SUPREME COURT OF THE UNITED STATES

No. 92–344

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 21, 1993]

JUSTICE BLACKMUN, dissenting.

When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U. S.T. 6223, T.I.A.S. 6577, it pledged not to "return (`*refouler*') a refugee in any manner whatsoever" to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Refugee Act of 1980, 94 Stat. 102. See *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 429, 436–437, 440 (1987); *INS* v. *Stevic*, 467 U. S. 407, 418, 421 (1984). Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return, *ante*, at 17, 24–25, because the opposite of "within the United States" is not outside the United States, *ante*, at 18–20, and because the official charged with controlling immigration has no role in enforcing an order to control immigration, *ante*, at 14–16.

I believe that the duty of nonreturn expressed in both the Protocol and the statute is clear. The majority finds it "extraordinary," *ante*, at 20, that Congress would have intended the ban on returning "any alien" to apply to aliens at sea. That Congress would have meant what it said is not remarkable. What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them

back to their persecutors—and that the Court would strain to sanction that conduct.

I begin with the Convention,[1] for it is undisputed that the Refugee Act of 1980 was passed to conform our law to Article 33, and that "the nondiscretionary duty imposed by §243(h) parallels the United States' mandatory *nonrefoulement* obligations under Article 33.1 . . . . " *INS* v. *Doherty*, ___ U. S. ___, ___ (1992) (slip op., at 3) (SCALIA, J., concurring in the judgment in part and dissenting in part). See also *Cardoza-Fonseca*, 480 U. S., at 429, 436–437, 440; *Stevic*, 467 U. S., at 418, 421. The Convention thus constitutes the backdrop against which the statute must be understood.[2]

Article 33.1 of the Convention states categorically and without geographical limitation:

"No Contracting State shall expel or return

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[1]United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U. S.T. 6259, 189 U.N.T.S. 150. Because the Protocol to which the United States acceded incorporated the Convention's Article 33, I shall follow the form of the majority, see *ante*, at 12, n. 19, and shall refer throughout this dissent (unless the distinction is relevant) only to the Convention.

[2]This Court has recognized that Article 33 has independent force. See, *e.g.*, *INS* v. *Stevic*, 467 U. S., at 428, n. 22 (1984) (By modifying his discretionary practice, Attorney General "`implemented'" and "honor[ed]" the Protocol's requirements). Because I agree with the near-universal understanding that the obligations imposed by Treaty and the statute are coextensive, I do not find it necessary to rely on the Protocol standing alone. As the majority suggests, however, *ante*, at 22, to the extent that the Treaty is more generous than the statute, the latter should not be read to limit the former.

> (`*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, see *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D.C. 367, 809 F. 2d 794 (1987), the Government consistently acknowledged that the Convention applied on the high seas.[3]

The majority, however, has difficulty with the Treaty's use of the term "return (`*refouler*')." "Return," it claims, does not mean return, but instead has a distinctive legal meaning. *Ante*, at 24. For this proposition the Court relies almost entirely on the fact that *American* law makes a general distinction

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[3]See, *e.g.*, 5 Op. Off. Legal Counsel 242, 248 (1981) (under proposed interdiction of Haitian flag vessels, "[i]ndividuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims" under the Convention); United States as a Country of Mass First Asylum: Hearing Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 208–209 (1981) (letter from Office of Attorney General stating: "Aliens who have not reached our borders (such as those on board interdicted vessels) are . . . protected . . . by the U.N. Convention and Protocol"); *id.*, at 4 (statement by Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, regarding the Haitian interdiction program: "I would like to also underscore that we intend fully to carry out our obligations under the U.N. Protocol on the status of refugees").

between *deportation* and *exclusion*. Without explanation, the majority asserts that in light of this distinction the word "return" as used in the Treaty somehow must refer only to "the exclusion of aliens who are . . . `on the threshold of initial entry'" (citation omitted). *Ibid.*

