March 2, 1993, Argued

June 21, 1993, Decided

## Prior History:

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

## Disposition:

969 F.2d 1350, reversed.

## Syllabus:

An Executive Order directs the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualify as refugees, but "authorizes [such forced repatriation] to be undertaken only beyond the territorial sea of the United States." Respondents, organizations representing interdicted Haitians and a number of Haitians, sought a temporary restraining order, contending that the Executive Order violates § 243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act) and Article 33 of the United Nations Convention Relating to the Status of Refugees. The District Court denied relief, concluding that § 243(h)(1) does not protect aliens in international waters and that the Convention's provisions are not self-executing. In reversing, the Court of Appeals held, inter alia, that § 243(h)(1) does not apply only to aliens within the United States and that Article 33, like the statute, covers all refugees, regardless of location.

## Held:

Neither § 243(h) nor Article 33 limits the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas. Pp. 14-32.

(a) The INA's text and structure demonstrate that § 243(h)(1) -- which provides that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country . . ." -- applies only in the context of the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States. In the light of other INA provisions that expressly confer upon the President and other officials certain responsibilities under the immigration laws, § 243(h)(1)'s reference to the Attorney General cannot reasonably be construed to describe either the President or the Coast Guard. Moreover, the reference suggests that the section applies only to the Attorney General's normal responsibilities under the INA, particularly her conduct of deportation and exclusion hearings in which requests for asylum or for withholding of deportation under § 243(h) are ordinarily advanced. Since the INA nowhere provides for the conduct of such proceedings outside the United States, since Part V of the Act, in which § 243 is located, obviously contemplates that they be held in this country, and since it is presumed that Acts of Congress do not ordinarily apply outside the borders, see, e.g., EEOC v. Arabian American Oil Co., 499 U.S. , § 243(h)(1) must be construed to apply only within United States territory. That the word "return" in § 243(h)(1) is not limited to aliens in this country does not render the section

applicable extraterritorially, since it must reasonably be concluded that Congress used the phrase "deport or return" only to make the section's protection available both in proceedings to deport aliens already in the country and proceedings to exclude those already at the border. Pp. 15-18.

(b) The history of the Refugee Act of 1980 -- which amended § 243(h)(1) by adding the phrase "or return" and deleting the phrase "within the United States" following "any alien" -- confirms that § 243(h) does not have extraterritorial application. The foregoing are the only relevant changes made by the 1980 amendment, and they are fully explained by the intent, plainly identified in the legislative history, to apply § 243(h) to exclusion as well as to deportation proceedings. There is no change in the 1980 amendment, however, that could only be explained by an assumption that Congress also intended to provide for the statute's extraterritorial application. It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Pp. 18-21.

(c) Article 33's text -- which provides that "no . . . State shall expel or return ('refouler') a refugee . . . to . . . territories where his life or freedom would be threatened . . .," Article 33.1, and that "the benefit of the present provision 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 [located]," Article 33.2 -- affirmatively indicates that it was not intended to have extraterritorial effect. First, if Article 33.1 applied on the high seas, Article 33.2 would create an absurd anomaly: dangerous aliens in extraterritorial waters would be entitled to 33.1's benefits because they would not be in any "country" under 33.2, while dangerous aliens residing in the country that sought to expel them would not be so entitled. It is more reasonable to assume that 33.2's coverage was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory. Second, Article 33.1's use of the words "expel or return" as an obvious parallel to the words "deport or return" in § 243(h)(1) suggests that "return" in 33.1 refers to exclusion proceedings, see Leng May Ma v. Barber, 357 U.S. 185, 187, and therefore has a legal meaning narrower than its common meaning. This suggestion is reinforced by the parenthetical reference to the French word "refouler," which is not an exact synonym for the English word "return," but has been interpreted by respected dictionaries to mean, among other things, "expel." Although gathering fleeing refugees and returning them to the one country they had desperately sought to escape may violate the spirit of Article 33, general humanitarian intent cannot impose uncontemplated obligations on treaty signatories. Pp. 23-27.

(d) Although not dispositive, the Convention's negotiating history -- which indicates, inter alia, that the right of non-refoulement applies only to aliens physically present in the host country, that the term "refouler" was included in Article 33 to avoid concern about an inappropriately broad reading of the word "return," and that the Convention's limited reach resulted from a hard-fought bargain -- solidly supports the foregoing conclusion. Pp. 28-31.

969 F.2d 1350, reversed.

## Judges:

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion.

## Opinion By:

STEVENS

## Opinion:

JUSTICE STEVENS delivered the opinion of the Court.

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, "authorized to be undertaken only beyond the territorial sea of the United States,"[1] violates § 243(h)(1) of the Immigration and Nationality Act of 1952 (INA or Act).[2] We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees[3] applies to action taken by the Coast Guard on the high seas.

Section 243(h)(2), 8 U.S.C. § 1253(h)(2), provides, in part: "(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that --

. . . . .

"(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States."

Before its amendment in 1965, § 243(h), 66 Stat. 214, read as follows: "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 physical persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason." 8 U.S.C. § 1253(h) (1976 ed.); see also INS v. Stevic, 467 U.S. 407, 414, n. 6 (1984).

## I

Aliens residing illegally in the United States are subject to deportation after a formal hearing.[4] Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States.[5] In either a deportation or exclusion proceeding the alien may seek asylum as a political refugee for whom removal to a particular country may threaten his life or freedom. Requests that the Attorney General grant asylum or withhold deportation to a particular country are typically, but not necessarily, advanced as parallel claims in either a deportation or an exclusion proceeding.[6] When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum pursuant to § 208 of the Act. If the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country because of his political or religious beliefs, under § 243(h) the Attorney General must not send him to that country.[7] The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the United States. For 12 years, in one form or another, the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those protections.

On September 23, 1981, the United States and the Republic of Haiti entered into an agreement authorizing the United States Coast Guard to intercept vessels engaged in the illegal transportation of undocumented aliens to our shores. While the parties agreed to prosecute "illegal traffickers," the Haitian Government also guaranteed that its repatriated citizens would not be punished for their illegal departure.[8] The agreement also established that the United States Government would not return any passengers "whom the United States authorities determined to qualify for refugee status." App. 382. On September 29, 1981, President Reagan issued a proclamation in which he characterized "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States." Presidential Proclamation No. 4865, 3 CFR 50-51 (1981-1983 Comp.). He therefore suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin. His executive order expressly "provided, however, that no person who is a refugee will be returned without his consent." Executive Order 12324, 3 CFR § 2(c)(3), p. 181 (1981-1983 Comp.).[9]

In the ensuing decade, the Coast Guard interdicted approximately 25,000 Haitian migrants.[10] After interviews conducted on board Coast Guard cutters, aliens who were identified as economic migrants were "screened out" and promptly repatriated. Those who made a credible showing of political refugee status were "screened in" and transported to the United States to file formal applications for asylum. App. 231.[11]

Section 1158(a) provides: "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." (Emphasis added.) This standard for asylum is similar, but not quite as strict as the standard applicable to a withholding of deportation pursuant to § 243(h)(1). See generally, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

On September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history. As the District Court stated in an uncontested finding of fact, since the military coup "hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding." App. to Pet. for Cert. 144a. Following the coup the Coast Guard suspended repatriations for a period of several weeks, and the United States imposed economic sanctions on Haiti.

On November 18, 1991, the Coast Guard announced that it would resume the program of interdiction and forced repatriation. The following day, the Haitian Refugee Center, Inc., representing a class of interdicted Haitians, filed a complaint in the United States District Court for the Southern District of Florida alleging that the Government had failed to establish and implement adequate procedures to protect Haitians who qualified for asylum. The District Court granted temporary relief that precluded any repatriations until February 4, 1992, when a reversal on appeal in the Court of Appeals for the Eleventh Circuit and a denial of certiorari by this

Court effectively terminated that litigation. See Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109 (1991) (per curiam), cert. denied, 502 U.S. (1992).

In the meantime the Haitian exodus expanded drama-tically. During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to accommodate them during the screening process. Those temporary facilities, how-ever, had a capacity of only about 12,500 persons. In the first three weeks of May 1992, the Coast Guard intercepted 127 vessels (many of which were considered unseaworthy, overcrowded, and unsafe); those vessels carried 10,497 undocumented aliens. On May 22, 1992, the United States Navy determined that no additional migrants could safely be accommodated at Guantanamo. App. 231-233.

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders and offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the Presi-dent's advisors, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft.[12] The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in. See App. 66.

On May 23, 1992, President Bush adopted the second choice.[13] After assuming office, President Clinton decided not to modify that order; it remains in effect today. The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration. We must decide only whether Executive Order No. 12807, 57 Fed. Reg. 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA.

"(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

"(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and "(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

"I, GEORGE BUSH, President of the United States of America, hereby order as follows: . . . .

"Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce

the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

. . . . .

"(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard: "(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation or persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

"(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

"(3) To return the vessel and its passengers to the country from which it came, or to another country, 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; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

"(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

. . . . .

"Sec. 5. This order shall be effective immediately.

/s/ George Bush THE WHITE HOUSE

May 24, 1992." 57 Fed. Reg. 12133-23134.

Although the Executive Order itself does not mention Haiti, the press release issued contemporaneously explained:

"President Bush has issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti. This action follows a large surge in Haitian boat people seeking to enter the United States and is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600-mile sea journey.

"The large number of Haitian migrants has led to a dangerous and unmanageable situation. Both the temporary processing facility at the U.S. Naval base Guantanamo and the Coast Guard cutters on patrol are filled to capacity. The President's action will also allow continued orderly processing of more than 12,000 Haitians presently at Guantanamo.

"Through broadcasts on the Voice of America and public statements in the Haitian media we continue to urge Haitians not to attempt the dangerous sea journey to the United States. Last week alone eighteen Haitians perished when their vessel capsized off the Cuban coast.

"Under current circumstances, the safety of Haitians is best assured by remaining in their country. We urge any Haitians who fear persecution to avail themselves of our refugee

processing service at our Embassy in Port-au-Prince. The Embassy has been processing refugee claims since February. We utilize this special procedure in only four countries in the world. We are prepared to increase the American embassy staff in Haiti for refugee processing if necessary." App. 327.

## II

Respondents filed this lawsuit in the United States District Court for the Eastern District of New York on March 18, 1992 -- before the promulgation of Executive Order No. 12807. The plaintiffs include organizations that represent interdicted Haitians as well as Haitians who were then being detained at Guantanamo. They sued the Commissioner of the Immigration and Naturalization Service, the Attorney General, the Secretary of State, the Commandant of the Coast Guard, and the Commander of the Guantanamo Naval Base, complaining that the screening procedures provided on Coast Guard cutters and at Guantanamo did not adequately protect their statutory and treaty rights to apply for refugee status and avoid repatriation to Haiti.

They alleged that the September 1991 coup had "triggered a continuing widely publicized reign of terror in Haiti"; that over 1,500 Haitians were believed to "have been killed or subjected to violence and destruction of their property because of their political beliefs and affiliations"; and that thousands of Haitian refugees "have set out in small boats that are often overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons, braving the hazards of a prolonged journey over high seas in search of safety and freedom." App. 24. In April, the District Court granted the plaintiffs a preliminary injunction requiring defendants to give Haitians on Guantanamo access to counsel for the screening process. We stayed that order on April 22, 1992, 503 U.S. , and, while the defendants' appeal from it was pending, the President issued the Executive Order now under attack. Plaintiffs then applied for a temporary restraining order to enjoin implementation of the Executive Order. They contended that it violated § 243(h) of the Act and Article 33 of the United Nations Protocol Relating to the Status of Refugees. The District Court denied the application because it concluded that § 243(h) is "unavailable as a source of relief for Haitian aliens in international waters," and that such a statutory provision was necessary because the Protocol's provisions are not "self-executing." App. to Pet. for Cert. 166a-168a.[14]

The Court of Appeals reversed. Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (CA2 1992). After concluding that the decision of the Eleventh Circuit in Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (1992), did not bar its consideration of the issue, the Court held that § 243(h)(1) does not apply only to aliens within the United States. The Court found its conclusion mandated by both the broad definition of the term "alien" in § 101(a)(3)[15] and the plain language of § 243(h), from which the 1980 amendment had removed the words "within the United States."[16] The Court reasoned that the text of the statute defeated the Eleventh Circuit's reliance on the placement of § 243(h)(1) in Part V of the INA (titled "Deportation; Adjustment of Status") as evidence that it applied only to aliens in the United States.[17] Moreover, the Court of Appeals rejected the Government's suggestion that since § 243(h) restricted actions of the Attorney General only, it did not limit the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas.

Nor did the Court of Appeals accept the Government's reliance on Article 33 of the United Nations Convention Relating to the Status of Refugees.[18] It recognized that the 1980

amendment to the INA had been intended to conform our statutory law to the provisions of the Convention,[19] but it read Article 33.1's prohibition against return, like the statute's, "plainly" to cover "all refugees, regardless of location." 969 F.2d, at 1362. This reading was supported by the "object and purpose" not only of that Article but also of the Convention as a whole.[20] While the Court of Appeals recognized that the negotiating history of the Convention disclosed that the representatives of at least six countries[21] construed the Article more narrowly, it thought that those views might have represented a dissenting position and that, in any event, it would "turn statutory construction on its head" to allow ambiguous legislative history to outweigh the Convention's plain text. Id., at 1366.[22]

The Second Circuit's decision conflicted with the Eleventh Circuit's decision in Haitian Refugee Center v. Baker, 953 F.2d 1498 (1992), and with the opinion expressed by Judge Edwards in Haitian Refugee Center v. Gracey, 257 U.S. App. D. C. 367, 410-414, 809 F.2d 794, 837-841 (1987) (Edwards, J., concurring in part and dissenting in part). Because of the manifest importance of the issue, we granted certiorari, 506 U.S. (1992).[23]

## III

Both parties argue that the plain language of § 243(h)(1) is dispositive. It reads as follows:

"The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) 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) (1988 ed., Supp. IV).

