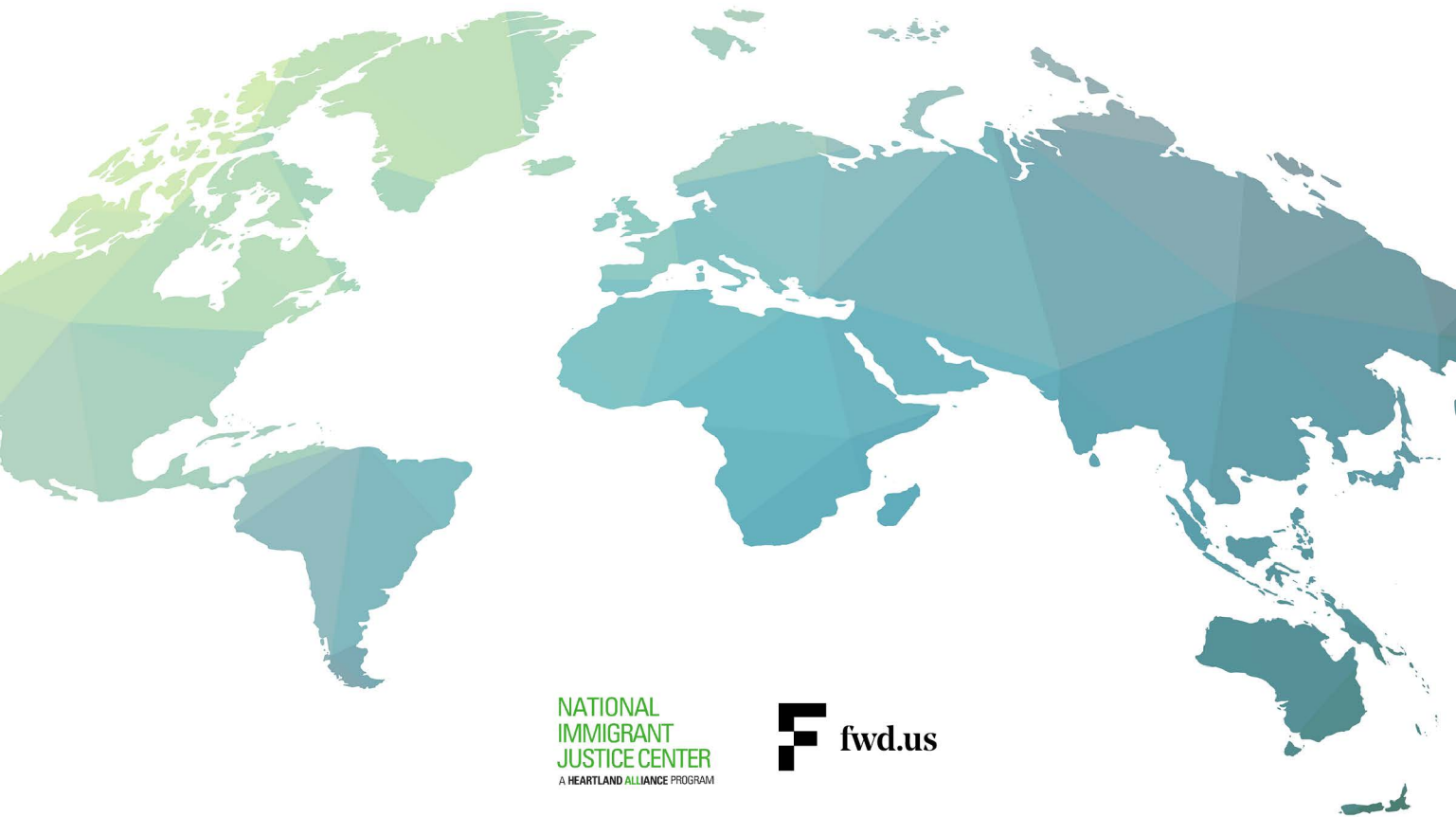


Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM

CHAPTER 4:
LAYING THE FOUNDATION OF U.S. OFFSHORING: FROM
ANGEL ISLAND TO GUANTÁNAMO BAY



NATIONAL
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A HEARTLAND ALLIANCE PROGRAM

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CHAPTER 4

Laying the Foundation Of U.S. Offshoring: From Angel Island to Guantánamo Bay

“This court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subjected to intentional ‘national origin’ discrimination. The plaintiffs are part of the first substantial flight of black refugees from a repressive regime to this country. All of the plaintiffs are black.”