Setting aside for the moment the fact that respondents in this case seem very much "on the threshold of initial entry"—at least in the eyes of the Government that has ordered them seized for "attempting to come to the United States by sea without necessary documentation," Preamble to Executive Order No. 12,807, 57 Fed. Reg. 23133 (1992)—I find this tortured reading unsupported and unnecessary. The text of the Convention does not ban the "exclusion" of aliens who have reached some indeterminate "threshold"; it bans their "return." It is well settled that a treaty must first be construed according to its "ordinary meaning." Article 31.1 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969). The ordinary meaning of "return" is "to bring, send, or put (a person or thing) back to or in a former position." Webster's Third New International Dictionary 1941 (1986). That describes precisely what petitioners are doing to the Haitians. By dispensing with ordinary meaning at the outset, and by taking instead as its starting point the assumption that "return," as used in the Treaty, "has a legal meaning narrower than its common meaning," *ante*, at 24, the majority leads itself astray.

The straightforward interpretation of the duty of nonreturn is strongly reinforced by the Convention's use of the French term "*refouler*." The ordinary meaning of "*refouler*," as the majority concedes, *ante*, at 25, is "[t]o repulse, . . .; to drive back, to repel." *Dictionnaire Larousse* 631 (1981).[4] Thus

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[4]The Court seems no more convinced than I am by

construed, Article 33.1 of the Convention reads: "No contracting state shall expel or [repulse, drive back, or repel] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . . ." That, of course, is exactly what the Government is doing. It thus is no surprise that when the French press has described the very policy challenged here, the term it has used is "*refouler*." See, *e.g.*, *Le bourbier haïtien*, Le Monde, May 31–June 1, 1992 ("[L]es Etats-Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde cotière." (The United States has decided [de refouler] directly the refugees picked up by the Coast Guard)).

And yet the majority insists that what has occurred is not, in fact, "*refoulement*." It reaches this conclusion in a peculiar fashion. After acknowledging that the ordinary meaning of "*refouler*" is "repulse," "repel," and "drive back," the majority without elaboration declares: "To the extent that they are relevant, these translations imply that `return' means a defensive act of resistance or exclusion at a border . . . ." *Ante*, at 25. I am at a loss to find the narrow notion of "exclusion at a border" in broad terms like "repulse," "repel," and "drive back." Gage was repulsed (initially) at Bunker Hill. Lee was repelled at Gettysburg. Rommel was driven back across North Africa. The majority's puzzling progression ("*refouler*" means repel or drive back; therefore "return" means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The

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the Government's argument that "refouler" is best translated as "expel." See Brief for Petitioners 38–39. That interpretation, as the Second Circuit observed, would leave the treaty redundantly forbidding a nation to "expel" or "expel" a refugee. *Haitian Centers Council, Inc.* v. *McNary*, 969 F. 2d 1350, 1363 (1992).

text of Article 33.1 is clear, and whether the operative term is "return" or "*refouler*," it prohibits the Government's actions.[5]

Article 33.1 is clear not only in what it says, but also in what it does not say: it does not include any geographical limitation. It limits only where a refugee may be sent "to", not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution.

Article 33.2, by contrast, *does* contain a geographical reference, and the majority seizes upon this as evidence that the section as a whole applies only within a signatory's borders. That inference is flawed. Article 33.2 states that the benefit of Article 33.1

> "may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The signatories' understandable decision to allow

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[5]I am surprised by the majority's apparent belief that (a) the translations of "*refouler*" are of uncertain relevance ("To the extent that they are relevant, these translations imply . . ."), and (b) the term "*refouler*" is pertinent only as an aid to understanding the meaning of the English word "return" ("these translations imply that `return' means . . ."). *Ante*, at 25. The first assumption suggests disregard for the basic rule that consideration of a treaty's ordinary meaning must be the first step in its interpretation. The second assumption, by neglecting to treat the term "*refouler*" as significant in and of itself, overlooks the fact that under Article 46 the French and English versions of the Convention's text are equally authoritative.

nations to deport criminal aliens who have entered their territory hardly suggests an intent to permit the apprehension and return of noncriminal aliens who have not entered their territory, and who may have no desire ever to enter it. One wonders what the majority would make of an exception that removed from the Article's protection all refugees who "constitute a danger to their families." By the majority's logic, the inclusion of such an exception presumably would render Article 33.1 applicable only to refugees with families.