Respondents emphasize the words "any alien" and "return"; neither term is limited to aliens within the United States. Respondents also contend that the 1980 amendment deleting the words "within the United States" from the prior text of § 243(h), see n. 2, supra, obviously gave the statute an extraterritorial effect. This change, they further argue, was required in order to conform the statute to the text of Article 33.1 of the Convention, which they find as unambiguous as the present statutory text. Petitioners' response is that a fair reading of the INA as a whole demonstrates that § 243(h) does not apply to actions taken by the President or Coast Guard outside the United States; that the legislative history of the 1980 amendment supports their reading; and that both the text and the negotiating history of Article 33 of the Convention indicate that it was not intended to have any extraterritorial effect.

We shall first review the text and structure of the statute and its 1980 amendment, and then consider the text and negotiating history of the Convention.

### A. The Text and Structure of the INA

Although § 243(h)(1) refers only to the Attorney General, the Court of Appeals found it "difficult to believe that the proscription of § 243(h)(1) -- returning an alien to his persecutors -- was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch." 969 F.2d, at 1360. Congress "understood" that the Attorney General is the "President's agent for dealing with immigration matters," and would intend any reference to her to restrict similar actions of any government official. Ibid. As evidence of this understanding, the court cited 8 U.S.C. § 1103(a). That section, however, conveys to us a different message. It provides, in part: "The Attorney General shall be charged with the

administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate 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 . . . ." (Emphasis added.)

Other provisions of the Act expressly confer certain responsibilities on the Secretary of State,[24] the President,[25] and, indeed, on certain other officers as well.[26] The 1981 and 1992 Executive Orders expressly relied on statutory provisions that confer authority on the President to suspend the entry of "any class of aliens" or to "impose on the entry of aliens any restrictions he may deem to be appropriate."[27] We cannot say that the interdiction program created by the President, which the Coast Guard was ordered to enforce, usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone.[28]

The reference to the Attorney General in the statutory text is significant not only because that term cannot reasonably be construed to describe either the President or the Coast Guard, but also because it suggests that it applies only to the Attorney General's normal responsibilities under the INA. The most relevant of those responsibilities for our purposes are her conduct of the deportation and exclusion hearings in which requests for asylum or for withholding of deportation under § 243(h) are ordinarily advanced. Since there is no provision in the statute for the conduct of such proceedings outside the United States, and since Part V and other provisions of the INA[29] obviously contemplate that such proceedings would be held in the country, we cannot reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she has not been authorized to conduct such proceedings. Part V of the INA contains no reference to a possible extraterritorial application.

Even if Part V of the Act were not limited to strictly domestic procedures, the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory. See, e. g., EEOC v. Arabian American Oil Co., 499 U.S.

(1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); Lujan v. Defenders of Wildlife, 504 U.S. , - , and n. 4 (1992) (STEVENS, J., concurring in judgment); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute"). The Court of Appeals held that the presumption against extraterritoriality had "no relevance in the present context" because there was no risk that § 243(h), which can be enforced only in United States courts against the United States Attorney General, would conflict with the laws of other nations. 969 F.2d, at 1358. We have recently held, however, that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations. Smith v. United States, 507 U.S. , n. 5 (1993) (slip op., at 7).

Respondents' expansive interpretation of the word "return" raises another problem: it would make the word "deport" redundant. If "return" referred solely to the destination to which the alien is to be removed, it alone would have been sufficient to encompass aliens involved in both deportation and exclusion proceedings. And if Congress had meant to refer to all aliens who might be sent back to potential oppressors, regardless of their location, the word "deport" would have been unnecessary. By using both words, the statute implies an exclusively territorial application, in the context of both kinds of domestic immigration proceedings. The use of both words reflects the traditional division between the two kinds of aliens and the two

kinds of hearings. We can reasonably conclude that Congress used the two words "deport or return" only to make § 243(h)'s protection available in both deportation and exclusion proceedings. Indeed, the history of the 1980 amendment confirms that conclusion.

## B. The History of the Refugee Act of 1980

As enacted in 1952, § 243(h) authorized the Attorney General to withhold deportation of aliens "within the United States."[30] Six years later we considered the question whether it applied to an alien who had been paroled into the country while her admissibility was being determined. We held that even though she was physically present within our borders, she was not "within the United States" as those words were used in § 243(h). Leng May Ma v. Barber, 357 U.S. 185, 186 (1958).[31] We explained the important distinction between "deportation" or "expulsion," on the one hand, and "exclusion," on the other: "It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.' Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). See Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). The distinction was carefully preserved in Title II of the Immigration and Nationality Act." Id., at 187.

Under the INA, both then and now, those seeking "admission" and trying to avoid "exclusion" were already within our territory (or at its border), but the law treated them as though they had never entered the United States at all; they were within United States territory but not "within the United States." Those who had been admitted (or found their way in) but sought to avoid "expulsion" had the added benefit of "deportation proceedings"; they were both within United States territory and "within the United States." Ibid. Although the phrase "within the United States" presumed the alien's actual presence in the United States, it had more to do with an alien's legal status than with his location.

The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of § 243(h). By adding the word "return" and removing the words "within the United States" from § 243(h), Congress extended the statute's protection to both types of aliens, but it did nothing to change the presumption that both types of aliens would continue to be found only within United States territory. The removal of the phrase "within the United States" cured the most obvious drawback of § 243(h): as interpreted in Leng May Ma, its protection was available only to aliens subject to deportation proceedings.

Of course, in addition to this most obvious purpose, it is possible that the 1980 amendment also removed any territorial limitation of the statute, and Congress might have intended a double-barreled result.[32] That possibility, however, is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require. Moreover, in our review of the history of the amendment, we have found no support whatsoever for that latter, alternative, purpose.

The addition of the phrase "or return" and the deletion of the phrase "within the United States" are the only relevant changes made by the 1980 amendment to § 243(h)(1), and they are fully explained by the intent to apply § 243(h) to exclusion as well as to deportation proceedings. That intent is plainly identified in the legislative history of the amendment.[33] There is no change in the 1980 amendment, however, that could only be explained by an assumption that

Congress also intended to provide for the statute's extraterritorial application. It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history.

In sum, all available evidence about the meaning of § 243(h) -- the government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a dual reference to "deport or return," and the relevance of that dual structure to immigration law in general -- leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.

## IV

Although the protection afforded by § 243(h) did not apply in exclusion proceedings before 1980, other provisions of the Act did authorize relief for aliens at the border seeking protection as refugees in the United States. See INS v. Stevic, 467 U.S., at 415-416. When the United States acceded to the Protocol in 1968, therefore, the INA already offered some protection to both classes of refugees. It offered no such protection to any alien who was beyond the territorial waters of the United States, though, and we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope. Both Congress and the Executive Branch gave extensive consideration to the Protocol before ratifying it in 1968; in all of their published consideration of it there appears no mention of the possibility that the United States was assuming any extraterritorial obligations.[34] Nevertheless, because the history of the 1980 Act does disclose a general intent to conform our law to Article 33 of the Convention, it might be argued that the extraterritorial obligations imposed by Article 33 were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. Or, just as the statute might have imposed an extraterritorial obligation that the Convention does not (the argument we have just rejected), the Convention might have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law.[35] With those possibilities in mind we shall consider both the text and negotiating history of the Convention itself.

Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders. Respondents argue that the Protocol's broad remedial goals require that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders. In spite of the moral weight of that argument, both the text and negotiating history of Article 33 affirmatively indicate that it was not intended to have extraterritorial effect.

### A. The Text of the Convention

Two aspects of Article 33's text are persuasive. The first is the explicit reference in Article 33.2 to the country in which the alien is located; the second is the parallel use of the terms "expel or return," the latter term explained by the French word "refouler."

The full text of Article 33 reads as follows: "Article 33. -- Prohibition of expulsion or return ('refoulement')

"1. 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 race, religion, nationality, membership of a particular social group or political opinion.

"2. The benefit of the present provision may not, however, 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." Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S. T. 6259, 6276, T. I. A. S. No. 6577 (emphasis added).

Under the second paragraph of Article 33 an alien may not claim the benefit of the first paragraph if he poses a danger to the country in which he is located. If the first paragraph did apply on the high seas, no nation could invoke the second paragraph's exception with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.[36]

Article 33.1 uses the words "expel or return ('refouler')" as an obvious parallel to the words "deport or return" in § 243(h)(1). There is no dispute that "expel" has the same meaning as "deport"; it refers to the deportation or expulsion of an alien who is already present in the host country. The dual reference identified and explained in our opinion in Leng May Ma v. Barber, suggests that the term "return ('refouler')" refers to the exclusion of aliens who are merely "'on the threshold of initial entry.'" 357 U.S., at 187 (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)).

This suggestion -- that "return" has a legal meaning narrower than its common meaning -- is reinforced by the parenthetical reference to "refouler", a French word that is not an exact synonym for the English word "return." Indeed, neither of two respected English-French Dictionaries mentions "refouler" as one of many possible French translations of "return."[37] Conversely, the English translations of "refouler" do not include the word "return."[38] They do, however, include words like "repulse," "repel," "drive back," and even "expel." To the extent that they are relevant, these translations imply that "return" means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination. In the context of the Convention, to "return" means to "repulse" rather than to "reinstate."[39] Although there are additional translations in the Larousse Modern French-English Dictionary 545 (1978), "refouler" is not among them.

"refouler [-le] v. tr. (l). To stem (la maree). NAUT. To stem (un courant). TECHN. To drive in (une cheville); to deliver (l'eau); to full (une etoffe); to compress (un gaz); to hammer, to fuller (du metal). MILIT. To repulse (une attaque); to drive back, to repel (l'ennemi); to ram home (un projectile). PHILOS. To repress (un instinct). CH. DE F. To back (un train). FIG. To choke back (un sanglot).

-- -v. intr. To flow back (foule); to ebb, to be on the ebb (maree). MeD. Refoule, inhibited." Larousse, at 607.

The text of Article 33 thus fits with Judge Edwards' understanding "that 'expulsion' would refer to a 'refugee already admitted into a country' and that 'return' would refer to a 'refugee already within the territory but not yet resident there.' Thus, the Protocol was not intended to govern parties' conduct outside of their national borders." Haitian Refugee Center v. Gracey, 257 U.S. App. D. C., at 413, 809 F.2d, at 840 (footnotes omitted). From the time of the Convention, commentators have consistently agreed with this view.[40]

Even the United Nations High Commissioner for Refugees has implicitly acknowledged that the Convention has no extraterritorial application. While conceding that the Convention does not mandate any specific procedure by which to determine whether an alien qualifies as a refugee, the "basic requirements" his office has established impose an exclusively territorial burden, and announce that any alien protected by the Convention (and by its promise of non-refoulement) will be found either "'at the border or in the territory of a Contracting State.'" Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979) (quoting Official Records of the General Assembly, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1), paragraph 53(6)(e)). Those basic requirements also establish the right of an applicant for refugee status "'to remain in the country pending a decision on his initial request.'" (emphasis added). Handbook on Refugee Status, at 460.

The drafters of the Convention and the parties to the Protocol -- like the drafters of § 243(h) -- may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.[41]

## B. The Negotiating History of the Convention

In early drafts of the Convention, what finally emerged as Article 33 was numbered 28. At a negotiating conference of plenipotentiaries held in Geneva, Switzerland on July 11, 1951, the Swiss delegate explained his understanding that the words "expel" and "return" covered only refugees who had entered the host country. He stated: "Mr. ZUTTER (Switzerland) said that the Swiss Federal Government saw no reason why article 28 should not be adopted as it stood; for the article was a necessary one. He thought, however, that its wording left room for various interpretations, particularly as to the meaning to be attached to the words 'expel' and 'return'. In the Swiss Government's view, the term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term 'brefoulement', on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word 'return', used in the English text, gave that idea exactly. Yet article 28 implied the existence of two categories of refugee: refugees who were liable to be expelled, and those who were liable to be returned. In any case, the States represented at the Conference should take a definite position with regard to the meaning to be attached to the word 'return'. The Swiss Government considered that in the present instance the word applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons

claiming refugee status to cross its frontiers. He would be glad to know whether the States represented at the Conference accepted his interpretations of the two terms in question. If they did, Switzerland would be willing to accept article 28, which was one of the articles in respect of which States could not, under article 36 of the draft Convention, enter a reservation." (Emphases added.)[42]42No one expressed disagreement with the position of the Swiss delegate on that day or at the session two weeks later when Article 28 was again discussed. At that session, the delegate of the Netherlands recalled the Swiss delegate's earlier position:

"Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' ('refoulement') related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.

"He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

"At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

"In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

"There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record.

"Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word 'return' was the nearest equivalent in English to the French term 'refoulement'. He assumed that the word 'return' as used in the English text had no wider meaning.

"The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word 'refoulement' ('refouler' in verbal uses) should be included in brackets and between inverted commas after the English word 'return' wherever the latter occurred in the text." (Emphasis added.)[43]

Although the significance of the President's comment that the remarks should be "placed on record" is not entirely clear, this much cannot be denied: at one time there was a "general consensus," and in July of 1951 several delegates understood the right of non-refoulement to apply only to aliens physically present in the host country.[44] There is no record of any later disagreement with that position. Moreover, the term "refouler" was included in the English version of the text to avoid the expressed concern about an inappropriately broad reading of the English word "return."

Therefore, even if we believed that Executive Order 12807 violated the intent of some signatory states to protect all aliens, wherever they might be found, from being transported to potential oppressors, we must acknowledge that other signatory states carefully -- and successfully -- sought to avoid just that implication. The negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.

## V

Respondents contend that the dangers faced by Haitians who are unwillingly repatriated demonstrate that the judgment of the Court of Appeals fulfilled the central purpose of the Convention and the Refugee Act of 1980. While we must, of course, be guided by the high purpose of both the treaty and the statute, we are not persuaded that either one places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United

States.

It is perfectly clear that 8 U.S.C. § 1182(f), see n. 27, supra, grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores. Whether the President's chosen method of preventing the "attempted mass migration" of thousands of Haitians -- to use the Dutch delegate's phrase -- poses a greater risk of harm to Haitians who might otherwise face a long and dangerous return voyage, is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits. As we have already noted, Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption 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. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). We therefore find ourselves in agreement with the conclusion expressed in Judge Edwards' concurring opinion in Gracey, 257 U.S. App. D. C., at 414, 809 F.2d, at 841: "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."

