent injunction ordering the release of the

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168. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

169. Koh, *supra* note 166, at 1530 (expanding this assertion and listing prisons and hospitals as examples of such wrongful systems). A variant of public law litigation is mass tort litigation: ostensibly private lawsuits that are now increasingly suffused with the public interest. *Id.* While such cases seek to sort out large-scale disasters, toxic torts, and products liability imbroglios through tort litigation, they have generally been resolved by the creation and distribution of mass tort compensation funds administered by special matters—such as the 9/11 Fund, the BP Oil Spill Fund, and the Boston Marathon case. *Id.*

170. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991); *see also* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169 (1987) (highlighting the role of transnational public law litigation).

171. Koh, *supra* note 166, at 1530. By bringing these transnational claim and party structures into domestic courts, transnational litigants “help generate judgments that can be used as judicially created bargaining chips in other political fora, with their aim generally being norm enunciation and transportation of those norms to trigger institutional dialogue with political actors and to effect changes in public policy.” *Id.*

172. *Id.* at 1531.

173. *See supra* text accompanying notes 152–53.

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refugees to anywhere but Haiti.<sup>174</sup> Since no other nation would accept the Haitian refugees, this order was effectively a directive to allow them to enter the United States.<sup>175</sup> If the Haitians had not prevailed at trial, they would have never been admitted.<sup>176</sup> But all counsel involved also understood that the trial win, standing alone, would not secure the refugees' release.<sup>177</sup> The government had the right to appeal to the Second Circuit, and even if it did not secure a stay pending appeal from the appellate court, it would likely have won another one from the Supreme Court.<sup>178</sup> And even if the Second Circuit had affirmed the trial decision, the Haitians' counsel knew that another grant of certiorari and eventual reversal by the Supreme Court could easily happen.<sup>179</sup> Because Judge Johnson's injunction was a "wasting asset," with limited half-life, the Haitians' lawyers finally chose to trade it before it disappeared, in exchange for the Haitian detainees' entry into the United States.<sup>180</sup> But the government would not agree to the trade unless we also agreed to vacate, by settlement, Judge Johnson's path-breaking judicial precedent holding that aliens on Guantánamo had due process rights.<sup>181</sup> I, for one, initially balked, thinking that we might need that precedent in the future.<sup>182</sup> But my colleagues soon convinced me that there was no real choice: Our duty to our clients demanded that we put their personal freedom first. And so with a slight tactical delay, we accepted the government's deal and the Guantánamo Haitians finally came into the United States.<sup>183</sup>

What we did not appreciate at the time was that the trade was a "win-win," because the Clinton administration was also looking for a way out of the Haitian conundrum. As one official involved in the decision to admit the Haitians later recalled, senior leaders in the Clinton administration had "no desire" to continue to detain refugees on Guantánamo and thus no real eagerness to appeal and seek a stay.<sup>184</sup> Public and congressional reaction opposed a unilateral executive branch decision to admit the refugees, but Judge Johnson's injunction supplied the government with a face-saving opportunity to avoid stay or appeal, while "resolv[ing]

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174. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1050 (E.D.N.Y. 1993).

175. Koh & Wishnie, *supra* note 1, at 426.

176. *Id.*

177. *Id.* at 427.

178. *Id.*

179. *Id.*

180. GOLDSTEIN, *supra* note 2, at 298–99.

181. *Id.* at 299.

182. It turned out we did, when Al Qaeda suspects were brought to Guantánamo, and we had to litigate these issues all over again. *See supra* Part II.

183. *See* GOLDSTEIN, *supra* note 2, at 288, 300. As Goldstein notes, we accepted the government's vacatur agreement only after Judge Johnson's opinion had irrevocably been published in the hardbound volume of the Federal Supplement and all electronic databases, where it remains available for citation. *Id.* at 300.