Far from constituting "an absurd anomaly," *ante*, at 23, the fact that a state is permitted to "expel or return" a small class of refugees found within its territory but may not seize and return refugees who remain outside its frontiers expresses precisely the objectives and concerns of the Convention. Non-return is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may "expel or return" him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country "in which he is" proves nothing.

The majority further relies on a remark by Baron van Boetzelaer, the Netherlands' delegate at the Convention's negotiating conference, to support its contention that Article 33 does not apply extraterritorially. This reliance, for two reasons, is misplaced. First, the isolated statement of a delegate to the Convention cannot alter the plain meaning of the Treaty itself. Second, placed in its proper context, van Boetzelaer's comment does not support the majority's position.

It is axiomatic that a treaty's plain language must control absent "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc.* v.

Avagliano, 457 U. S. 176, 185 (1982). See also *United States* v. *Stuart*, 489 U. S. 353, 371 (1989) (SCALIA, J., concurring in the judgment); *id.*, at 370 (KENNEDY, J., concurring in part and concurring in the judgment). Reliance on a treaty's negotiating history (*travaux preparatoires*) is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to "manifestly absurd or unreasonable" results. See Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S., at 340, 8 I.L.M., at 692 (1969). Moreover, even the general rule of treaty construction allowing limited resort to *travaux preparatoires* "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." *Arizona* v. *California*, 292 U. S. 341, 360 (1934). There is no evidence that the comment on which the majority relies was ever communicated to the United States' Government or to the Senate in connection with the ratification of the Convention.

The pitfalls of relying on the negotiating record are underscored by the fact that Baron van Boetzelaer's remarks almost certainly represent, in the words of the United Nations High Commissioner for Refugees, a mere "parliamentary gesture by a delegate whose views did *not* prevail upon the negotiating conference as a whole" (emphasis in original). Brief for Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* 24. The Baron, like the Swiss delegate whose sentiments he restated, expressed a desire to reserve the right to *close borders* to *large groups* of refugees. "According to [the Swiss delegate's] interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross [their] frontiers." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth

Meeting, U.N. Doc. A/CONF.2/SR.16, p.6 (July 11, 1951). Article 33, van Boetzelaer maintained, "would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations" and this was important because "[t]he Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-Fifth Meeting, U.N. Doc. A/CONF.2/SR.35, pp. 21–22 (Dec. 3, 1951). Yet no one seriously contends that the Treaty's protections depend on the number of refugees who are fleeing persecution. Allowing a state to disavow "any obligations" in the case of mass migrations or attempted mass migrations would eviscerate Article 33, leaving it applicable only to "small" migrations and "small" attempted migrations.

There is strong evidence as well that the Conference rejected the right to close land borders where to do so would trap refugees in the persecutors' territory.[6] Indeed, the majority agrees

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[6]In proceedings prior to that at which van Boetzelaer made his remarks, the Ad Hoc Committee delegates from France, Belgium, and the United Kingdom had made clear that the principle of *non-refoulement*, which existed only in France and Belgium *did* proscribe the rejection of refugees at a country's frontier. Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twenty-First Meeting, U.N. Doc. E/AC.32/SR.21, pp. 4–5 (1950). Consistent with the United States' historically strong support of nonreturn, the United States delegate to the Committee, Louis Henkin, confirmed this:

"Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of

that the Convention *does* apply to refugees who have reached the border. *Ante*, at 25. The majority thus cannot maintain that van Boetzelaer's interpretation prevailed.

That it did not is evidenced by the fact that Baron van Boetzelaer's interpretation was merely "placed on record," unlike formal amendments to the Convention which were "agreed to" or "adopted."[7] It should not be assumed that other delegates agreed with the comment simply because they did not object to their colleague's request to memorialize it, and the majority's statement that "this much cannot be denied: at one time there was a `general

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expelling him after he had been admitted to residence in the territory, the problem was more or less the same.

"Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp." Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twentieth Meeting, U.N. Doc. E/AC.32/SR.20, ¶¶54 and 55, pp. 11–12 (1950).