The judgment of the Court of Appeals is reversed.

It is so ordered.

## Dissent by:

BLACKMUN

## Dissent:

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

I begin with the Convention,[45] 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.[46]

## A

Article 33.1 of the Convention states categorically and without geographical limitation: "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 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.[47]

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 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 "to repulse, . . .; to drive back, to repel." Dictionnaire Larousse 631 (1981).[48] Thus 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 hatien, Le Monde, May 31-June 1, 1992 ("Les Etats-Unis ont decide de refouler directement les refugies recueillis par la garde cotire." (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 text of Article 33.1 is clear, and whether the operative term is "return" or "refouler," it prohibits the Government's actions.[49]

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 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.

## B

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 "the 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.[50] Indeed, the majority agrees 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.

"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, P P 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 P 61, p. 13.

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."[51] 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 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.[52]

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 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 . . . ."

## II

## A

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.[53] The majority fails to 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.

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 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).

Even the challenged Executive Order places the Attorney General "on the boat" with the Coast Guard.[54] The Order purports to give the Attorney General "unreviewable discretion" to decide that an alien will not be returned.[55]

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, 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.

## B

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 "returning," as well as "deporting," 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."[56] It does so not by analyzing Article 33,

the provision that inspired the 1980 amendments,[57] 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 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.[58] 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 aliens "physically present in the United States, or at a land border or port of entry," it said so. See § 208(a).[59] 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.[60]

## C

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. 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 extraterritorially); 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. "'Over 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.[61]

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.

## III

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 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.

Citation: 509 U.S. 43; 113 S. Ct. 2485; 125 L. Ed. 2d 38; 61 U.S.L.W. 4652; 93 Cal. Daily Op. Service 4504; 93 Daily Journal DAR 7703; 7 Fla. Law W. Fed. S 442

Language: English

Date: 18 June 1993

Index Terms: Aliens; Judicial proceedings; Procedural requirements; Residence

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS v.
CATHOLIC SOCIAL SERVICES, INC., ET AL.
No. 91-1826 SUPREME COURT OF THE UNITED STATES
509 U.S. 43; 113 S. Ct. 2485;125 L.
Ed. 2d 38; 61 U.S.L.W. 4652; 93 Cal. Daily Op. Service 4504;
93 Daily Journal DAR 7703; 7 Fla. Law W. Fed. S 442
January 11, 1993, Argued
June 18, 1993, Decided

## Prior History:

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

## Disposition:

956 F.2d 914, vacated and remanded.

## Syllabus:

Under the alien legalization program created by Title II of the Immigration Reform and Control Act of 1986, an alien unlawfully present in the United States who sought permission to reside permanently had to apply first for temporary resident status by establishing, inter alia, that he had resided continuously in this country in an unlawful status and had been physically present here continuously for specified periods. After the Immigration and Naturalization Service (INS) issued regulations construing particular aspects of, respectively, the "continuous physical presence" and "continuous unlawful residence" requirements, two separate class actions were brought, each challenging one of the regulations on behalf of aliens whom it would render ineligible for legalization. In each instance, the District Court struck down the challenged regulation as inconsistent with the Reform Act and issued a remedial order directing the INS to accept legalization applications beyond the statutory deadline. The Court of Appeals, among other rulings, consolidated the INS's appeals from the remedial orders, rejected the INS's argument that the Reform Act's restrictive judicial review

provisions barred district court jurisdiction in each case, and affirmed the District Courts' judgments.

## Held:

The record is insufficient to allow this Court to decide all issues necessary to determine whether the District Courts had jurisdiction. Pp. 9-23.

(a)The Reform Act's exclusive review scheme -- which applies to "determinations respecting an application for adjustment of status," 8 U.S.C. § 1255a(f)(1), and specifies that "a denial" of such adjustment may be judicially scrutinized "only in the . . . review of an order of deportation" in the Courts of Appeals, § 1255a(f)(4)(A) -- does not preclude district court jurisdiction over an action which, in challenging the legality of an INS regulation, does not refer to or rely on the denial of any individual application. The statutory language delimiting the jurisdictional bar refers only to review of such an individual denial. McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 494. Pp. 9-12, 112 L. Ed. 2d 1005, 111 S. Ct. 888 .

(b)However, the promulgation of the challenged regulations did not itself affect each of the plaintiff class members concretely enough to render his claim "ripe" for judicial review, as is required by, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 . The regulations impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens. Rather, the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations. It delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of the Act's conditions, not merely those interpreted by the regulations in question. In these circumstances, a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying a regulation to him. Ordinarily, that barrier would appear when the INS formally denied the alien's application on the ground that a regulation rendered him ineligible for legalization. But a plaintiff who sought to rely on such a denial to satisfy the ripeness requirement would then still find himself at least temporarily barred by the Reform Act's exclusive review provisions, since he would be seeking "judicial review of a determination respecting an application" under § 1255(a)(f). Pp. 12-17.

(c)Nevertheless, the INS's "front-desking" policy -- which directs employees to reject applications at a Legalization Office's front desk if the applicant is statutorily ineligible for adjustment of status -- may well have left some of the plaintiffs with ripe claims that are outside the scope of § 1255(a)(f). A front-desked class member whose application was rejected because one of the regulations at issue rendered him ineligible for legalization would have felt the regulation's effects in a particularly concrete manner, for his application would have been blocked then and there; his challenge to the regulation should not fail for lack of ripeness. Front-desking would also have the untoward consequence for jurisdictional purposes of effectively excluding such an applicant from access even to the Reform Act's limited administrative and judicial review procedures, since he would have no formal denial to appeal administratively nor any opportunity to build an administrative record on which judicial review might be based. Absent clear and convincing evidence of a congressional intent to preclude judicial review entirely, it must be presumed that front-desked applicants may obtain district court review of the regulations in these circumstances. See McNary, supra, at 496-497. However, as there is also no evidence that particular class members were actually subjected to

front-desking, the jurisdictional issue cannot be resolved on the records below. Because, as the cases have been presented to this Court, only those class members (if any) who were front-desked have ripe claims over which the District Courts should exercise jurisdiction, the cases must be remanded for new jurisdictional determinations and, if appropriate, remedial orders. Pp. 17-23.

956 F.2d 914, vacated and remanded.

## Judges:

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined.

## Opinion By:

SOUTER

## Opinion:

JUSTICE SOUTER delivered the opinion of the Court.

This petition joins two separate suits, each challenging a different regulation issued by the Immigration and Naturalization Service in administering the alien legalization program created by Title II of the Immigration Reform and Control Act of 1986. In each instance, a District Court struck down the regulation challenged and issued a remedial order directing the INS to accept legalization applications beyond the statutory deadline; the Court of Appeals consolidated the INS's appeals from these orders, and affirmed the District Courts' judgments. We are now asked to consider whether the District Courts had jurisdiction to hear the challenges, and whether their remedial orders were permitted by law. We find the record insufficient to decide all jurisdictional issues and accordingly vacate and remand for new jurisdictional determinations and, if appropriate, remedial orders limited in accordance with the views expressed here.

I

On November 6, 1986, the President signed the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, Title II of which established a scheme under which certain aliens unlawfully present in the United States could apply, first, for the status of a temporary resident and then, after a one-year wait, for permission to reside permanently.[62] An applicant for temporary resident status must have resided continuously in the United States in an unlawful status since at least January 1, 1982, 8 U.S.C. § 1255a(a)(2)(A); must have been physically present in the United States continuously since November 6, 1986, the date the Reform Act was enacted, § 1255a(a)(3)(A); and must have been otherwise admissible as an immigrant. § 1255a(a)(4). The applicant must also have applied during the 12-month period beginning on May 5, 1987. § 1255a(a)(1).[63]

The two separate suits joined before us challenge regulations addressing, respectively, the first two of these four requirements. The first, Reno v. Catholic Social Services, Inc. (CSS) et

al. focuses on an INS interpretation of 8 U.S.C. § 1255a(a)(3), the Reform Act's requirement that applicants for temporary residence prove "continuous physical presence" in the United States since November 6, 1986. To mitigate this requirement, the Reform Act provides that "brief, casual, and innocent absences from the United States" will not break the required continuity. § 1255a(a)(3)(B). In a telex sent to its regional offices on November 14, 1986, however, the INS treated the exception narrowly, stating that it would consider an absence "brief, casual and innocent" only if the alien had obtained INS permission, known as "advance parole," before leaving the United States; aliens who left without it would be "ineligible for legalization." App. 186. The INS later softened this limitation somewhat by regulations issued on May 1, 1987, forgiving a failure to get advance parole for absences between November 6, 1986 and May 1, 1987. But the later regulation confirmed that any absences without advance parole on or after May 1, 1987 would not be considered "brief, casual, and innocent" and would therefore be taken to have broken the required continuity. See 8 CFR § 245a.1(g) (1992) ("Brief, casual, and innocent means a departure authorized by [the INS] (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes").

The CSS plaintiffs challenged the advance parole regulation as an impermissible construction of the Reform Act. After certifying the case as a class action, the District Court eventually defined a class comprising "persons prima facie eligible for legalization under [8 U.S.C. § 1255a] who departed and reentered the United States without INS authorization (i.e. 'advance parole') after the enactment of the [Reform Act] following what they assert to have been a brief, casual and innocent absence from the United States."[64] No. Civ. S-86-1343 LKK (ED Cal., May 3, 1988) (App. 50). On April 22, 1988, 12 days before the end of the legalization program's 12-month application period, the District Court granted partial summary judgment invalidating the regulation and declaring that "brief, casual, and innocent" absences did not require prior INS approval. No. Civ. S-86-1343 LKK (ED Cal., Apr. 22, 1988) (Record, Doc. No. 161); see Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149 (ED Cal. 1988) (explaining the basis of the April 22 order). No appeal was taken by the INS (by which initials we will refer to the Immigration and Naturalization Service and the Attorney General collectively), and after further briefing on remedial issues the District Court issued an order on June 10, 1988 requiring the INS to extend the application period to November 30, 1988[65] for class members who "knew of [the INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application."[66] No. Civ. S-86-1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 25a). Two further remedial orders issued on August 11, 1988 provided, respectively, an alternative remedy if the extension of the application period should be invalidated on appeal, and further specific relief for any class members who had been detained or apprehended by the INS or who were in deportation proceedings.[67] No. Civ. S-86-1343 LKK (ED Cal.) (Record, Doc. No. 187, 189). The INS appealed all three of the remedial orders.[68]

The second of the two lawsuits, styled INS v. League of United Latin American Citizens (LULAC) et al., goes to the INS's interpretation of 8 U.S.C. § 1255a(a)(2)(A), the Reform Act's "continuous unlawful residence" requirement. The Act provides that certain brief trips abroad will not break an alien's continuous unlawful residence (just as certain brief absences from the United States would not violate the "continuous physical presence" requirement). See § 1255a(g)(2)(A). Under an INS regulation, however, an alien would fail the "continuous unlawful residence" requirement if he had gone abroad and reentered the United States by presenting "facially valid" documentation to immigration authorities. 8 CFR § 245a.2(b)(8) (1992).[69] On the INS's reasoning, an alien's use of such documentation made his subsequent

presence "lawful" for purposes of § 1255a(a)(2)(A), thereby breaking the continuity of his unlawful residence. Thus, an alien who had originally entered the United States under a valid nonimmigrant visa, but had become an unlawful resident by violating the terms of that visa in a way known to the Government before January 1, 1982, was eligible for relief under the Reform Act. If, however, the same alien left the United States briefly and then used the same visa to get back in (a facially valid visa that had in fact become invalid after his earlier violation of its terms), he rendered himself ineligible.

In July 1987, the LULAC plaintiffs brought suit challenging the reentry regulation as inconsistent both with the Act and the equal protection limitation derived from Fifth Amendment due process. With this suit still pending, on November 17, 1987, some seven months into the Reform Act's 12-month application period, the INS modified its reentry policy by issuing two new regulations.[70] The first, codified at 8 CFR § 245a.2(b)(9) (1992), specifically acknowledged the eligibility of an alien who "reentered the United States as a nonimmigrant . . . in order to return to an unrelinquished unlawful residence," so long as he "would be otherwise eligible for legalization and . . . was present in the United States in an unlawful status prior to January 1, 1982." 52 FR 43845 (1987). The second, codified at 8 CFR § 245a.2(b)(10) (1992), qualified this expansion of eligibility by obliging such an alien to obtain a waiver of a statutory provision requiring exclusion of aliens who enter the United States by fraud. Ibid.

Although the LULAC plaintiffs then amended their complaint, they pressed their claim that 8 CFR § 245a.2(b)(8), the reentry regulation originally challenged, had been invalid prior to its modification. As to that claim, the District Court certified the case as a class action, with a class including "all persons who qualify for legalization but who were deemed ineligible for legalization under the original [reentry] policy, who learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply for legalization before the May 4, 1988 deadline."[71] No. 87-4757-WDK (JRx) (CD Cal. July 15, 1988) (App. 216).

On July 15, 1988, 10 weeks after the end of the 12-month application period, the District Court held the regulation invalid, while reserving the question of remedy. Ibid. (App. 224-225). Again, the INS took no appeal. The LULAC plaintiffs then sought a remedial order extending the application period for class members to November 30, 1988,[72] and compelling the INS to publicize the modified policy and the extended application period. They argued that the INS had effectively truncated the 12-month application period by enforcing the invalid regulation, by publicizing the regulation so as to dissuade potential applicants, and by failing to give sufficient publicity to its change in policy. On August 12, 1988, the District Court granted the plaintiffs' request for injunctive relief.[73] No. 87-4757-WDK (JRx) (CD Cal., Aug. 12, 1988) (App. to Pet. for Cert. 50a). The INS appealed this remedial order.

In its appeals in both CSS and LULAC, the INS raised two challenges to the orders of the respective District Courts. First, it argued that the restrictive judicial review provisions of the Reform Act barred district court jurisdiction over the claim in each case. It contended, second, that each District Court erred in ordering an extension of the 12-month application period, the 12-month limit being, it maintained, a substantive statutory restriction on relief beyond the power of a court to alter.