— Senior U.S. Federal District Judge James Lawrence King²⁴⁰

This is an excerpt of the full report, [Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum](#), co-authored by the National Immigrant Justice Center (NIJC) and FWD.us.

For access to Acknowledgements, Abbreviations, Terminology, other Chapters, and Closing Recommendations please click [here](#). Executive summary is [here](#).

Though the U.S.’s offshoring policy did not begin until later in the twentieth century, the policy to push migrants to the periphery of U.S. land is not new. Hyper-focused on deterring non-European migration and for a period of time migration from southern and eastern Europe,²⁴¹ the United States has long concentrated on pushing maritime arrivals away from its mainland. This goal drove policymakers to expand upon U.S. island quarantine stations at the turn of the century, eventually evolving into militarization of the U.S.-Mexico border, as well as the conversion of leased Cuban land into an indefinite offshore jail for Haitians.

4.1. The Incipient Stage Of U.S. Offshoring: Public Health as Racial Exclusion From Angel Island to the U.S.-Mexico Border

Ellis and Angel Islands became the site of a new experiment in the late 19th century as millions of people migrated from Europe and Asia to the U.S. Part of U.S. territory facing the Atlantic and Pacific oceans,²⁴² the islands morphed into quarantine detention centers where the U.S. piloted its first offshoring: keeping migrants away from the domestic mainland while they were subjected to intrusive medical screenings.²⁴³ These medical screenings, though ostensibly promoting public

El Paso
 “disinfection”
 plant blueprints
 from 1916.