184. Koh & Wishnie, *supra* note 1, at 427 (citing Telephone Interview by Michael J. Wishnie with Eric P. Schwartz, Former Nat'l Sec. Council Staff Member (Jan. 2, 2008)).

the situation in a humanitarian way.”<sup>185</sup> Accordingly, the refugees were admitted to the United States and resettled in New York and southern Florida by early July 1993. Despite some skepticism by the advocacy community that the Haitian refugee litigation had been nothing more than “a time-consuming, resource-intensive, lawyer-dominated process played out before a conservative judiciary,” the outcome of the case proved that transnational public law litigation can play a crucial part in delivering individual justice to voiceless underdogs.<sup>186</sup>

Increasingly, such transnational cases are playing a growing role in our Procedure curriculum. As any first-year law student knows, today’s Civil Procedure canon now includes such international cases as *Goodyear*,<sup>187</sup> *McIntyre*,<sup>188</sup> *Helicopteros*,<sup>189</sup> *Asahi*,<sup>190</sup> *Schlunk*,<sup>191</sup> *Aérospatiale*,<sup>192</sup> *Bremen v. Zapata*,<sup>193</sup> and *Piper v. Reyno*.<sup>194</sup> But at the same time, other cases in the canon ruling against human rights plaintiffs on grounds of subject matter jurisdiction,<sup>195</sup> personal jurisdiction,<sup>196</sup> or inadequate pleading<sup>197</sup> all show that the Supreme Court retains considerable skepticism toward the broader project of transnational public law litigation. In the long run, these restrictive readings of procedural rules may end up having serious substantive impacts, particularly if a Trump presidency moves the Court rightward.

As Steve Burbank and Sean Farhang have recently shown, restrictive readings of the Federal Rules of Civil Procedure have considerably limited meaningful private enforcement of public policy.<sup>198</sup> Had today’s iconic Procedure case, *Iqbal v. Ashcroft* (which imposed a higher level of pleading through judicial interpretation) been the law, the Haitian refugee case might never have made it into court at all.<sup>199</sup> Going forward, human rights lawyers will need to monitor procedural interpretations closely to ensure that insensitive judicial enforcement of procedural rules does not foster

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185. *Id.*

186. *Id.* at 426–27.

187. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

188. *J. MacIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

189. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

190. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

191. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

192. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987).

193. 407 U.S. 1 (1972).

194. 454 U.S. 235 (1981). For a review of many of these decisions, see generally Koh, *supra* note 159.

195. *E.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

196. *E.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

197. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

198. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583–1612 (2014).

199. See Koh, *supra* note 166, at 1531.

inequality of treatment among similarly situated parties or discourage underdogs from meaningful litigation.

## V. HUMAN RIGHTS ADVOCACY AND CLINICAL LEGAL EDUCATION

Finally, what are the legacies of the Haitian refugee litigation for human rights advocacy and clinical education? The Haitian refugee story shows, as Itamar Mann has argued, that “[t]ransnationalism’s ideals have fueled legal initiatives to protect human rights internationally and have encouraged law students to participate in international human rights clinics and choose human rights-oriented careers.”<sup>200</sup> One legacy of the litigation has been an energized human rights advocacy movement, reinforced by a new generation of what Deena Hurwitz has named “inevitable” human rights clinics.<sup>201</sup> The Haitian refugee litigation inspired advocacy strategies that enlist “inside” and “outside” politics, combining transnational public law litigation with popular movement politics.<sup>202</sup> These advocacy strategies have inspired law professors to expand experiential learning in law schools and to create a new generation of “live-client” human rights clinics that reengage in the real world with amicus briefs, arguments, and blog posts.<sup>203</sup> This reengagement has been spurred on by the rise of information networks through the World Wide Web, the explosion of social media, and the ensuing globalization of transnational human rights networks.<sup>204</sup>

Sadly, committed human rights advocates too often fail to achieve their desired results “because they cannot manage politics, harness incentives and institutions, or deploy law in a way that operationalizes the principles they value.”<sup>205</sup> But as I have noted elsewhere, “an increasingly rich transnational legal process has created multiple new avenues for ‘clinical trials,’ whereby practitioners can test arguments that have not fully succeeded in one forum in another, more sympathetic venue”<sup>206</sup> in search of better human rights outcomes.

200. Mann, *supra* note 138, at 316.

201. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505, 508 (2003).

202. For an explanation of inside and outside politics, see Koh & Wishnie, *supra* note 1, at 427–28.

203. Koh, *supra* note 6. For example, after working as a law student on the Haitian case, Mike Wishnie went on to co-found an innovative immigrants’ rights clinic at New York University and later at Yale Law School. GOLDSTEIN, *supra* note 2, at 304. Most recently, following the November 2016 election, Mike Wishnie and I, now as faculty colleagues, decided that it was time to co-found yet another Rule of Law clinic at Yale to monitor the incoming Trump administration’s fidelity to the rule of law in such areas as counterterrorism, antidiscrimination, and climate change.