The Ninth Circuit eventually consolidated the two appeals. After holding them pending this Court's disposition of McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991), it rendered a decision in February 1992, affirming the District Courts.[74] Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (1992). We were prompted to grant certiorari, 505 U.S. (1992), by the importance of the issues, and by a conflict between circuits on the jurisdictional issue, see Ayuda, Inc. v. Thornburgh, 292 U.S. App. D.C. 150, 156-162, 948 F.2d 742, 748-754 (1991) (holding that the Reform Act precluded district court jurisdiction over a claim that INS regulations were inconsistent with the Act), cert. pending, No. 91-1924. We now vacate and remand.

## II

The Reform Act not only sets the qualifications for obtaining temporary resident status, but provides an exclusive scheme for administrative and judicial review of "determinations respecting . . . applications for adjustment of status" under the Title II legalization program. 8 U.S.C. § 1255a(f)(1). Section 1255a(f)(3)(A) directs the Attorney General to "establish an appellate authority to provide for a single level of administrative appellate review" of such determinations. Section 1255a(f)(4)(A) provides that a denial of adjustment of status is subject to review by a court "only in the judicial review of an order of deportation under [8 U.S.C. § 1105a]"; under § 1105a, this review takes place in the Courts of Appeals. Section 1255a(f)(1) closes the circle by explicitly rendering the scheme exclusive: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection."

Under this scheme, an alien denied adjustment of status by the INS in the first instance may appeal to the Associate Commissioner for Examinations, the "appellate authority" designated by the Attorney General pursuant to § 1255a(f)(3)(A). See 8 CFR §§ 103.1(f)(1)(xxvii), 245 A. 2(1992) (p) . Although the Associate Commissioner's decision is the final agency action on the application, an adverse decision does not trigger deportation proceedings. On the contrary, because the Reform Act generally allows the INS to use information in a legalization application only to make a determination on the application, see 8 U.S.C. § 1255a(c)(5),[75] an alien whose appeal has been rejected by the Associate Commissioner stands (except for a latent right to judicial review of that rejection) in the same position he did before he applied: he is residing in the United States in an unlawful status, but the Government has not found out about him yet.[76] We call the right to judicial review "latent" because § 1255a(f)(4)(A) allows judicial review of a denial of adjustment of status only on appeal of "an order of deportation." Hence, the alien must first either surrender to the INS for deportation[77] or wait for the INS to catch him and commence a deportation proceeding, and then suffer a final adverse decision in that proceeding, before having an opportunity to challenge the INS's denial of his application in court.

The INS takes these provisions to preclude the District Courts from exercising jurisdiction over the claims in both the CSS and LULAC cases, reasoning that the regulations it adopted to elaborate the qualifications for temporary resident status are "determinations respecting an application for adjustment of status" within the meaning of § 1255a(f)(1); because the claims in CSS and LULAC attack the validity of those regulations, they are subject to the limitations contained in § 1255a(f), foreclosing all jurisdiction in the district courts, and granting it to the Courts of Appeals only on review of a deportation order. The INS recognizes, however, that this reasoning is out of line with our decision in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991), where we construed a virtually identical

set of provisions governing judicial review within a separate legalization program for agricultural workers created by Title III of the Reform Act.[78] There, as here, the critical language was "a determination respecting an application for adjustment of status." We said that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." Id., at 492. We noted that the provision permitting judicial review only in the context of a deportation proceeding also defined its scope by reference to a single act: "'judicial review of such a denial.'" Ibid. (emphasis in original) (quoting 8 U.S.C. § 1160(e)(3)); see § 1255a(f)(4)(A) (using identical language). We therefore decided that the language setting the limits of the jurisdictional bar "describes the denial of an individual application," 498 U.S. at 492, and thus "applies only to review of denials of individual . . . applications." Id., at 494. The INS gives us no reason to reverse course, and we reject its argument that § 1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation without referring to or relying on the denial of any individual application.

Section 1255a(f)(1), however, is not the only jurisdictional hurdle in the way of the CSS and LULAC plaintiffs, whose claims still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific Congressional directive. To be sure, a statutory source of jurisdiction is not lacking, since 28 U.S.C. § 1331, generally granting federal question jurisdiction, "confers jurisdiction on federal courts to review agency action." Califano v. Sanders, 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). Neither is it fatal that the Reform Act is silent about the type of judicial review those plaintiffs seek. We customarily refuse to treat such silence "as a denial of authority to [an] aggrieved person to seek appropriate relief in the federal courts," Stark v. Wickard, 321 U.S. 288, 309, 88 L. Ed. 733, 64 S. Ct. 559 (1944), and this custom has been "reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (quoting 5 U.S.C. § 702).

As we said in Abbott Laboratories, however, the presumption of available judicial review is subject to an implicit limitation: "injunctive and declaratory judgment remedies," what the respondents seek here, "are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution,"[79] 387 U.S. at 148, that is to say, unless the effects of the administrative action challenged have been "felt in a concrete way by the challenging parties." Id., at 148-149. In some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy this requirement, as it did in Abbott Laboratories itself. There, for example, as well as in Gardner v. Toilet Goods Assn., Inc., 387 U.S. 167, 18 L. Ed. 2d 704, 87 S. Ct. 1526 (1967), the promulgation of the challenged regulations presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation. Abbott Laboratories, supra, at 152-153; Gardner, supra, at 171-172. But that will not be so in every case. In Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967), for example, we held that a challenge to another regulation, the impact of which could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs," id., at 164, would not be ripe before the regulation's application to the plaintiffs in some more acute fashion, since "no irremediably adverse consequences flowed from requiring a later challenge." Ibid.; see Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (a controversy concerning a regulation is not ordinarily ripe for

review under the Administrative Procedure Act until the regulation has been applied to the claimant's situation by some concrete action).

The regulations challenged here fall on the latter side of the line. They impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens. Rather, the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations.[80] It delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of the Act's conditions, not merely those interpreted by the regulations in question. In these circumstances, the promulgation of the challenged regulations did not itself give each CSS and LULAC class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.[81]20Similarly distinguishable is our decision in Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, 508 U.S. (1993), the factual and legal setting of which JUSTICE STEVENS appears to equate with that of the present cases, see post, at 6-7. In Associated General Contractors, the plaintiff association alleged that "many of its members regularly bid on and perform construction work for the [defendant City]," 508 U.S., at (slip op., at 2) (internal quotation marks omitted), thus providing an historical basis for the further unchallenged allegation that the members "would have . . . bid on . . . designated set aside contracts but for the restrictions imposed by the [challenged] ordinance." Ibid. (internal quotation marks omitted). A plaintiff in these cases can point to no similar history of application behavior to support a claim that "she would have applied but for the invalid regulations," post, at 9; and we think the mere fact that she may have heard of the invalid regulations through a QDE, a private attorney, or "word of mouth," post, at 4, insufficient proof of this counterfactual. Further, we defined the "injury in fact" in Associated General Contractors as "the inability to compete on an equal footing in the bidding process, not the loss of a contract," 508 U.S., at (slip op., at 9); thus, whether the association's members would have been awarded contracts but for the challenged ordinance was not immediately relevant. Here, the plaintiffs seek, not an equal opportunity to compete for adjustments of status, but the adjustments of status themselves. Under this circumstance, it becomes important to know whether they would be eligible for the adjustments but for the challenged regulations.

JUSTICE O'CONNOR'S ripeness analysis encounters one further difficulty. In her view, the plaintiffs' claims are ripe because "it is certain that an alien who now applies to the INS for legalization will be denied that benefit because the period has closed." Post, at 6 (emphasis in original). In these circumstances, she suggests, it would make no sense to require "the would-be beneficiary [to] make the wholly futile gesture of submitting an application." Ibid. But a plaintiff who, to establish ripeness, relies on the certainty that his application would be denied on grounds of untimeliness, must confront § 1255a(f)(2), which flatly bars all "courts of the United States" from reviewing "denials of adjustment of status . . . based on a late filing of an application for such adjustment." We would almost certainly interpret this provision to bar such reliance, since otherwise plaintiffs could always entangle the INS in litigation over application timing claims simply by suing without filing an application, a result we believe § 1255a(f)(2) was intended to foreclose in the ordinary case.

Ordinarily, of course, that barrier would appear when the INS formally denied the alien's application on the ground that the regulation rendered him ineligible for legalization. A plaintiff who sought to rely on the denial of his application to satisfy the ripeness requirement, however, would then still find himself at least temporarily barred by the Reform Act's

exclusive review provisions, since he would be seeking "judicial review of a determination respecting an application." 8 U.S.C. § 1255a(f)(1). The ripeness doctrine and the Reform Act's jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence. Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme. The CSS and LULAC plaintiffs do not argue that this limited scheme would afford them inadequate review of a determination based on the regulations they challenge, presumably because they would be able to obtain such review on appeal from a deportation order, if they become subject to such an order; their situation is thus different from that of the "17 unsuccessful individual SAW applicants" in McNary, 498 U.S. at 487, whose procedural objections, we concluded, could receive no practical judicial review within the scheme established by 8 U.S.C. § 1160(e). Id., at 496-497.

This is not the end of the matter, however, because the plaintiffs have called our attention to an INS policy that may well have placed some of them outside the scope of § 1255a(f)(1). The INS has issued a manual detailing procedures for its offices to follow in implementing the Reform Act's legalization programs and instructing INS employees called "Legalization Assistants" to review certain applications in the presence of the applicants before accepting them for filing. See Procedures Manual for the Legalization and Special Agricultural Worker Programs of the Immigration Reform and Control Act of 1986 (Legalization Manual).[82] According to the Manual, "minor correctable deficiencies such as incomplete responses or typographical errors may be corrected by the [Legalization Assistant]." Id., at IV-6. "If the applicant is statutorily ineligible," however, the Manual provides that "the application will be rejected by the [Legalization Assistant]." Ibid. (emphasis added). Because this prefiling rejection of applications occurs at the front desk of an INS office, it has come to be called "front-desking."[83] While the regulations challenged in CSS and LULAC were in force, Legalization Assistants who applied both the regulations and the Manual's instructions may well have "front-desked" the applications of class members who disclosed the circumstances of their trips outside the United States, and affidavits on file in the LULAC case represent that they did exactly that.[84] See n. 26, infra.

We cannot find, in either of the two sentences the parties point to, the policy now articulated by the INS. The first sentence does not say that applicants will be informed; it says that applications will be rejected. The second sentence contains no hint that the Legalization Assistant should tell the applicant that he has a right to file an application despite the "rejection," or that he should file an application if he wants to preserve his rights. Rather, it seems to provide little more than a procedure for dealing with the pesky applicant who "won't take 'no' for an answer." Neither of the sentences preserves a realistic path to judicial review.

As respondents argue, see Brief for Respondents 17, n. 23, a class member whose application was "front-desked" would have felt the effects of the "advance parole" or "facially valid document" regulation in a particularly concrete manner, for his application for legalization would have been blocked then and there; his challenge to the regulation should not fail for lack of ripeness. Front-desking would also have a further, and untoward, consequence for jurisdictional purposes, for it would effectively exclude an applicant from access even to the limited administrative and judicial review procedures established by the Reform Act. He would have no formal denial to appeal to the Associate Commissioner for Examinations, nor would he have an opportunity to build an administrative record on which judicial review might be based.[85] Hence, to construe § 1255a(f)(1) to bar district court jurisdiction over his

challenge, we would have to impute to Congress an intent to preclude judicial review of the legality of INS action entirely under those circumstances. As we stated recently in McNary, however, there is a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," McNary, 498 U.S. at 496 ; and we will accordingly find an intent to preclude such review only if presented with "'clear and convincing evidence.'" Abbott Laboratories, 387 U.S. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-380, 7 L. Ed. 2d 809, 82 S. Ct. 787 (1962)); see generally Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-673, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986) (discussing the presumption in favor of judicial review).

There is no such clear and convincing evidence in the statute before us. Although the phrase "a determination respecting an application for adjustment of status" could conceivably encompass a Legalization Assistant's refusal to accept the application for filing at the front desk of a Legalization Office, nothing in the statute suggests, let alone demonstrates, that Congress was using "determination" in such an extended and informal sense. Indeed, at least one related statutory provision suggests just the opposite. Section 1255a(f)(3)(B) limits administrative appellate review to "the administrative record established at the time of the determination on the application"; because there obviously can be no administrative record in the case of a front-desked application, the term "determination" is best read to exclude front-desking. Thus, just as we avoided an interpretation of 8 U.S.C. § 1160(e) in McNary that would have amounted to "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims," McNary, supra, at 497, so here we avoid an interpretation of § 1255a(f)(1) that would bar front-desked applicants from ever obtaining judicial review of the regulations that rendered them ineligible for legalization.

Unfortunately, however, neither the CSS record nor the LULAC record contains evidence that particular class members were actually subjected to front-desking. None of the named individual plaintiffs in either case alleges that he or she was front-desked,[86] and while a number of affidavits in the LULAC record contain the testimony of immigration attorneys and employees of interested organizations that the INS has "refused," "rejected," or "denied individuals the right to file" applications,[87] the testimony is limited to such general assertions; none of the affiants refers to any specific incident that we can identify as an instance of front-desking.[88]

This lack of evidence precludes us from resolving the jurisdictional issue here, because, on the facts before us, the front-desking of a particular class member is not only sufficient to make his legal claims ripe, but necessary to do so. As the case has been presented to us, there seems to be no reliable way of determining whether a particular class member, had he applied at all (which, we assume, he did not), would have applied in a manner that would have subjected him to front-desking. As of October 16, 1987, the INS had certified 977 Qualified Designated Entities which could have aided class members in preparing applications that would not have been front-desked, see 52 FR 44812 (1987); n. 21, supra, and there is no prior history of application behavior on the basis of which we could predict who would have applied without Qualified Designated Entity assistance and therefore been front-desked. Hence, we cannot say that the mere existence of a front-desking policy involved a "concrete application" of the invalid regulations to those class members who were not actually front-desked.[89] Because only those class members (if any) who were front-desked have ripe claims over which the District Courts should exercise jurisdiction, we must vacate the judgment of the Court of Appeals, and remand with directions to remand to the respective District Courts for proceedings to determine which class members were front-desked.[90]

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

## Concur By:

O'CONNOR

## Concur:

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the District Courts in these two cases, Reno v. Catholic Social Services, Inc. (CSS) and INS v. League of United Latin American Citizens (LULAC), erred in extending the application period for legalization beyond May 4, 1988, the end of the 12-month interval specified by the Reform Act. I would not, however, reach this result on ripeness grounds. The Court holds that a member of the plaintiff class in CSS or LULAC who failed to apply to the INS during the 12-month period does not now have a ripe claim to extend the application deadline. In my view, that claim became ripe after May 4, 1988, even if it was not ripe before. The claim may well lack merit, but it is no longer premature.