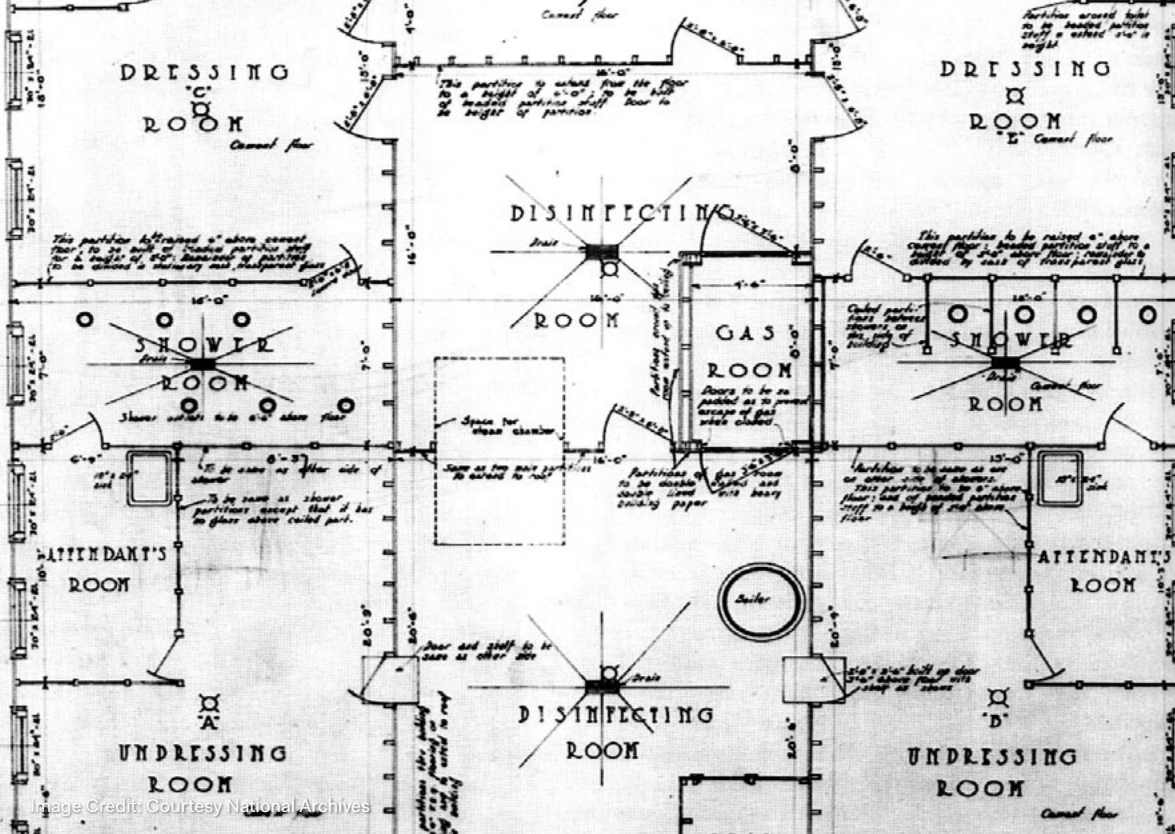


Image Credit: Courtesy National Archives

health, were in reality tactics of racial exclusion which aimed to ban migrants who were carrying “loathsome and contagious disease” and to rid the U.S. of other “undesirable” populations.²⁴⁴ The percentage of Europeans excluded from the U.S. was much lower than non-Europeans.²⁴⁵ In contrast to Ellis Island, Angel Island, which is located in the San Francisco Bay, served as the primary arrival point or official gateway for Chinese and other Asian immigrants.²⁴⁶ In fact, the construction for an immigration facility on the West Coast was the direct consequence of two pieces of legislation designed to block or limit Chinese migrants from coming to the U.S. mainland: the Page Act of 1875, and the Chinese Exclusion Act of 1882.²⁴⁷

This experiment ushered in a lasting shift at another periphery for the first half of the 20th century, the U.S.-Mexico border, where Mexican laborers were also subjected to humiliating health screenings and “cleansing” procedures that included being forced to strip, as well the use of gas chambers to fumigate their clothes.²⁴⁸ Combined with a new law that created criminal penalties for border crossings (a law used widely to this day and originally championed by a U.S. Senator who proudly defended lynching, segregation, and nativist policies against Mexican laborers),²⁴⁹ the U.S. government laid the groundwork for massive push-backs at the southern border. This marked a shift from comparatively fluid movement across the U.S.-Mexico border, emanating from the relatively recent U.S. annexation of large portions of Mexican land. While erecting a new infrastructure of border control, state police and vigilantes terrorized Mexicans they encountered. Lynchings of Mexican migrants from the late 19th century until the first half of the 20th century range between hundreds and several thousands.²⁵⁰

The southern border remains a deadly place for migrants to this day.²⁵¹ But the southern border did not become the primary springboard for push-backs and offshoring until the 2000s. Until then, the U.S. returned to the insular laboratory; Angel Island, it turns out, was the prologue for Guantánamo Bay, a near colonial territory of the United States in Cuba.

4.2. Guantánamo Bay: From a Naval Station to a Detention Center for Asylum Seekers

Guantánamo Bay transformed into a makeshift U.S. detention center for asylum seekers in response to a twofold situation: the exodus of tens of thousands of Haitians fleeing a brutal military dictatorship²⁵⁷ and increasing panic among policymakers over the HIV/AIDS epidemic in the U.S.—culminating with the Centers for Disease Control and Prevention’s (CDC) designation of Haitians as a high-risk group in 1983 and an immigration ban on individuals living with HIV/AIDS in 1987.²⁵⁸ In the early 1990s, the U.S. began detaining Haitian asylum seekers intercepted at sea *en masse* away from the U.S. mainland, even if they were not HIV-positive,²⁵⁹ veering sharply from the policy formally adopted by the U.S. in the 1950s of not incarcerating migrants.²⁶⁰

Large numbers of Haitians fled by boat to the United States in 1980—the same year that the U.S. codified non-refoulement in its domestic asylum code, the Refugee Act of 1980. One year later, President Ronald Reagan struck a deal with Haiti’s government to return anyone apprehended at sea who travelled “illegally.”²⁶¹ Though Reagan pledged not to return asylum seekers, only 6 out of 21,000 Haitians received asylum hearings over the course of nine years.

While Reagan paid lip-service to the principle of non-refoulement, his successor George H.W. Bush explicitly limited its scope.²⁶² Beginning in late 1991, the Bush administration re-directed boats toward Guantánamo Bay, stating that the influx of rafts would be overwhelming for the U.S. Coast Guard.²⁶³ By the end of the year, the U.S. Coast Guard “screened-in” approximately 10,500 Haitians who had a credible fear of returning to Haiti and detained them at Guantánamo Bay.²⁶⁴ Then, in the spring of 1992, President Bush issued an executive order stating that the U.S. obligation not to refoul—i.e., not to return refugees to harm—did not apply to asylum seekers intercepted outside of the U.S.²⁶⁵ Within eighteen months, the U.S. Coast Guard intercepted more than 34,000 asylum seekers attempting to escape the military regime in Haiti.²⁶⁶