Speaking next, the Israeli delegate to the Ad Hoc Committee concluded: "The Committee had already settled the humanitarian question of sending any refugee . . . back to a territory where his life or liberty might be in danger." *Id.*, at ¶61, p. 13.

[7]See, *e.g.*, A/Conf.2/SR.35, at 22 ("adopt[ing] unanimously" the proposal to place the word "*refouler*" alongside the word "return"; *ibid.* ("adopt[ing] unanimously" the suggestion that the words "membership of a particular social group" be inserted); *ibid.* ("agree[ing]" to changes in the actual wording of Article 33).

consensus,'" *ante*, at 30, is wrong. All that can be said is that at one time Baron van Boetzelaer remarked that "he had gathered" that there was a general consensus, and that his interpretation was placed on record.

In any event, even if van Boetzelaer's statement *had* been "agreed to" as reflecting the dominant view, this is not a case about the right of a nation to close its borders. This is a case in which a Nation has gone forth to *seize* aliens who are *not* at its borders and *return* them to persecution. Nothing in the comments relied on by the majority even hints at an intention on the part of the drafters to countenance a course of conduct so at odds with the Convention's basic purpose.[8]

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[8]The majority also cites secondary sources that, it claims, share its reading of the Convention. See *ante*, at 26, nn. 40 and 41. Not one of these authorities suggests that any signatory nation sought to reserve the right to seize refugees outside its territory and forcibly return them to their persecutors. Indeed, the first work cited explains that the entire reason for the drafting of Article 33 was "the consideration that the turning back of a refugee to the frontiers of a country where his life or freedom is threatened on account of race or similar grounds would be tantamount to delivering him into the hands of his persecutors." N. Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 161 (1953). These sources emphasize instead that nations need not *admit* refugees or grant them *asylum*—questions not at issue here. See, *e.g.*, 2 A. Grahl-Madsen, The Status of Refugees in International Law 94 (1972) ("Article 33 only prohibits the expulsion or return (*refoulement*) of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting States to *admit* any person who has not already set foot on their

In sum, the fragments of negotiating history upon which the majority relies are not entitled to deference, were never voted on or adopted, probably represent a minority view, and in any event do not address the issue in this case. It goes without saying, therefore, that they do not provide the "extraordinarily strong contrary evidence," *Sumitomo Shoji America, Inc.*, 457 U. S., at 185, required to

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respective territories") (emphasis added); Goodwin-Gill, The Refugee in International Law 87 ("A categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement*, even though it may result in serious consequences for *asylum*-seekers") (emphasis added); Aga Khan, Legal Problems Relating to Refugees and Displaced Persons, in Hague Academy of Int'l Law, 149 Recuil des Cours 287, 318 (1976) ("Does the *non-refoulement* rule thus laid down apply to refugees who present themselves at the frontier or only to those who are already within the territory of the Contracting State? . . . . It is intentional that the Convention fails to mention *asylum* as a right which the contracting States would undertake to grant to a refugee who, presenting himself at their frontiers, seeks the benefit of it . . . . There is thus a serious gap in refugee law as established by the 1951 Convention and other related instruments and it is high time that this gap should be filled") (emphasis added). The majority also cites incidental territorial references in the 1979 Handbook on Procedures and Criteria for Determining Refugee Status as "implici[t] acknowledg[ment]" that the United Nations High Commissioner for Refugees subscribes to their view that the Convention has no extraterritorial application. The majority neglects to point out that the current High Commissioner for Refugees acknowledges that the Convention *does* apply extraterritorially. See Brief for United Nations High

overcome the Convention's plain statement: "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 . . . ."

Commissioner for Refugees as *Amicus Curiae*.

Like the Treaty whose dictates it embodies, §243(h) is unambiguous. It reads:

> "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 race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. §1253(h)(1).