The Court of Appeals did not consider the problem of ripeness, and the submissions to this Court have not discussed that problem except in passing. See Pet. for Cert. 11, n. 13; Brief for Petitioners 20; Brief for Respondents 17, n. 23. Rather, certiorari was granted on two questions, to which the parties rightly have adhered: first, whether the District Courts had jurisdiction under 8 U.S.C. § 1255a(f), the judicial-review provision of Title II of the Reform Act; and second, whether the courts properly extended the application period. See Pet. for Cert. I. The Court finds the jurisdictional challenge meritless under McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991), see ante, at 9-12, as do I. But instead of proceeding to consider the second question presented, the Court sua sponte attempts to resolve the case on ripeness grounds. It reaches out to hold that "the promulgation of the challenged regulations did not itself give each CSS and LULAC class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." Ante, at 15-16. This is new and, in my view, incorrect law. Moreover, even if it is correct, the new ripeness doctrine propounded by the Court is irrelevant to the case at hand.

Our prior cases concerning anticipatory challenges to agency rules do not specify when an anticipatory suit may be brought against a benefit-conferring rule, such as the INS regulations here. An anticipatory suit by a would-be beneficiary, who has not yet applied for the benefit that the rule denies him, poses different ripeness problems than a pre-enforcement suit against a duty-creating rule, see Abbott Laboratories v. Gardner, 387 U.S. 136, 148-156, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (permitting pre-enforcement suit). Even if he succeeds in his anticipatory action, the would-be beneficiary will not receive the benefit until he actually applies for it; and the agency might then deny him the benefit on grounds other than his ineligibility under the rule. By contrast, a successful suit against the duty-creating rule will relieve the plaintiff immediately of a burden that he otherwise would bear.

Yet I would not go so far as to state that a suit challenging a benefit-conferring rule is necessarily unripe simply because the plaintiff has not yet applied for the benefit. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." Regional Rail Reorganization Act Cases, 419 U.S. 102, 143, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). If it is "inevitable" that the challenged rule will "operate" to the plaintiff's disadvantage -- if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule -- then there may well be a justiciable controversy that the court may find prudent to resolve.

I do not mean to suggest that a simple anticipatory challenge to the INS regulations would be ripe under the approach I propose. Cf. ante, at 14-15, n. 19. That issue need not be decided because, as explained below, these cases are not a simple anticipatory challenge. See infra, at 5-8. My intent is rather to criticize the Court's reasoning -- its reliance on a categorical rule that would-be beneficiaries cannot challenge benefit-conferring regulations until they apply for benefits.

Certainly the line of cases beginning with Abbott Laboratories does not support this categorical approach. That decision itself discusses with approval an earlier case that involved an anticipatory challenge to a benefit-conferring rule.

"In United States v. Storer Broadcasting Co., 351 U.S. 192, 100 L. Ed. 1081, 76 S. Ct. 763, the Court held to be a final agency action . . . an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant already owning five such licenses, even though no specific application was before the Commission." 387 U.S. at 151 (emphasis added).

More recently, in EPA v. National Crushed Stone Assn., 449 U.S. 64, 66 L. Ed. 2d 268, 101 S. Ct. 295 (1980), the Court held that a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance." Id., at 72, n. 12. And in Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983), the Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the utilities had not yet applied for a certificate. See id., at 200-202. To be sure, all of these decisions involved licenses, certificates, or variances, which exempt the bearer from otherwise-applicable duties; but the same is true of the instant cases. The benefit conferred by the Reform Act -- an adjustment in status to lawful temporary resident alien, see 8 U.S.C. § 1255a(a) -- readily can be conceptualized as a "license" or "certificate" to remain in the United States, or a "variance" from the immigration laws.

As for Lujan v. National Wildlife Federation, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990), the Court there stated that: "Absent [explicit statutory authorization for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review

at once, whether or not explicit statutory review apart from the APA is provided.)" Id., at 891-892 (citations omitted).

This language does not suggest that an anticipatory challenge to a benefit-conferring rule will of necessity be constitutionally unripe, for otherwise an "explicit statutory review" provision would not help cure the ripeness problem. Rather, Lujan points to the prudential considerations that weigh in the ripeness calculus: the need to "flesh out" the controversy and the burden on the plaintiff who must "adjust his conduct immediately." These are just the kinds of factors identified in the two-part, prudential test for ripeness that Abbott Laboratories articulated. "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149 . See Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581-582, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985) (relying upon Abbott Laboratories test); Pacific Gas, supra, at 200-203 (same); National Crushed Stone, supra, at 72-73, n. 12 (same). At the very least, where the challenge to the benefit-conferring rule is purely legal, and where the plaintiff will suffer hardship if he cannot raise his challenge until later, a justiciable, anticipatory challenge to the rule may well be ripe in the prudential sense. Thus I cannot agree with the Court that ripeness will never obtain until the plaintiff actually applies for the benefit.

But this new rule of ripeness law, even if correct, is irrelevant here. These cases no longer fall in the above-described category of anticipatory actions, where a would-be beneficiary simply seeks to invalidate a benefit-conferring rule before he applies for benefits. As the cases progressed in the District Courts, respondents amended their complaints to request an additional remedy beyond the invalidation of the INS regulations: an extension of the 12-month application period. Compare Sixth Amended Complaint in CSS (Record, Doc. No. 140), First Amended Complaint in LULAC (Record, Doc. No. 56) with Third Amended Complaint in CSS (Record, Doc. No. 69), Complaint in LULAC (Record, Doc. No. 1). That period expired on May 4, 1988, and the District Courts thereafter granted an extension. See App. to Pet. for Cert. 22a-28a, 50a-60a (orders dated June and August 1988). The only issue before us is whether these orders should have been entered. See ante, at 4-5, 8-9. Even if the Court is correct that a plaintiff cannot seek to invalidate an agency's benefit-conferring rule before applying to the agency for the benefit, it is a separate question whether the would-be beneficiary must make the wholly futile gesture of submitting an application when the application period has expired and he is seeking to extend it.

In the instant cases, I do not see why a class member who failed to apply to the INS within the 12-month period lacks a ripe claim to extend the application deadline, now that the period actually has expired. If Congress in the Reform Act had provided for an 18-month application period, and the INS had closed the application period after only 12 months, no one would argue that court orders extending the period for 6 more months should be vacated on ripeness grounds. The orders actually before us are not meaningfully distinguishable. Of course, respondents predicate their argument for extending the period on the invalidity of the INS regulations, see infra, at 8-10, not on a separate statutory provision governing the length of the period, but this difference does not change the ripeness calculus. The "basic rationale" behind our ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," when those "disagreements" are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." Union Carbide, supra, at 580-581 (internal quotation marks omitted). There is no contingency to the closing of the 12-month application period. It is certain that an alien who

now applies to the INS for legalization will be denied that benefit because the period has closed. Nor does prudence justify this Court in postponing an alien's claim to extend the period, since that claim is purely legal and since a delayed opportunity to seek legalization will cause grave uncertainty.

The Court responds to this point by reiterating that class members who failed to apply to the INS have not yet suffered a "concrete" injury, because the INS has not denied them legalization by virtue of the challenged regulations. See ante, at 16, n. 20. At present, however, class members are seeking to redress a different, and logically prior, injury: the denial of the very opportunity to apply for legalization.

The Court's ripeness analysis focuses on the wrong question: whether "the promulgation of the challenged regulations [gave] each CSS and LULAC class member a ripe claim." Ante, at 15 (emphasis added). But the question is not whether the class members' claims were ripe at the inception of these suits, when respondents were seeking simply to invalidate the INS regulations and the 12-month application period had not yet closed. Whatever the initial status of those claims, they became ripe once the period had in fact closed and respondents had amended their complaints to seek an extension. In the Regional Rail Reorganization Act Cases, this Court held that "since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." 419

U.S. at 140 . Accord, Buckley v. Valeo, 424 U.S. 1, 114-118, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). Similarly, in the cases before us, it is the situation now (and, as it happens, at the time of the District Courts' orders), rather than at the time of the initial complaints, that must govern.

The Court also suggests that respondents' claim to extend the application period may well be "flatly" barred by 8 U.S.C. § 1255a(f)(2), which provides: "No denial of adjustment of status [under Title II of the Reform Act] based on a late filing of an application for such adjustment may be reviewed by [any] court . . . ." See ante, at 16, n. 20. I find it remarkable that the Court might construe § 1255a(f)(2) as barring any suit seeking to extend the application deadline set by the INS, while at the same time interpreting § 1255a(f)(1) not to bar respondents' substantive challenge to the INS regulations, see ante, at 9-12. As the INS itself observes, the preclusive language in § 1255a(f)(1) is "broader" than in § 1255a(f)(2), because the latter provision uses the word "denial" instead of "determination." See Brief for Petitioners 19. If Congress in the Reform Act had provided for an 18-month application period, and the INS had closed the period after only 12 months, I cannot believe that § 1255a(f)(2) would preclude a suit seeking to extend the period by 6 months. Nor do I think that § 1255a(f)(2) bars respondents' claim to extend the period, because that claim is predicated on their substantive challenge to the INS regulations, which in turn is permitted by § 1255a(f)(1). In any event, § 1255a(f)(2) concerns reviewability, not ripeness; whether or not that provision precludes the instant actions, the Court's ripeness analysis remains misguided.

Of course, the closing of the application period was not an unalloyed benefit for class members who had failed to apply. After May 4, 1988, those aliens had ripe claims, but they also became statutorily ineligible for legalization. The Reform Act authorizes the INS to adjust the status of an illegal alien only if he "applies for such adjustment during the 12-month period beginning on a date . . . designated by the Attorney General." 8 U.S.C. § 1255a(a)(1)(A). As the INS rightly argues, this provision precludes the legalization of an alien who waited to apply until after the 12-month period had ended. The District Courts' orders

extending the application period were not unripe, either constitutionally or prudentially, but they were impermissible under the Reform Act. "A court is no more authorized to overlook the valid [requirement] that applications be [submitted] than it is to overlook any other valid requirement for the receipt of benefits." Schweiker v. Hansen, 450 U.S. 785, 790, 67 L. Ed. 2d 685, 101 S. Ct. 1468 (1981) (per curiam).

Respondents assert that equity requires an extension of the time limit imposed by § 1255a(a)(1)(A). Whether that provision is seen as a limitations period subject to equitable tolling, see Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990), or as a substantive requirement subject perhaps to equitable estoppel, see Office of Personnel Management v. Richmond, 496 U.S. 414, 419-424, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990), the District Courts needed some special reason to exercise that equitable power against the United States. The only reason respondents adduce is supposed "affirmative misconduct" by the INS. See Irwin, supra, at 96. ("We have allowed equitable tolling in situations . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); Richmond, supra, at 421 ("Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of 'affirmative misconduct' might give rise to estoppel against the Government"). Respondents argue that the INS engaged in "affirmative misconduct" by promulgating the invalid regulations, which deterred aliens who were ineligible under those regulations from applying for legalization. See Plaintiffs' Submission Re Availability of Remedies for the Plaintiff Class in CSS, pp. 6-15 (Record, Doc. No. 164), Plaintiffs' Memorandum on Remedies in LULAC (Record, Doc. No. 40). The District Courts essentially accepted the argument, ordering remedies coextensive with the INS' supposed "misconduct." The CSS court extended the application period for those class members who "knew of [the INS'] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," App. to Pet. for Cert. 25a; the LULAC court provided an almost identical remedy, see id., at 59a.

I cannot agree that a benefit-conferring agency commits "affirmative misconduct," sufficient to justify an equitable extension of the statutory time period for application, simply by promulgating a regulation that incorrectly specifies the eligibility criteria for the benefit. When Congress passes a benefits statute that includes a time period, it has two goals. It intends both that eligible claimants receive the benefit and that they promptly assert their claims. The broad definition of "misconduct" that respondents propose would give the first goal absolute priority over the second, but I would not presume that Congress intends such a prioritization. Rather, absent evidence to the contrary, Congress presumably intends that the two goals be harmonized as best possible, by requiring would-be beneficiaries to make a timely application and concurrently to contest the invalid regulation. "We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." Irwin, supra, at 96. The broad equitable remedy entered by the District Courts in these cases is contrary to Congress's presumptive intent in the Reform Act, and thus is error. "'Courts of equity can no more disregard statutory . . . requirements and provisions than can courts of law.'" INS v. Pangilinan, 486 U.S. 875, 883, 100 L. Ed. 2d 882, 108 S. Ct. 2210 (1988) (quoting Hedges v. Dixon County, 150 U.S. 182, 192, 37 L. Ed. 1044, 14 S. Ct. 71 (1893)).

I therefore agree with the Court that the District Courts' orders extending the application period must be vacated. I also agree that "front-desked" aliens already have "applied" within the meaning of § 1255a(a)(1)(A). See ante, at 23, n. 29. On remand, respondents may be able

to demonstrate particular instances of "misconduct" by the INS, beyond the promulgation of the invalid regulations, that might perhaps justify an extension for certain members of the LULAC or CSS classes. See Brief for Respondents 16-20, 35-42. I would not preclude the possibility of a narrower order requiring the INS to adjudicate the applications of both "front-desked" aliens and some aliens who were not "front-desked," but neither would I endorse that possibility, because at this point respondents have made only the most general suggestions of "misconduct."

## Dissent by:

STEVENS

## Dissent:

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

After Congress authorized a major amnesty program in 1986, the Government promulgated two regulations severely restricting access to that program. If valid, each regulation would have rendered ineligible for amnesty the members of the respective classes of respondents in this case. The Government, of course, no longer defends either regulation. See ante, at 4, 8. Nevertheless, one of the regulations was in effect for all but 12 days of the period in which applications for legalization were accepted; the other, for over half of that period. See ante, at 4, 6-7. Accordingly, after holding the regulations invalid, the District Courts entered orders extending the time for filing applications for certain class members. See ante, at 4, 8.