204. As I have noted elsewhere, “[a]ll of this has been given new impetus by the academy’s response to human rights issues raised by the so-called ‘Global War on Terror,’ a role analogous to the one played by the public law academy during the Civil Rights Revolution.” Koh, *supra* note 6.

205. *Id.*

206. *Id.* (“Because human rights advocates are by their nature ‘forum-shoppers’ and because globalization has generated a growing set of fora in which the same legal issues can be contested, human rights scholars and advocates now have repeated opportunities to work together, through repeated lawsuits, to find better fora in which to crystallize norms and leverage legal rulings into meaningful policy change.”).

From the inception of the Haitian refugee litigation in early spring 1992, counsel litigated the case both inside and outside the courtroom. From the start, we played the “inside game,” reaching out to sympathetic officials in both the Bush and Clinton administrations.<sup>207</sup> But at the same time, we pursued an “outside” advocacy strategy—complementary to our litigation strategy—which sought allies in the media and political elites, and among local government officials, students, and grassroots activists willing to take these issues to the streets. Over the litigation’s eighteen-month course, members of Team Haiti made numerous telephone calls and traveled to Washington to lobby Congress and their staff, and to meet and strategize with influential AIDS, civil rights, and human rights NGOs; pitched story after story to the national media;<sup>208</sup> and collaborated with prominent civil rights and entertainment leaders on high-profile public events.<sup>209</sup> The legal team also pursued a bottom-up, grassroots strategy that included engagement with local AIDS and Haitian activists in New York City. Yale law students started a campaign of campus hunger strikes that resulted in local media coverage across the country.<sup>210</sup> This strategy resulted in local protests and surprisingly large media coverage, coupled with outreach to municipal officials in New York, Boston, Seattle, and elsewhere, who came to support the resettlement of the refugees by offering the Clinton administration the local political support necessary to enable the Haitians’ release after trial.<sup>211</sup> The Haitian refugee case thereby reaffirmed that public law litigation does not occur in a vacuum, and that courtroom victories alone cannot achieve lasting change without genuine social internalization of the norms being contested.<sup>212</sup>

Engaging the public and political debate for an extended period proved vital to winning the human rights struggle. Between the years 1992 and 1993, advocates for the fleeing Haitian refugees failed to persuade the public—whether the elites within the Clinton administration and Congress, or the wider American population at a grassroots level—of the “moral weight” and practical advisability of providing sanctuary to those fleeing persecution.<sup>213</sup> But “by 1994, the ‘inside/outside advocacy’ game had finally helped turn the political tide in the refugees’ favor, which made a different political solution possible.”<sup>214</sup> This same general lesson reappeared in the post-9/11 Guantánamo advocacy, which over a number of years deployed a blend of

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207. Koh & Wishnie, *supra* note 1, at 427–28.

208. *See id.* at 428 & n.174.

209. *See* Ratner, *supra* note 4, at 217.

210. *Id.* at 215.

211. Koh & Wishnie, *supra* note 1, at 428 (citing Clawson et al., *supra* note 4, at 2372).

212. *See generally* Koh, *supra* note 148 (describing the parallel processes of social, political, and legal internalization of international norms into domestic law and arguing that “social internalization” is triggered by and often spurs political and legal internalization of international legal norms into domestic law).

213. Koh & Wishnie, *supra* note 1, at 430.

214. *Id.*

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litigation, political advocacy, and public commentary to shift national and public opinion in favor of the protracted effort to close the Guantánamo detention camps.<sup>215</sup>

The Haitian refugee litigation thus offers an important example to clinical legal education, especially as conducted by the rapidly growing number of human rights clinics nationwide.<sup>216</sup> Yale's Lowenstein Human Rights Clinic consciously did not adopt the "small case" approach that some contemporary clinicians generally favor, in which students take on discrete individual cases like eviction defenses or divorces, and handle all court appearances while exercising professional judgment in the live-client relationship.<sup>217</sup> But neither was the Haitian refugee litigation an ordinary human rights clinic addressing such projects as analytic NGO reports documenting human rights abuses.<sup>218</sup> The scale and velocity of the litigation did not allow for the usual degree of student responsibility or structured reflection ordinarily sought in clinical education.<sup>219</sup>