"With regard to this very statutory scheme, we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Cardoza-Fonseca*, 480 U. S., at 431 (internal quotation marks omitted). Ordinary, but not literal. The statement that "the Attorney General shall not deport or return any alien" obviously does not mean simply that the person who is the Attorney General at the moment is forbidden personally to deport or return any alien, but rather that her agents may not do so. In the present case the Coast Guard without question is acting as the agent of the Attorney General. "The officers of the Coast Guard insofar as they are engaged . . . in enforcing any law of the United States shall . . . be deemed to be acting as agents of the particular executive department . . . charged with the administration of the particular law . . . and . . . be subject to all the rules and regulations promulgated by such Department . . . with respect to the enforcement of that law." 14 U. S. C. §89(b). The Coast Guard is engaged in enforcing the immigration laws. The sole identified purpose of Executive Order 12,807 is to address "the serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally." The Coast Guard's task under the order is "to enforce the suspension of the entry of

undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens." The Coast Guard is authorized to return a vessel and its passengers *only* "when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist."

The majority suggests indirectly that the law which the Coast Guard enforces when it carries out the order to return a vessel reasonably believed to be violating the immigration laws is somehow not a law that the Attorney General is charged with administering. *Ante*, at 14–16. That suggestion is baseless. Under 8 U. S. C. §1103(a), the Attorney General, with some exceptions, "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ." The majority acknowledges this designation, but speculates that the particular enforcement of immigration laws here may be covered by the exception for laws relating to "the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . . ." *Ante*, at 15–16.[9] The majority fails to

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[9]The Executive Order at issue cited as authority 8 U. S. C. §1182(f), which allows the President to restrict or "for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants." The Haitians, of course, do not claim a right of entry.

Indeed, the very invocation of this section in this context is somewhat of a stretch. The section pertains to the President's power to interrupt for as long as necessary *legal* entries into the United States. Illegal entries cannot be "suspended"—they are already disallowed. Nevertheless, the Proclamation

point out the proviso that directly follows the exception: "*Provided, however*, That . . . the Attorney General . . . . shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . ." There can be no doubt that the Coast Guard is acting as the Attorney General's agent when it seizes and returns undocumented aliens.

Even the challenged Executive Order places the Attorney General "on the boat" with the Coast Guard.[10] The Order purports to give the Attorney General "unreviewable discretion" to decide that an alien will not be returned.[11] Discretion not to return an alien is of course discretion to return him. Such discretion cannot be given; Congress removed it in 1980 when it amended the Immigration Act to make mandatory ("*shall not* deport or *return*") what had been a discretionary function ("The Attorney General is authorized to withhold deportation"). The Attorney General may not decline to follow the command of §243(h). If she encounters a refugee, she must not return him to persecution.

The laws that the Coast Guard is engaged in enforcing when it takes to the seas under orders to prevent aliens from illegally crossing our borders are laws whose administration has been assigned to the Attorney General by Congress, which has plenary power over immigration matters. *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972). Accordingly,

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on which the Order relies declares, solemnly and hopefully: "The entry of undocumented aliens from the high seas is hereby suspended . . . ." Presidential Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981).

[10]Of course the Attorney General's authority is not dependent on its recognition in the Order.

[11]"[T]he Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."

there is no merit to the argument that the concomitant legal restrictions placed on the Attorney General by Congress do not apply with full force in this case.

Comparison with the pre-1980 version of §243(h) confirms that the statute means what it says. Before 1980, §243(h) provided:

> "The Attorney General is authorized to *withhold deportation* of any alien . . . *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason" (emphasis added).

The Refugee Act of 1980 explicitly amended this provision in three critical respects. Congress (1) deleted the words "within the United States"; (2) barred the Government from "return[ing]," as well as "deport[ing]," alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions.

The import of these changes is clear. Whether "within the United States" or not, a refugee may not be returned to his persecutors. To read into §243(h)'s mandate a territorial restriction is to restore the very language that Congress removed. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U. S., at 442–443 (citations omitted). Moreover, as all parties to this case acknowledge, the 1980 changes were made in order to conform our law to the United Nations Protocol. As has been shown above, that Treaty's absolute ban on *refoulement* is similarly devoid of territorial restrictions.

The majority, however, downplays the significance of the deletion of "within the United States" to

improvise a unique meaning for "return."[12] It does so not by analyzing Article 33, the provision that inspired the 1980 amendments,[13] but by reference to a lone case from this Court that is not even mentioned in the legislative history and that had been on the books a full 22 years before the amendments' enactment.