On appeal, the Government argued that the District Courts lacked jurisdiction both to entertain the actions and to provide remedies in the form of extended application periods. The Court of Appeals rejected the first argument on the authority of our decision in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991). Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914, 919-921 (CA9 1992). As the Court holds today, ante, at 9-12, that ruling was plainly correct. The Court of Appeals also correctly rejected the second argument advanced by the Government, noting that extension of the filing deadline effectuated Congress' intent to provide "meaningful opportunities to apply for adjustments of status," which would otherwise have been frustrated by enforcement of the invalid regulations. 956 F.2d at 921-922 . We should, accordingly, affirm the judgment of the Court of Appeals.

This Court, however, finds a basis for prolonging the litigation on a theory that was not argued in either the District Courts or the Court of Appeals, and was barely mentioned in this Court: that respondents' challenges are not, for the most part, "ripe" for adjudication. Ante, at 13-17. I agree with JUSTICE O'CONNOR, ante, (opinion concurring in judgment), that the Court's rationale is seriously flawed. Unlike JUSTICE O'CONNOR, however, see ante, at 7, I have no doubt that respondents' claims were ripe as soon as the concededly invalid regulations were promulgated.

Our test for ripeness is two pronged, "requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Whether an issue is fit for judicial review, in turn, often depends on "the degree and nature of [a]

regulation's present effect on those seeking relief," Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 164, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967), or, put differently, on whether there has been some "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him," Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). As JUSTICE O'CONNOR notes, we have returned to this two-part test for ripeness time and again, see ante, at 5, and there is no question but that the Abbott Laboratories formulation should govern this case.

As to the first Abbott Laboratories factor, I think it clear that the challenged regulations have an impact on respondents sufficiently "direct and immediate," 387 U.S. at 152, that they are fit for judicial review. My opinion rests, in part, on the unusual character of the amnesty program in question. As we explained in McNary, supra:

"The Immigration Reform and Control Act of 1986 (Reform Act) constituted a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States. . . . In recognition that a large segment of the shadow population played a useful and constructive role in the American economy, but continued to reside in perpetual fear, the Reform Act established two broad amnesty programs to allow existing undocumented aliens to emerge from the shadows." 498 U.S. at 481-483 (footnotes omitted).[91]1A major purpose of this ambitious effort was to eliminate the fear in which these immigrants lived, "'afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.'" Ayuda, Inc. v. Thornburgh, 292 U.S. App. D.C. 150, 168, 948 F.2d 742, 760 (1991) (Wald, J., dissenting) (quoting H. R. Rep. No. 99-682, pt. 1, p. 49 (1986). Indeed, in recognition of this fear of governmental authority, Congress established a special procedure through which "qualified designated entities," or "QDEs," would serve as a channel of communication between undocumented aliens and the INS, providing reasonable assurance that "emergence from the shadows" would result in amnesty and not deportation. 8 U.S.C. § 1255a(c)(2); see Ayuda, 292 U.S. App. D. C., at 168, and n. 1, 948 F.2d at 760, and n. 1.

Under these circumstances, official advice that specified aliens were ineligible for amnesty was certain to convince those aliens to retain their "shadow" status rather than come forward. At the moment that decision was made -- at the moment respondents conformed their behavior to the invalid regulations -- those regulations concretely and directly affected respondents, consigning them to the shadow world from which the Reform Act was designed to deliver them, and threatening to deprive them of the statutory entitlement that would otherwise be theirs.[92] Cf. Lujan, 497 U.S. at 891 (concrete application threatening harm as basis for ripeness).

The majority concedes, of course, that class members whose applications were "front-desked" felt the effects of the invalid regulations concretely, because their applications were "blocked then and there." See ante, at 19. Why "then and there," as opposed to earlier and elsewhere, should be dispositive remains unclear to me; whether a potential application is thwarted by a front-desk Legalization Assistant, by advice from a QDE, by consultation with a private attorney, or even by word-of-mouth regarding INS policies, the effect on the potential applicant is equally concrete, and equally devastating. In my view, there is no relevant difference, for purposes of ripeness, between respondents who were "front-desked," and those who can demonstrate, like the LULAC class, that they "'learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did

not apply,'" ante, at 7, or, like the class granted relief in CSS, that they "'knew of [the INS'] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," ante, at 4. As Judge Wald explained in Ayuda, supra: "The majority admits that if low level INS officials had refused outright to accept legalization applications for filing, the district court could hear the suit. Even if the plaintiffs' affidavits are read to allege active discouragement rather than outright refusal to accept, this is a subtle distinction indeed, and one undoubtedly lost on the illegal aliens involved, upon which to grant or deny jurisdiction to challenge the practice." 292 U.S. App. D. C., at 169, n. 3, 948 F.2d at 761, n. 3 (Wald, J., dissenting) (internal citation omitted).

The second Abbott Laboratories factor, which focuses on the cost to the parties of withholding judicial review, also weighs heavily in favor of ripeness in this case. Every day during which the invalid regulations were effective meant another day spent in the shadows for respondents, with the attendant costs of that way of life. See supra, at 3. Even more important, with each passing day, the clock on the application period continued to run, increasing the risk that review, when it came, would be meaningless because the application period had already expired. See Ayuda, 292 U.S. App. D. C., at 178, 948 F.2d at 770 (Wald, J., dissenting).[93] Indeed, the dilemma respondents find themselves in today speaks volumes about the costs of deferring review in this situation. Cf. Toilet Goods Assn., 387 U.S. at 164 (challenge not ripe where "no irremediable adverse consequences flow from requiring a later challenge").

Under Abbott Laboratories, then, I think it plain that respondents' claims were ripe for adjudication at the time they were filed. The Court's contrary holding, which seems to rest on the premise that respondents cannot challenge a condition of legalization until they have satisfied all other conditions, see ante, at 14-15, is at odds not only with our ripeness case law, but also with our more general understanding of the way in which government regulation affects the regulated. In Northeastern Florida Chapter of Associated General

Contractors of America v. Jacksonville, U.S. (1993), for instance, we held that a class of contractors could challenge an ordinance making it more difficult for them to compete for public business without making any showing that class members were actually in a position to receive such business, absent the challenged regulation. We announced the following rule: "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." U.S., at (slip op., at 8-9).[94]

Our decision in the Jacksonville case is well supported by precedent; the Court's ripeness holding today is notable for its originality.

Though my approach to the ripeness issue differs from that of JUSTICE O'CONNOR, we are in agreement in concluding that respondents' claims are ripe for adjudication. We also agree that the validity of the relief provided by the District Courts, in the form of extended application periods, turns on whether that remedy is consistent with congressional intent. See ante, at 10 (opinion concurring in judgment); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 557-558, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974) (equitable relief must be "consonant with the legislative scheme"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313,

72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982) (courts retain broad equity powers to enter remedial orders absent clear statutory restriction); INS v. Pangilinan, 486 U.S. 875, 883, 100 L. Ed. 2d 882, 108 S. Ct. 2210 (1988) (courts of equity bound by statutory requirements). Where I differ from JUSTICE O'CONNOR is in my determination that extensions of the application period in this case were entirely consistent with legislative intent, and hence well within the authority of the District Courts.

It is no doubt true that "when Congress passes a benefits statute that includes a time period, it has two goals." See ante, at 9 (opinion concurring in judgment). Here, Congress' two goals were finality in its one-time amnesty program, and the integration of productive aliens into the American mainstream. See Perales v. Thornburgh, 967 F.2d 798, 813 (CA2 1992). To balance both ends, and to achieve each, Congress settled on a 12-month application period. Twelve months, Congress determined, would be long enough for frightened aliens to come to understand the program and to step forward with applications, especially when the full period was combined with the special outreach efforts mandated by the Reform Act. Ibid.; see 8 U.S.C. § 1255a(i) (requiring broad dissemination of information about amnesty program); 8 U.S.C. § 1255a(c)(2) (establishing QDEs). The generous 12-month period would also serve the goal of finality, by "'ensuring true resolution of the problem and . . . that the program will be a one-time-only program.'" 967 F.2d at 813 (quoting H. R. Rep. No. 99-682, pt 1, p. 72 (1986).

The problem, of course, is that the full 12-month period was never made available to respondents. For the CSS class, the 12-month period shrank to precisely 12 days during which they were eligible for legalization; for the LULAC class, to roughly 5 months. See supra, at 1. Accordingly, congressional intent required an extension of the filing deadline, in order to make effective the 12-month application period critical to the balance struck by Congress. See 956 F.2d at 922 ; Perales, 967 F.2d at 813 .

That congressional intent is furthered, not frustrated, by the equitable relief granted here distinguishes this case from Pangilinan, supra, in which we held that a court lacked the authority to order naturalization for certain persons after expiration of a statutory deadline. 486 U.S. 882 at 882-885 . In Pangilinan, we were faced with a "congressional command [that] could not be more manifest" specifically precluding the relief granted. Id., at 884. The Reform Act, on the other hand, contains no such explicit limitation.[95] Indeed, the Reform Act does not itself contain a statutory deadline at all, leaving it largely to the Attorney General to delineate a 12-month period. 8 U.S.C. § 1255a(a)(1)(A). This delegation highlights the relative insignificance to Congress of the application cutoff date, as opposed to the length of the application period itself. See Perales, 967 F.2d at 813, n. 4.

Finally, I can see no reason to limit otherwise available relief to those class members who experienced "front-desking," on the theory that they have "applied" for legalization. Cf. ante, at 23, n. 29; ante, at 10 (opinion concurring in judgment). It makes no sense to condition relief on the filing of a futile application. Indeed, we have already rejected the proposition that such an application is necessary for receipt of an equitable remedy. In Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), a case involving discriminatory employment practices under Title VII of the Civil Rights Act of 1964, we held that those who had been deterred from applying for jobs by an employer's practice of rejecting applicants like themselves were eligible for relief along with those who had unsuccessfully applied. We reasoned: "A consistently enforced discriminatory policy can surely deter job applications

from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

". . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U.S. 365 at 365-366 .

The same intelligent principle should control this case. A respondent who can show that she would have applied for legalization but for the invalid regulations is "in a position analogous to that of an applicant," and entitled to the same relief. See 431 U.S. at 368 .

In my view, then, the Court of Appeals was correct on both counts when it affirmed the District Court orders in this case: Respondents' claims were justiciable when filed, and the relief ordered did not exceed the authority of the District Courts. Accordingly, I respectfully dissent.

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[1]This language appears in both Executive Order No. 12324, 3 CFR 181 (1981-1983 Comp.), issued by President Reagan, and Executive Order No. 12807, 57 Fed. Reg. 21133 (1992), issued by President Bush.

[2]Title 8 U.S.C. § 1253(h) (1988 ed. and Supp. IV), as amended by § 203(e) of the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107. Section 243(h)(1) provides: "(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) 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."

[3]Jan. 31, 1967, 19 U.S. T. 6223, T. I. A. S. No. 6577.

[4] U.S.C. § 1252 (1988 ed. and Supp. IV).

[5] U.S.C. § 1226. Although such aliens are located within the United States, the INA (in its use of the term exclusion) treats them as though they had never been admitted; § 1226(a), for example, says that the special inquiry officer shall determine "whether an arriving alien . . . shall be allowed to enter or shall be excluded and deported." Aliens subject to either deportation or exclusion are eventually subjected to a physical act referred to as "deportation," but we shall refer, as immigration law generally refers, to the former as "deportables" and the latter as"excludables."

[6]See INS v. Stevic, 467 U.S., at 423, n. 18.

[7]Id., at 424-425; 426, n. 20.

[8]As a part of that agreement, "the Secretary of State obtained an assurance from the Haitian government that interdicted Haitians would 'not be subject to prosecution for illegal departure.' See Agreement on Migrant(s) -- Interdiction, Sept. 23, 1981, United States-Haiti,

33 U.S. T. 3559, 3560, T. I. A. S. No. 10241." See Department of State v. Ray, 502 U.S. , (1991) (slip op., at 3-4).

[9]That proviso reflected an opinion of the Office of Legal Counsel that Article 33 of the United Nations Convention Relating to the Status of Refugees imposed some procedural obligations on the United States with respect to refugees outside United States territory. That opinion was later withdrawn after consideration was given to the contrary views expressed by the legal advisor to the State Department. See App. 202-230.

[10]App. 231. In 1985 the District Court for the District of Columbia upheld the interdiction program, specifically finding that § 243(h) provided relief only to Haitians in the United States. Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1406. On appeal from that holding, the Court of Appeals noted that "over 78 vessels carrying more than 1800 Haitians have been interdicted. The government states that it has interviewed all interdicted Haitians and none has presented a bona fide claim to refugee status. Accordingly, to date all interdictees have been returned to Haiti." Haitian Refugee Center v. Gracey, 257 U.S. App. D. C. 367, 370, 809 F.2d 794, 797 (1987). The Court affirmed the judgment of the District Court on the ground that the plaintiffs in that case did not have standing, but in a separate opinion Judge Edwards agreed with the District Court on the merits. He concluded that neither the United Nations Protocol nor § 253(h) was "intended to govern parties' conduct outside of their national borders. . . . The other best evidence of the meaning of the Protocol may be found in the United States' understanding of it at the time of accession. There can be no doubt that the Executive and the Senate decisions to adhere were made in the belief that the Protocol worked no substantive change in existing immigration law. At that time 'the relief authorized by § 243(h) [8 U.S.C. § 1253(h)] was not . . . available to aliens at the border seeking refuge in the United States due to persecution.'" Id., at 413-414, 809 F.2d, at 840-841 (Edwards, J., concurring in part and dissenting in part) (footnotes omitted). See INS v. Stevic, 467 U.S., at 415.

[11]A "refugee" as defined in 8 U.S.C. § 1101(a)(42)(A), is entitled to apply for a discretionary grant of asylum pursuant to 8 U.S.C. § 1158. The term "refugee" includes "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."

[12]See App. 244-245.