Still, the Haitian refugee litigation accomplished many clinical objectives.<sup>220</sup> The case involved substantial student participation in all aspects of the Haitian refugee litigation, from its inception to the final settlement. While students generally did not argue legal motions or appeals in court, they helped develop mixed litigation/policy strategies; drafted countless pleadings, briefs, and discovery; took and defended depositions; identified, interviewed, and prepared witnesses; participated in negotiations; and examined many witnesses at trial.<sup>221</sup> The inspiration that experience gave to so many members of Team Haiti to continue in public interest law showed that reflective lawyering can be achieved, even in complex transnational law reform matters.<sup>222</sup> And both now and then, as life experience and case study, the litigation continues to inspire and nurture student passion for law as a force for human rights and social change.<sup>223</sup>

Looking back, the Haitian refugee case was in many ways a throwback to the early days of clinical education, which included many complex law reform suits focused on civil rights and social justice.<sup>224</sup> As I have noted elsewhere, the Haitian case ultimately "showed that what civil rights had been to the clinical education

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215. *Id.*

216. *Id.* (citing Hurwitz, *supra* note 201; Stacy Caplow, "Deport All the Students": Lessons Learned in an X-treme Clinic, 13 CLINICAL L. REV. 633 (2006) (reviewing GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON (2005))).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 430–31 (citing Clawson et al., *supra* note 4, at 2387–88).

222. *Id.* at 431.

223. *Id.* (citing Clawson et al., *supra* note 4, at 2388–89).

224. *Id.* (citing Caplow, *supra* note 216, at 643 ("In the 1970s, many clinics did handle large impact cases as a means for advancing civil rights and social justice.")).

movement of the 1960s, international human rights could become for the clinical education movement of a new global century.”<sup>225</sup> Significantly, even foreign clinical law professors in emerging justice systems have seized on the potential for the Haitian refugee litigation to inspire law reform and litigation efforts and to update legal institutions through clinical education.<sup>226</sup> And the clearest and simplest message that the Haitian refugee case taught law students was just this: “You don’t have to have your law degree in hand to change the world.”

## VI. CONCLUSION

A quarter century later, the Haitian case should be remembered as more than just a memorable case. To paraphrase Justice Felix Frankfurter, it gave us a new way of looking at the law.<sup>227</sup> It taught us how to attack and close legal black holes. It fostered the birth of transnationalism as a legal theory to promote human rights. It taught us how to pursue transnational legal process in a globalizing world through techniques of “LawFAIR.” And through experiential legal education, the litigation taught a young cohort of law students, “Team Haiti,” how to think globally and act locally, so that a quarter-century later that cohort has emerged as a mature and potent group of human rights advocates.<sup>228</sup>

These are legacies that will not become dated. To see this, one need look no further than today’s Syrian refugee crisis.<sup>229</sup> In Yogi Berra’s immortal words, “it’s like

225. *Id.* at 431.

226. As proof of the Haitian case’s cross-border appeal, the Committee of Chinese Clinical Legal Educators secured Ford Foundation funding to translate and publish *Storming the Court*, under the Chinese title *Fating Fengbao* (“*Courtroom Storm*”), as part of their efforts to establish clinical legal education in the People’s Republic. *Id.* at 431 n.185. And at Peking University School of Transnational Law, a law student bidding to take the school’s Cross Border Advocacy Clinic provided the following statement of interest:

The first time I heard about “legal clinic” was in the summer in 2008. I spent the whole afternoon sitting down on the floor of the biggest book store in Shanghai and finishing reading the book, *A Documentary Companion to Storming the Court*, where a band of law students from legal clinic of Yale law school fought against the president of United States for human rights on behalf of Haitian refugees detained at the American Navy base in Guantánamo Bay, Cuba. The book is not long, but it indeed encourages me to be a fighter for ones in need of justice[] for a long time. And at that time, I made my mind to be a member of legal clinic . . . some day.

E-mail from Stephen T. Yandle, Vice Dean, Peking Univ. Sch. of Transnat’l Law, Shenzhen China, to Harold Hongju Koh (Apr. 2, 2014, 11:39 PM) (on file with author).