In *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958), this Court decided that aliens paroled into the United States from detention at the border were not "within the United States" for purposes of the former §243(h) and thus were not entitled to its benefits. Pointing to this decision, the majority offers the negative inference that Congress' removal of the words "within the United States" was meant only to extend a right of nonreturn to those in exclusion proceedings. But nothing in *Leng May Ma* even remotely suggests that

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[12]The word "return" is used throughout the INA; in no instance is there any indication that the word has a specialized meaning. See, *e.g.*, 8 U. S. C. §§ 1101(a)(27)(A) ("special immigrant" is one lawfully admitted "who is *returning* from a temporary visit abroad"); 1101(a)(42)(A) ("refugee" is a person outside his own country who is "unable or unwilling to *return* to" his country because of persecution); 1182(a)(7)(B)(i)(I) (nonimmigrant who does not possess passport authorizing him "to *return* to country from which" he came is excludable); 1252 (deportable alien's parole may be revoked and the alien "*returned* to custody"); 1353 (travel expenses will be paid for INS officers who "become eligible for voluntary retirement and *return* to the United States"). It is axiomatic that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932).

[13]Indeed, reasoning backwards, the majority actually looks to the *American* scheme to illuminate the *Treaty*. See *ante*, at 24.

the *only* persons not "within the United States" are those involved in exclusion proceedings. Indeed, such a suggestion would have been ridiculous. Nor does the narrow concept of exclusion relate in any obvious way to the amendment's broad phrase "return any alien."

The problems with the majority's *Leng May Ma* theory run deeper, however. When Congress in 1980 removed the phrase "within the United States," it did not substitute any other geographical limitation. This failure is exceedingly strange in light of the majority's hypothesis that the deletion was intended solely to work the particular technical adjustment of extending protection to those physically present in, yet not legally admitted to, the United States. It is even stranger given what Congress did elsewhere in the Act. The Refugee Act revised the immigration code to establish a comprehensive, tripartite system for the protection of refugees fleeing persecution.[14] Section 207 governs overseas refugee processing. Section 208, in turn, governs asylum claims by aliens "physically present in the United States, or at a land border or entry port." Unlike these sections, however, which explicitly apply to persons present in specific locations, the amended §243(h) includes no such limiting language. The basic prohibition against forced return to persecution applies simply to "any alien." The design of all three sections is instructive, and it undermines the majority's assertion that §243(h) was meant to apply only to aliens physically present in the United States or at one of its borders. When Congress wanted a provision to apply only to

[14]For this reason, the majority is mistaken to find any significance in the fact that the ban on return is located in the Part of the INA that deals as well with the deportation and exclusion hearings in which requests for asylum or for withholding of deportation "are ordinarily advanced." *Ante*, at 17.

aliens "physically present in the United States, or at a land border or port of entry," it said so. See §208(a).[15] An examination of the carefully designed provisions of the INA—not an elaborate theory about a 1958 case regarding the rights of aliens in exclusion proceedings—is the proper basis for an analysis of the statute.[16]

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[15]Congress used the words "physically present within the United States" to delimit the reach not just of §208 but of sections throughout the INA. See, *e.g.*, 8 U. S. C. §§1159 (adjustment of refugee status); 1101(a)(27(I) (defining "special immigrant" for visa purposes); 1254(a)(1)-(2) (eligibility for suspension of deportation); 1255a(a)(3) (requirements for temporary resident status); 1401(d),(e),(g) (requirements for nationality but not citizenship at birth); 1409(c) (requirements for nationality status for children born out of wedlock); 1503(b) (requirement for appeal of denial of nationality status); and 1254a(c)(1)(A)(i), (c)(3)(B) (1988 ed., Supp. IV) (requirements for temporary protected status). The majority offers no hypothesis for why Congress would not have done so here as well.

