cc: Flanigan
Harrison
Cox
Leitch
Armacost Davidson Reading File
Movsesian Murphy
Duffy Files
Grant Ret. (Cox) Coast2

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 31, 1992

MEMORANDUM FOR GEORGE J. TERWILLIGER, III
Acting Deputy Attorney General

Re: Issues Regarding the Interdiction of Vessels Within the Territorial Waters of Haiti

This memorandum is in response to your request for our opinion, on an expedited basis, whether the Coast Guard may interdict vessels within the territorial waters of Haiti to return the passengers on such vessels to a port or other point in the land territory of Haiti without violating any outstanding judicial order in the ongoing Haitian Refugee Center v. Baker litigation (No. 91-2653-CIV-ATKINS (S.D. Fla.)). For the reasons stated below, we agree with the legal conclusions of the Solicitor General's Office and of the Civil Division that no injunction or other restraining order currently in force would prohibit the United States from returning Haitians interdicted in Haitian territorial waters[1] to a port or other point in the land territory of Haiti.

The Solicitor General's Office and the Civil Division have advised us that there is only one relevant injunction currently in force in the Haitian Refugee Center v. Baker litigation.[2] That order is based on the First Amendment claims raised by attorneys seeking to communicate with Haitian interdictees and provides:

> defendants shall grant plaintiffs' counsel meaningful access to its interdicted class members, before

---

[1] As of 1988, Haiti claimed a 12-mile territorial sea. See New Directions in the Law of the Sea Release 88-2, at 2 (Kenneth R. Simmonds ed. 1988).

[2] We have relied on the Solicitor General's Office and the Civil Division for all facts regarding the litigation.

repatriation, subject to reasonable, content-neutral, time, place and manner restrictions . . . .

Order Granting Limited Preliminary Injunctive Relief, Dec. 20, 1991 (the "injunction" or the "order"), at 11 (emphases added). The class that the district court certified

> [c]onsists of all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

Motion to Maintain the Amended Complaint for Declaratory and Injunctive Relief as the Class Action on Behalf of Plaintiffs, Dec. 2, 1991, at 2 (emphasis added); see also Second Amended Complaint, Dec. 2, 1991, ¶ 62; Order Granting Motions to Maintain the Amended Complaint for Declaratory and Injunctive Relief as the Class Action on Behalf of Plaintiffs and for Leave to File Supplemental Pleading and Second Amended Complaint, Dec. 3, 1991 (granting plaintiffs' motion to maintain class action). Thus, the order covers only those Haitian aliens who are interdicted on the "high seas," as that term was used in certifying the class.

Neither the judge's order certifying the class nor the plaintiffs' motion requesting the class define the term "high seas." In the absence of an express definition to the contrary, the term should be given its ordinary meaning. The 1958 Convention on the High Seas is cited twice in the Executive Order at the center of this controversy, Executive Order 12324, "Interdiction of Illegal Aliens" (September 29, 1981). Accordingly, the 1958 Convention is an appropriate source for defining a term used in litigation relating to that Order. The convention defines "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Convention on the High Seas, Apr. 29, 1958, art. 1, 13 U.S.T. 2313. Additional definitions of this term found in Coast Guard regulations, the 1982 U.N. Convention on the Law of the Sea, and Webster's Dictionary all exclude from the term "high seas" a nation's territorial waters. See 33 C.F.R. § 2.05-1(a) ("'high seas' means all waters which are neither territorial seas nor internal waters of the United States or of any foreign country") (footnote omitted); New Directions in the Law of the Sea Release 86-2, at 32 ("high seas" includes "all parts of the sea that are not included . . . in the territorial sea or in the internal waters of a State") (quoting U.N. Convention on the Law of the Sea, 1982); Webster's Third New International Dictionary 1069 (Grove ed. 1986) ("high sea" defined as "the sea or ocean

lying outside the territorial waters or maritime belts of a country").[3]

The injunction applies, moreover, only to certain "Haitian aliens . . . who are being denied First Amendment and procedural rights." The United States has maintained in this litigation that the aliens detained on Coast Guard cutters or at Guantanamo Bay Naval Base do not enjoy constitutional or procedural protections entitling them to any relief. Even were an appellate court to accept the contrary view, we believe it to be beyond doubt that such protections do not extend to Haitian nationals who are in Haiti. See EEOC v. Arabian American Oil Co., 111 S. Ct. 1227, 1230 (1991) (citing presumption against extraterritorial application of statutes); United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061 (1990) (citing United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904), for proposition that excludable alien is not entitled to First Amendment protections). Accordingly, the injunction by terms would not apply to Haitians who are intercepted in Haitian territorial waters.[4]

Finally, the injunction grants counsel access before "repatriation." Because persons interdicted in Haitian waters and returned to shore would never leave the territory of Haiti, the United States would not be "repatriat[ing]" such persons. See Webster's Third New International Dictionary 1069 (Grove ed.

---

[3] For the purposes of a few domestic law statutes (e.g., 18 U.S.C. § 7(1); 33 U.S.C. § 151), the term "high seas" also includes certain territorial waters of the United States. See 33 C.F.R. § 2.05-1(b), (c). These statutes, however, are anomalous features of domestic law and should not be used in interpreting the term "high seas" in an international context. Moreover, Executive Order 12324 explicitly states that it authorizes interdiction actions only outside the territorial waters of the United States.

[4] As further support for the Department's construction of the order, we note that the order only applies to Haitian aliens who are "detained on" a Coast Guard cutter or "detained at" the Guantanamo Naval base. Obviously, Haitians who are interdicted in Haitian waters cannot be said to be "detained at" the naval base; similarly, when the Coast Guard intercepts boats in Haitian waters and directs those boats to reverse course, or tows a boat to the land territory of Haiti, Haitians on those boats are clearly not "detained on" a Coast Guard cutter.

1986) ("repatriate" means "to restore or return to one's country of origin").[5]

Thus, we, like the Solicitor General's Office and the Civil Division, conclude that the injunction does not apply to persons interdicted in Haitian territorial waters, and accordingly there is no basis in law to conclude that the proposed interdiction would violate the existing injunction.

Please let us know if we can be of further assistance in this matter.

Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel

---

[5] Moreover, there is a substantial additional legal question as to whether the class could include persons interdicted on the high seas as well as persons interdicted in the territorial waters of Haiti because such a class may not share common questions of law and fact as required by Federal Rule of Civil Procedure 23(a). Cf. Memorandum in Support of Motion for Class Action Certification, Dec. 2, 1991, at 6-8.