227. *Cf.* *Guar. Trust Co. v. York*, 326 U.S. 99, 101 (1945) (“In overruling *Swift v. Tyson*, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law . . . .”) (citation omitted).

228. *See supra* note 9.

229. In 1994, I argued that there was a “Haiti Paradigm” in U.S. human rights policy, whereby government officials tend to underrespond to a root cause crisis elsewhere in the world—whether in Haiti or Syria—instead choosing to wait, and then belatedly to react to a mass outflow of refugees, treating the refugees as the problem, not the symptom of a root cause that demands urgent political attention. *See generally* Koh, *The “Haiti Paradigm,” supra* note 4. Recently, Michael Ignatieff and his students have developed a perceptive, comprehensive, integrated plan for Syria that offers a far better approach to manage the current

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déjà vu all over again.”<sup>230</sup> Once again, we have interdictions and a search for legal black holes. We still have detention camps at Guantánamo and elsewhere. Governments are still pushing territorial theories of refugee and human rights law, and we are still engaged in a counter-search for better human rights advocacy strategies and clinical approaches. This dialectic will not end; it will only evolve.<sup>231</sup>

Even so, there are moments of redemption. My most memorable came in late 2000, when I was leaving the Clinton administration after serving for several years as Assistant Secretary of State for Democracy, Human Rights, and Labor. At my farewell dinner, a black government car suddenly pulled up. Out stepped Sandy Berger, Clinton’s National Security Advisor, with whom I had worked closely on Kosovo, East Timor, Sierra Leone, and many other human rights challenges.<sup>232</sup> Although we had worked together often, we had never discussed frankly the battles we had early in the Clinton administration over Haitian and Cuban refugees.<sup>233</sup> Sandy entered the room and gave a gracious toast. He said, “At the beginning of this administration, we were fighting with a group of Yale law students and their professor over the plight of the Haitians, and Harold, in the middle of that case, I appeared on television with you. When the camera went off, I said, ‘I want that guy on our side, fighting for human rights *for* the U.S. government. I’m here tonight to say thank you for your service to human rights, both inside and out of the government. And I want you to know that on Haiti, looking back, you folks were right and we were wrong.”

Years later, Sandy Berger is gone,<sup>234</sup> and now, so too is Michael Ratner.<sup>235</sup> I miss them both intensely. But whenever I do, I recall that moment. Michael, wherever you are, I hope you can hear that message.

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burgeoning crisis. See MICHAEL IGNATIEFF ET AL., HARV. KENNEDY SCH. SHORENSTEIN CTR., THE UNITED STATES AND THE SYRIAN REFUGEE CRISIS: A PLAN OF ACTION (2016), <http://shorensteincenter.org/united-states-syrian-refugee-crisis-plan-action/>.

230. Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY (Sept. 23, 2015, 7:30 AM), <http://ftw.usatoday.com/2015/09/the-50-greatest-yogi-berra-quotes>.

231. See Mann, *supra* note 138 (discussing the “dialectic of transnationalism”).

232. For background information on my joint efforts with Sandy Berger, see, for example, Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Foreign Press Center Briefing on the International Court of Justice’s Advisory Opinion on Kosovo’s Declaration of Independence (July 22, 2010); *Country Reports on Human Rights Practices for 1999: Hearing Before the Subcomm. on Int’l Operations & Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 9–52 (2000) (statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor) (regarding Sierra Leone); and *The Humanitarian Crisis in East Timor: Hearing Before the Subcomm. on Int’l Operations & Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. (1999) (statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor).

233. See, e.g., Koh & Wishnie, *supra* note 1, at 427; see also *supra* note 12 (quoting Jesse Jackson: “Let’s not argue with the mailman,” but instead call Sandy Berger).

234. See David E. Sanger, *Samuel Berger, Adviser to Clinton Who Shaped Foreign Ties, Dies at 70*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/us/samuel-berger-dies.html?>

235. See Sam Roberts, *Michael Ratner, Lawyer Who Won Rights for Guantánamo Prisoners, Dies at 72*, N.Y. TIMES (May 11, 2016), <http://www.nytimes.com/2016/05/12/us/michael-ratner-lawyer-who-won-rights-for-guantanamo-prisoners-dies-at-72.html>; see also Cole, *supra* note 9.



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