[16]Even if the majority's *Leng May Ma* proposition were correct, it would not support today's result. Leng May Ma was an excludable alien who had been in custody but was paroled into the United States. The Court determined that her parole did not change her legal status, and therefore that her case should be analyzed as if she were still "in custody." The Court then explained that "the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States," and stated: "It seems quite clear to us that an alien so confined would not be `within the United States' for purposes of §243(h)." 357 U. S., at 188. *Leng May Ma* stands

That the clarity of the text and the implausibility of its theories do not give the majority more pause is due, I think, to the majority's heavy reliance on the presumption against extraterritoriality. The presumption runs throughout the majority's opinion, and it stacks the deck by requiring the Haitians to produce "affirmative evidence" that when Congress prohibited the return of "any" alien, it indeed meant to prohibit the interception and return of aliens at sea.

The judicially created canon of statutory construction against extraterritorial application of United States law has no role here, however. It applies only where congressional intent is "unexpressed." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. ___, ___ (1991); *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). Here there is no room for doubt: a territorial restriction has been deliberately deleted from the statute.

Even where congressional intent is unexpressed, however, a statute must be assessed according to its intended scope. The primary basis for the application of the presumption (besides the desire—not relevant here—to avoid conflict with the laws of other nations) is "the common-sense notion that Congress generally legislates with domestic concerns in mind." *Smith* v.

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for the proposition that aliens in custody who have not made legal entries—including, but not limited to, those who are granted the privilege of parole—are legally outside the United States. According to the majority, Congress deleted the territorial reference in order to extend protection to such aliens. By the majority's own reasoning, then, §243(h) applies to unadmitted aliens held in U. S. custody. That, of course, is exactly the position in which the interdicted Haitians find themselves.

United States, 507 U. S. ___, n. 5 (1993) (slip op., at 7–8). Where that notion seems unjustified or unenlightening, however, generally-worded laws covering varying subject matters are routinely applied extraterritorially. See, *e.g.*, *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U. S. 306 (1970) (extraterritorial application of the Jones Act); *Steele* v. *Bulova Watch Co.*, 344 U. S. 280 (1952) (Lanham Act applies extra-territorially); *Kawakita* v. *United States*, 343 U. S. 717 (1952) (extraterritorial application of treason statute); *Ford* v. *United States*, 273 U. S. 593, 602 (1927) (applying National Prohibition Act to high seas despite its silence on issue of extraterritoriality).

In this case we deal with a statute that regulates a distinctively international subject matter: immigration, nationalities, and refugees. Whatever force the presumption may have with regard to a primarily domestic statute evaporates in this context. There is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond this Nation's borders. The "common-sense notion" that Congress was looking inwards—perfectly valid in a case involving the Federal Tort Claims Act, such as *Smith*, —cannot be reasonably applied to the Refugee Act of 1980.

In this regard, the majority's dictum that the presumption has "special force" when we construe "statutory provisions that may involve foreign and military affairs for which the President has unique responsibility," *ante*, at 31–32, is completely wrong. The presumption that Congress did not intend to legislate extraterritorially has *less* force—perhaps, indeed, no force at all—when a statute on its face relates to foreign affairs. What the majority appears to be getting at, as its citation to *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), suggests, *ante*, at 32, is that in some areas, the President, and not Congress, has sole constitutional

authority. Immigration is decidedly not one of those areas. "`[O]ver no conceivable subject is the legislative power of Congress more complete . . . .'" *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977), quoting *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909). And the suggestion that the President somehow is acting in his capacity as Commander-in-Chief is thwarted by the fact that nowhere among Executive Order No. 12,807's numerous references to the immigration laws is that authority even once invoked.[17]

If any canon of construction should be applied in this case, it is the well-settled rule that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Charming Betsy*, 2 Cranch 64, 117–118 (1804). The majority's improbable construction of §243(h), which flies in the face of the international obligations imposed by Article 33 of the Convention, violates that established principle.

The Convention that the Refugee Act embodies was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of impotence and regret notwithstanding.

The refugees attempting to escape from Haiti do

[17]Indeed, petitioners are hard-pressed to argue that restraints on the Coast Guard infringe upon the Commander-in-Chief power when the President himself has placed that agency under the direct control of the Department of Transportation. See Declaration of Admiral Leahy, App. 233.

not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the Treaty and the statute. We should not close our ears to it.

I dissent.