[13]Executive Order No. 12,807 reads in relevant part as follows: "Interdiction of Illegal Aliens "By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1), and whereas: "(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

[14]This decision was not based on agreement with the executive's policy. The District Court wrote: "On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit language of the Protocol and dicta in Supreme Court cases such as INS v. Cardoza Fonseca, 480 U.S. 421 (1987) and INS v. Stevic, 467 U.S. 407 (1984), the controlling precedent in the Second Circuit is Bertrand v. Sava which indicates that the Protocols' provisions are not self-executing. See 684 F.2d 204, 218 (2d Cir. 1982).

[15]Section 101(a)(3), 8 U.S.C. § 1101(a)(3), provides: "The term 'alien' means any person not a citizen or national of the United States."

[16]"Before 1980, § 243(h) distinguished between two groups of aliens: those 'within the United States', and all others. After 1980, § 243(h)(1) no longer recognized that distinction, although § 243(h)(2)(C) preserves it for the limited purposes of the 'serious nonpolitical crime' exception. The government's reading would require us to rewrite § 243(h)(1) into its pre-1980 status, but we may not add terms or provisions where congress has omitted them, see Gregory v. Ashcroft, [501 U.S. , ] (1991); West Virginia Univ. Hosps., Inc. v. Casey, [499 U.S. , ] (1991), and this restraint is even more compelling when congress has specifically removed a term from a statute: '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.' Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-93 . . . (1980) (Stewart, J., dissenting) (quoted with approval in INS v. Cardoza-Fonseca, 480 U.S. at 442-43 . . .). 'To supply omissions transcends the judicial function.' Iselin v. United States, 270 U.S. 245, 250 . . . (1926) (Brandeis, J.)." 969 F.2d, at 1359.

[17]"The statute's location in Part V reflects its original placement there before 1980 -- when § 243(h) applied by its terms only to 'deportation'. Since 1980, however, § 243(h)(1) has applied to more than just 'deportation' -- it applies to 'return' as well (the former is necessarily limited to aliens 'in the United States', the latter applies to all aliens). Thus, § 243, which applies to all aliens, regardless of whereabouts, has broader application than most other portions of Part V, each of which is limited by its terms to aliens 'in' or 'within' the United States; but the fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself." Id., at 1360.

[18]July 28, 1951, 19 U.S. T. 6259, T. I. A. S. No. 6577.

[19]See INS v. Cardoza-Fonseca, 480 U.S. 421, 436-437 (1987). Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nation Protocol Relating to the Status of Refugees, which bound the parties to comply with Articles 2 through 34 of the Convention as to persons who had become refugees because of events taking place after January 1, 1951. See INS v. Stevic, 467 U.S., at 416. Because the Convention established Article 33, and the Protocol merely incorporated it, we shall refer throughout this opinion to the Convention, even though it is the Protocol that applies here.

[20]"One of the considerations stated in the Preamble to the Convention is that the United Nations has 'endeavored to assure refugees the widest possible exercise of . . . fundamental rights and freedoms.' The government's offered reading of Article 33.1, however, would narrow the exercise of those freedoms, since refugees in transit, but not present in a sovereign area, could freely be returned to their persecutors. This would hardly provide refugees with

'the widest possible exercise' of fundamental human rights, and would indeed render Article 33.1 'a cruel hoax.'" 969 F.2d, at 1363.

[21]The Netherlands, Belgium, The Federal Republic of Germany, Italy, Sweden, and Switzerland. See id., at 1365.

[22]Judge Newman concurred separately, id., at 1368-1369, and Judge Walker dissented, noting that the 1980 amendment eliminating the phrase "within the United States" evidenced only an intent to extend the coverage of § 243(h) to exclusion proceedings because the Court had previously interpreted those words as limiting the section's coverage to deportation proceedings. Id., at 1375-1377. See Leng May Ma v. Barber, 357 U.S. 185, 187-189 (1958); see also Plyler v. Doe, 457 U.S. 202, 212-213, n. 12 (1982).

[23]On November 30, 1992, we denied the respondents' motion to suspend briefing. 506 U.S. .

[24]See 8 U.S.C. §§ 1104, 1105, 1153, 1201, and 1202 (1988 ed. and Supp. IV).

[25]See 8 U.S.C. §§ 1157(a), (b), and (d); § 1182(f); §§ 1185(a) and (b); and § 1324a(d) (1988 ed. and Supp. IV).

[26]See §§ 1161(a), (b), and (c) (Secretaries of Agriculture and Labor); § 1188 (Secretary of Labor); § 1421 (federal courts).

[27]Title 8 U.S.C. § 1182(f) provides: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

[28]It is true that Executive Order 12807, 57 Fed. Reg. 23133, 23134 (1992), grants the Attorney General certain authority under the interdiction program ("The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the . . . Attorney General . . . shall issue appropriate instructions to the Coast Guard," and "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent"). Under the first phrase, however, any authority the Attorney General retains is subsidiary to that of the Coast Guard's leaders, who give the appropriate commands, and of the Coast Guard itself, which carries them out. As for the second phrase, under neither President Bush nor President Clinton has the Attorney General chosen to exercise those discretionary powers. Even if she had, she would have been carrying out an executive, rather than a legislative command, and therefore would not necessarily have been bound by § 243(h)(1). Respondents challenge a program of interdiction and repatriation established by the President and enforced by the Coast Guard.

[29]See, e. g., § 1158(a), quoted in n. 11, supra.

[30] Stat. 214; see also n. 2, supra.

[31]"We conclude that petitioner's parole did not alter her status as an excluded alien or otherwise bring her 'within the United States' in the meaning of § 243(h)." 357 U.S., at 186.

[32]Even respondents acknowledge that § 243(h) did not apply extraterritorially before its amendment. See Brief for Respondents 9, 12.

[33]See H. R. Rep. No. 96-608, p. 30 (1979) (the changes "require . . . the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation, proceedings"); see also S. Rep. No. 96-256, p. 17 (1979).

[34]"The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol. E. g., S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968) ('refugees in the United States have long enjoyed the protection and the rights which the protocol calls for'); id., at 6,7 ('the United States already meets the standards of the Protocol'); see also, id., at 2; S. Exec. K, 90th Cong., 2d Sess., III, VII (1968); 114 Cong. Rec. 29391 (1968) (remarks of Sen. Mansfield); id., at 27757 (remarks of Sen. Proxmire). And it was 'absolutely clear' that the Protocol would not 'require the United States to admit new categories or numbers of aliens.' S. Exec. Rep. No. 14, supra, at 19. It was also believed that apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language. See e. g., S. Exec. K, supra, at VIII." INS v. Stevic, 407 U.S., at 417-418.

[35]U.S. Const., Art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ." In Murray v. The Charming Betsy, 2 Cranch 64, 117-118 (1804), Chief Justice Marshall wrote that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." See also Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Clark v. Allen, 331 U.S. 503, 508-511 (1947); Cook v. United States, 288 U.S. 102, 118-120 (1933).

[36]Although the parallel provision in § 243(h)(2)(D), 8 U.S.C. § 243(h)(2)(D), that was added to the INA in 1980 does not contain the "country in which he is" language, the general understanding that it was intended to conform the statute to the Protocol leads us to give it that reading, particularly since its text is otherwise so similar to Article 33(2). It provides that § 243(h)(1) "shall not apply" to an alien if the Attorney General determines that "there are reasonable grounds for regarding the alien as a danger to the security of the United States." Thus the statutory term "security of the United States" replaces the Protocol's term "security of the country in which he is." The parallel surely implies that for statutory purposes "the United States" is "the country in which he is."

[37]The New Cassell's French Dictionary 440 (1973), gives this translation: "return (I) [rit :n], v.i. Revenir (to come back); retourner (to go back); rentrer (to come in again); repondre, repliquer (to answer). To return to the subject, revenir au sujet, (fam.) revenir ses moutons. -- -v.t. Rendre (to give back); renvoyer (to send back); rembourser (to repay); rapporter (interest); repondre ; rendre compte (to render an account of); elire (candidates). He was returned, il fut elu; the money returns interest, argent rapporte intert; to return good for evil, rendre le bien pour le mal. -- -n. Retour (coming back, going back), m.; rentree (coming back in), f.; renvoi (sending back), m.; remise en place (putting back), f.; profit,gain (profit), m.; restitution (restitution), f.; remboursement (reimbursement), m.; election (election), f.; rapport, compte rendu, releve, etat (report); (Comm. montant des operations, montant des remises; bilan (of a bank), m.; (pl.) produit, m. By return of post, par retour du courrier; in

return for, en retour de; nil return, etat neant, m.; on my return, au retour, comme je revenais chez moi; on sale or return, en dept, en commission; return address, addrese de l'expediteur, f.; return home, retour au foyer, m.; return journey, retour, m.; return match, revanche, f.; return of casualties, etat des pertes, m.; small profits (and) quick returns, petits profits, vente rapide; the official returns, les releves officiels, m.pl.; to make some return for, payer de retour."

[38]"refouler [r fle], v.t. To drive back, to back (train etc.); to repel; to compress; to repress, to suppress, to inhibit; to expel (aliens); to refuse entry; to stem (the tide); to tamp; to tread (grapes etc.) again; to full (stuffs) again; to ram home (the charge in a gun). Refouler la maree, to stem, to go against the tide. -- v.i. To ebb, to flow back. La maree refoule, the tide is ebbing." Cassell's, at 627.

[39]Under Article 33, after all, a nation is not prevented from sending a threatened refugee back only to his homeland, or even to the country that he has most recently departed; in some cases Article 33 would even prevent a nation from sending a refugee to a country where he had never been. Because the word "return," in its common meaning, would make no sense in that situation (one cannot return, or be returned, to a place one has never been), we think it means something closer to "exclude" than "send back."

[40]See, e. g., N. Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 162-163 (1953) ("The Study on Statelessness [,U. N. Dept. of Social Affairs 60 (1949),] defined 'expulsion' as 'the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country' and 'reconduction' (which is the equivalent of 'refoulement' and was changed by the Ad Hoc Committee to the word 'return') as 'the mere physical act of ejecting from the national territory a person residing therein who has gained entry or is residing regularly or irregularly.' . . . Art. 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into [the] territory"); 2 A. Grahl-Madsen, The Status of Refugees in International Law 94 (1972) ("[Non-refoulement] may only be invoked in respect of persons who are already present -- lawfully or unlawfully -- in the territory of a Contracting State. 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 State to admit any person who has not already set foot on their respective territories"). A more recent work describes the evolution of non-refoulement into the international (and possibly extraterritorial) duty of non-return relied on by respondents, but it also admits that in 1951 non-refoulement had a narrower meaning, and did not encompass extraterritorial obligations. Moreover, it describes both "expel" and "return" as terms referring to one nation's transportation of an alien out of its own territory and into another. See G. Goodwin-Gill, The Refugee in International Law 74-76 (1983).

[41]The Convention's failure to prevent the extraterritorial reconduction of aliens has been generally acknowledged (and regretted). See Aga Khan, Legal Problems Relating to Refugees and Displaced Persons, in Hague Academy of Int'l Law, 149 Recueil des Cours, 287, 318 (1976) ("Does the non-refoulement rule . . . apply . . . only to those already within the territory of the Contracting State? . . . 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"); Robinson, Convention Relating to the Status of Refugees, at 163 ("If a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck. It cannot be said that this is a satisfactory solution of the problem of asylum"); Goodwin-Gill, The

Refugee in International Law, at 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").

[42]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).

[43]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, at 21-22 (July 25, 1951).

[44]The Swiss delegate's statement strongly suggests, moreover, that at least one nation's accession to the Convention was conditioned on this understanding.

[45]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.

[46]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 "honored" 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.

[47]See, e. g., 5 Op. Off. Legal Counsel 242, 248 (1981) (under proposed interdiction of Haitian flag vessels, "individuals 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").

[48]The Court seems no more convinced than I am by 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).

[49]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.

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

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

[52]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 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 "implicit acknowledgment" 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 Commissioner for Refugees as Amicus Curiae.

[53]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.

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

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

[56]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).

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

[58]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.

[59]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.

[60]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 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.

[61]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.

[62]The Immigration Reform and Control Act of 1986 amended the Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. § 1101 et seq. Section 201(a)(1) of the Reform Act created the alien legalization program at issue in this case by adding § 245A to the Immigration and Nationality Act, codified at 8 U.S.C. § 1255a. For the sake of convenience, we will refer to the sections of the Act as they have been codified.

[63]The Reform Act requires the 12-month period to "begin on a date (not later than 180 days after November 6, 1986) designated by the Attorney General." 8 U.S.C. § 1255a(a)(1)(A). The Attorney General set the period to begin on May 5, 1987, the latest date the Reform Act authorized him to designate. See 8 CFR § 245a.2(a)(1) (1992). A separate provision of the Act requires "an alien who, at any time during the first 11 months of the 12-month period . . ., is the subject of an order to show cause [why he should not be deported]" to "make application . . . not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever is later." § 1255a(a)(1)(B); see § 1255a(e)(1) (providing further relief for certain aliens "apprehended before the beginning of the application period").

[64]The CSS lawsuit originally challenged various aspects of the INS's administration of both the legalization program created by Title II of the Reform Act and the "Special Agricultural Workers" (SAW) legalization program created by Part A of Title III of the Reform Act (codified at 8 U.S.C. § 1160). The challenge to the SAW program eventually took its own procedural course, and was resolved by a district court order that neither party appealed. No. Civ. S-86-1343 LKK (ED Cal., Aug. 11, 1988) (App. 3, Record, Doc. No. 188). With respect to the Title II challenge, the District Court originally certified a broad class comprising all persons believed by the Government to be deportable aliens who could establish a prima facie claim for adjustment of status to temporary resident under 8 U.S.C. § 1255a. No. Civ. S-86-1343 LKK (ED Cal., Nov. 24, 1986) (App. 15). After further proceedings, the District Court narrowed the class definition to that set out in the text.

[65]The District Court chose November 30, 1988, to coincide with the deadline for legalization applications under the Reform Act's SAW program. See No. Civ. S-86-1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 22a).

[66]The order also required the INS to identify all class members whose applications had been denied or recommended for denial on the basis of the advance parole regulation, and to "rescind such denials . . . and readjudicate such applications in a manner consistent with the

court's order." No. Civ. S-86-1343 LKK (ED Cal., June 10, 1988) (App. to Pet. for Cert. 24a). The INS did not appeal this part of the order. See Brief for Petitioners 11, n. 11.

[67]The latter order required the INS to provide apprehended and detained aliens, and those in deportation proceedings, with "a reasonable opportunity, of not less than thirty (30) days, to submit an application [for legalization]." See n. 2, supra (describing the Act's provisions regarding such aliens); n. 12, infra (describing the LULAC court's relief for such aliens).

[68]The Catholic Social Services plaintiffs cross-appealed, challenging the District Court's denial of their request for an injunction ordering the INS to permit class members outside the United States to enter the United States so that they could file applications for adjustment of status. The Court of Appeals affirmed the District Court's denial, see Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914, 923 (CA9 1992), and the plaintiffs did not petition this Court for review of the Court of Appeals' judgment; thus, the issues presented by the cross-appeal are not before us.

[69]This regulation expresses the INS policy in signally cryptic form, stating that an alien's eligibility "shall not be affected by entries to the United States subsequent to January 1, 1982 that were not documented on Service Form I-94, Arrival-Departure Record." By negative implication, an alien would be rendered ineligible by an entry that was documented on an I-94 form. An entry is documented on an I-94 form when it occurs through a normal, official port of entry, at which an alien must present some valid-looking document (for example, a nonimmigrant visa) to get into the United States. See 8 CFR § 235.1(f) (1992). Under the INS policy, an alien who reentered by presenting such a "facially valid" document broke the continuity of his unlawful residence, whereas an alien who reentered the United States by crossing a desolate portion of the border, thus avoiding inspection altogether, maintained that continuity.

[70]The INS first announced its intention to modify its policy in a statement issued by then-INS Commissioner Alan Nelson on October 8, 1987, see Record, Addendum to Doc. No. 8; however, it did not issue the new regulations until November 17 following.

[71]The LULAC plaintiffs also challenged the modified policy, claiming that aliens should not have to comply with the requirement of 8 CFR § 245a.2(b)(10) (1992) to obtain a waiver of excludability for having fraudulently procured entry into the United States. With respect to this challenge, the District Court certified a second class comprising persons adversely affected by the modified policy. See No. 87-4757-WDK (JRx) (CD Cal. July 15, 1988) (App. 216). However, the District Court ultimately rejected the challenge to the modified policy, see ibid. (App. 234), and the LULAC plaintiffs did not appeal the grant of summary judgment to the INS on this issue.

[72]As in the CSS case, this date was chosen to coincide with the deadline for legalization applications under the Reform Act's SAW program. No. 87-4757-WDK (JRx) (CD Cal., Aug. 12, 1988) (App. to Pet. for Cert. 50a); see n. 5, supra.

[73]The order also required the INS to give those illegal aliens apprehended by INS enforcement officials "adequate time" to apply for legalization. App. to Pet. for Cert. 60a; see n. 2, supra (describing the Act's provisions regarding such aliens); n. 6, supra (describing the CSS court's relief for such aliens).

[74]While the appeals were pending in the Ninth Circuit, the orders of the District Courts were each subject to a stay order. Under the terms of each stay order, the INS was obliged to grant a stay of deportation and temporary work authorization to any class member whose application made a prima facie showing of eligibility for legalization, but was not obliged to process the applications. See App. to Pet. for Cert. 63a-64a. Because the Court of Appeals has stayed its mandate pending this Court's disposition of the case, see Nos. 88-15046, 88-15127, 88-15128, 88-6447 (CA9, May 1, 1992) (staying the mandate); Nos. 88-15046, 88-15127, 88-15128, 88-6447 (CA9, Sept. 17, 1992) (denying the INS's motion to dissolve the stay and issue its mandate), the INS is still operating under these stay orders. By March 1992, it had received some 300,000 applications for temporary resident status under the stay orders. See App. to Pet for Cert. 83a.

[75]The INS may also use the information to enforce a provision penalizing the filing of fraudulent applications, and to prepare statistical reports to Congress. § 1255a(c)(5)(A).

[76]This description excludes the alien who was already in deportation proceedings before he applied for legalization under § 1255a. Once his application is denied, however, such an alien must also continue with deportation proceedings as if he had never applied, and may obtain further review of the denial of his application only upon review of a final order of deportation entered against him. See 8 U.S.C. § 1255a(f)(4)(A). The Act's provisions regarding aliens who have been issued an order to show cause before applying are described at n. 2, supra; the provisions of the District Court orders regarding such aliens are described at nn. 6 and 12, supra.

[77]Although aliens have no explicit statutory right to force the INS to commence a deportation proceeding, the INS has represented that "any alien who wishes to challenge an adverse determination on his legalization application may secure review by surrendering for deportation at any INS district office." Reply Brief for Petitioners 9-10 (footnote omitted).

[78]The single difference between the two sets of provisions is the addition, in the provisions now before us, of a further specific jurisdictional bar: "No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." 8 U.S.C. § 1255a(f)(2). As the INS appears to concede, see Brief for Petitioners 19, the claims at issue in this case do not fall within the scope of this bar.

[79]We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. See, e.g., Buckley v. Valeo, 424 U.S. 1, 114, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588, 32 L. Ed. 2d 317, 92 S. Ct. 1716 (1972). Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and "cannot be bound by the wishes of the parties." Regional Rail Act Reorganization Cases, 419 U.S. 102, 138, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). Although the issue of ripeness is not explicitly addressed in the questions presented in the INS's petition, it is fairly included and both parties have touched on it in their briefs before this Court. See Brief for Petitioners 20; Brief for Respondents 17, n. 23.

[80]JUSTICE O'CONNOR contends that "if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the [challenged] rule[,] then there may well be a justiciable controversy that the court may

find prudent to resolve." Post, at 3. Even if this is true, however, we do not see how such a "firm prediction" could be made in this case. As for the prediction that the plaintiffs "will apply for the benefit," we are now considering only the cases of those plaintiffs who, in fact, failed to file timely applications. As for the prediction that "the agency will deny the application by virtue of the [challenged] rule," we reemphasize that in this case, access to the benefit in question is conditioned on several nontrivial rules other than the two challenged. This circumstance makes it much more difficult to predict firmly that the INS would deny a particular application "by virtue of the [challenged] rule," and not by virtue of some other, unchallenged rule that it determined barred an adjustment of status.

[81]JUSTICE O'CONNOR maintains that the plaintiffs' actions are now ripe because they have amended their complaints to seek the additional remedy of extending the application period, and the application period is now over. Post, at 5. We do not see how these facts establish ripeness. In both cases before us, the plaintiffs' underlying claim is that an INS regulation implementing the Reform Act is invalid. Because the Act requires each alien desiring legalization to take certain affirmative steps, and because the Act's conditions extend beyond those addressed by the challenged regulations, one cannot know whether the challenged regulation actually makes a concrete difference to a particular alien until one knows that he will take those affirmative steps and will satisfy the other conditions. Neither the fact that the application period is now over, nor the fact that the plaintiffs would now like the period to be extended, tells us anything about the willingness of the class members to take the required affirmative steps, or about their satisfaction of the Reform Act's other conditions. The end of the application period may mean that the plaintiffs no longer have an opportunity to take the steps that could make their claims ripe; but this fact is significant only for those plaintiffs who can claim that the Government prevented them from filing a timely application. See infra, at 17-20 (discussing the INS's "front-desking" practice).

[82]Under the Manual's procedures, only those applications that were not prepared with the assistance of a "Qualified Designated Entity" (the Reform Act's designation for private organizations that serve as intermediaries between applicants and the INS, see 8 U.S.C. § 1255a(c)(1)) are subject to review by Legalization Assistants. The applications that were prepared with the help of Qualified Designated Entities skip this step. See Legalization Manual, at IV-5, IV-6. There is no evidence in the record indicating how many CSS and LULAC class members were assisted by Qualified Designated Entities in preparing their applications.

[83]The INS forwards a different interpretation of the policy set forth in the Legalization Manual. According to the INS, the Manual reflects a policy, motivated by "charitable concern," of "informing aliens of [the INS's] view that their applications are deficient before it accepts the filing fee, so that they can make an informed choice about whether to pay the fee if they are not going to receive immediate relief." Reply Brief for Petitioners 9 (emphasis omitted). The "rejection" policy, argues the INS, did not really bar applicants from filing applications; another sentence in the Manual proves that the door remains open, for it provides that "if an applicant whose application has been rejected by the [Legalization Assistant] insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip from the [Legalization Assistant] stating the noted deficiency(ies)." Legalization Manual, at IV-6.

[84]In its reply brief in this Court, see Reply Brief for Petitioners 14, the INS argues that those individuals who were front-desked fall outside the classes defined by the District

Courts, since the CSS class included only those who "knew of [INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," App. to Pet. for Cert. 25a, and the LULAC class included only those "who learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply for legalization before the May 4, 1988 deadline." App. 216. The language in CSS that INS points to, however, is not the class definition, which is much broader, see supra, at 4; rather, it is part of the requirements class members must meet to obtain one of the forms of relief ordered by the District Court. We understand the LULAC class definition to use the word "apply" to mean "have an application accepted for filing by the INS," as under this reading the definition encompasses all those whom INS refuses to treat as having timely applied (which is the refusal that lies at the heart of the parties' dispute), and as the definition then includes those who "learned of their ineligibility" by being front-desked, since it would be odd to exclude those who learned of their ineligibility in the most direct way possible from this description. As we note below, however, see n. 29, infra, we believe that the word "applied" as used in § 1255(a)(1)(A) has a broader meaning than that given to the word in the LULAC class definition.

[85]The Reform Act limits judicial review to "the administrative record established at the time of the review by the appellate authority." 8 U.S.C. § 1255a(f)(4)(B). In addition, an INS regulation provides that a legalization application may not "be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings." 8 CFR § 103.3(a)(3)(iii) (1992).

[86]In LULAC, the one named individual plaintiff who represents the subclass challenging the INS' original "facially-valid document" policy never attempted to file an application, because he was advised by an attorney over the telephone that he was ineligible. See LULAC, First Amended Complaint 11-12 (Record, Doc. No. 56) (describing plaintiff John Doe). In CSS, none of the named plaintiffs challenging the "advance parole" regulation allege that they attempted to file applications. See CSS Sixth Amended Complaint 12-18 (Record, Doc. No. 140).

[87]See App. 204 (affidavit of Pilar Cuen) (legalization counselor states that "INS has refused applications for legalization because our clients entered after January 1, 1982 with a non-immigrant visa and an I-94 was issued at the time of reentry"); App. 209 (affidavit of Joanne T. Stark) (immigration lawyer in private practice states that she is "aware that the Service has discouraged application in the past by [LULAC class members] or has rejected applications made"); Record, Doc. No. 16, Ex. H, p. 135 (affidavit of Isabel Garcia Gallegos) (immigration attorney states that "the legalization offices in Southern Arizona [have] rejected, and otherwise, discouraged individuals who had, in fact entered the United States with an I-94 after January 1, 1982"); App. 200 (affidavit of Marc Van Der Hout) (immigration attorney states that "it has been the practice of the San Francisco District legalization office to deny individuals the right to file an application for legalization under the [Reform Act] if the individual had been in unlawful status prior to January 1, 1982, departed the United States post January 1, 1982, and re-entered on a non-immigrant visa").

[88]Only one affiant refers to a specific incident. He recounts: "In August [1987] I was at the San Francisco legalization office when an individual came in seeking to apply for legalization. She was met at the reception desk by a clerk and when she explained the facts of her case, [that she had departed and re-entered the United States after January 1, 1982 on a non-immigrant visa], she was told that she did not qualify for legalization and could not file."

App. 200-201 (affidavit of Marc Van Der Hout). The significance of this incident is unclear, however, since there is no way of telling whether this individual was a LULAC class member (that is, whether she would otherwise have been eligible for legalization), nor whether she had a completed application ready for filing and payment in hand.

[89]The record reveals relatively little about the application of the front-desking policy and surrounding circumstances. Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not to apply, so that they can be said to have had the "advanced parole" or "facially valid document" regulation applied to them in a sufficiently concrete manner to satisfy ripeness concerns.

[90]Although we do not reach the question of remedy on this disposition of the case, we note that, by definition, each CSS and LULAC class member who was front-desked presented at an INS office to an INS employee an application that under the terms of the Reform Act (as opposed to the terms of the invalid regulation) entitled him to an adjustment of status. Under any reasonable interpretation of the word, such an individual "applied" for an adjustment of status within the 12-month period under § 1255a(a)(1)(A). Because that individual timely applied, the INS need only readjudicate the application, and grant the individual the relief to which he is entitled. Since there is no statutory deadline for processing the applications, and since a front-desked individual need not await a deportation order before obtaining judicial review, there is no reason to think that a District Court would lack the power to order such relief.

[91]This case involves the first, and more important, of the two amnesty programs; McNary involved the second.

[92]As the majority explains, the classes certified in both actions were limited to persons otherwise eligible for legalization. See ante, at 3, 7.

[93]"Absent judicial action, the period for filing for IRCA legalization would have ended and thousands of persons would have lost their chance for amnesty. In purely human terms, it is difficult -- perhaps impossible -- for those of us fortunate enough to have been born in this country to appreciate fully the value of that lost opportunity. For undocumented aliens, IRCA offered a one-time chance to come out of hiding, to stop running, to 'belong' to America. The hardship of withholding judicial review is as severe as any that I have encountered in more than a decade of administrative review." 292 U.S. App. D. C., at 178, 948 F.2d at 770 (Wald, J., dissenting).

[94]Jacksonville is, of course, an equal protection case, while respondents in this case are seeking a statutory benefit. If this distinction has any relevance to a ripeness analysis, then it should mitigate in favor of finding ripeness here; I assume we should be more reluctant to overcome jurisdictional hurdles to decide constitutional issues than to effectuate statutory programs.

[95]There is no language in the Reform Act prohibiting an extension of the application period. Section 1255a(f)(2), relied on by the Government, see Brief for Petitioners 28-29, precludes review of individual late-filed applications; like § 1255a(f)(1), it has no bearing on the kind of broad-based challenge and remedy at issue here. See ante, at 11-12; ante, at 7-8 (opinion concurring in judgment).