When Bill Clinton was elected President, he originally vowed to reverse this policy, but went on to continue intercepting asylum seekers at sea after relabeling it as a “humanitarian mission” to rescue them, and claiming that a lack of space in the U.S. made offshore detention necessary.²⁶⁷ In reality, asylum seekers were trapped in a legal black hole: forcing asylum seekers to return to Haiti would have violated domestic and international law, yet many were barred from entering the U.S. under the 1987 prohibition on HIV-

History of U.S. Control of Guantánamo Bay Within the Broader Context of U.S.-Cuba Relations

A number of the “Founders”—including George Washington, James Madison, and Thomas Jefferson—readily professed ambitions of expanding the “American Empire.” Jefferson thought Cuba “the most interesting addition which could ever be made to our system of States,” and told John C. Calhoun in 1820 that the United States “ought, at the first possible opportunity, to take Cuba.” John Quincy Adams, James Monroe’s Secretary of State and his successor in the White House, considered the annexation of Cuba “indispensable to the continuance and integrity of the Union itself.”²⁵²

This expansionist approach brought the U.S. Senate to advocate for the purchase of Cuba from Spain in the mid-1850s.²⁵³ By the end of the century, the Cuban government struck a deal to lease Guantánamo Bay to the U.S. in exchange for its independence.²⁵⁴ Fidel Castro’s government viewed the continued U.S. occupation of the Bay as illegal.²⁵⁵ Though the U.S. acquired “an empire of military bases” across the Caribbean and later colonized the Philippines in the Pacific,²⁵⁶ Guantánamo Bay was unique in becoming an extension of U.S. border processing—permitting offshore, indefinite detention and interceptions at sea at a ‘safe’ distance from the mainland.

positive foreigners from entering the country.²⁶⁸ Asylum seekers languished in detention because the U.S. continued to use public health as an immigration tool to repress Haitian asylum seekers.

This led to the mass detention of Haitian asylum seekers in shocking conditions at Guantánamo Bay. The detention center (limited to a maximum of 12,500 persons) reached capacity numerous times between 1991 and 1992.²⁶⁹ Asylum seekers were housed in tents covered in garbage bags, which barely protected them from the rain, and enclosed by barbed wire fencing.²⁷⁰ They were forced to eat spoiled and sometimes maggot-filled food in extreme heat.²⁷¹ Asylum seekers' physical and mental health declined significantly, resulting in some suicide attempts.²⁷²

Medical care was also inadequate, especially for the hundreds of HIV-positive refugees detained. For the tens of thousands of refugees detained at Guantánamo Bay, there were only a handful of medical personnel on site and a small number of hospital beds.²⁷³

The rest of the world denounced these conditions, which the Doctors of the World called a “disgrace.”²⁷⁴ Haitians protested their detention conditions and harsh treatment by marching through the detention camp, but were met by military police in riot gear.²⁷⁵ News outlets across the globe reported refugees protesting in a weeks-long hunger strike.²⁷⁶

Following this public outcry, the number of asylum seekers detained at Guantánamo declined. In 1992, approximately 300 Haitians remained, more than 230 of whom were HIV-positive.²⁷⁷ The U.S. government determined that all 300 asylum seekers were “bona fide” refugees but did not process their asylum cases because of the 1987 HIV ban.²⁷⁸ A federal court later noted that the U.S. enforced the HIV ban against only Haitian refugees.²⁷⁹

At the same time, two court battles ensured that the U.S. government could continue the practice. A federal district court determined that asylum seekers were deprived of due process by being denied the opportunity to speak to their own attorneys and adequate medical care.²⁸⁰ The court ordered the government to release the refugees to anywhere but Haiti, and the government ultimately transferred many asylum seekers to the U.S.²⁸¹ The Clinton administration later settled the case, stripping the decision of any legal precedent.²⁸²

In *Haitian Centers Council v. Sale* in 1993, the U.S. Supreme Court determined that neither section 243(h) of the Immigration and Nationality Act nor Article 33 of the 1951 Refugee Convention prohibited the U.S. from intercepting refugees beyond U.S. territory and forcing repatriation.²⁸³ So long as these interceptions did not occur within U.S. territory, the U.S. had carte blanche to refoul asylum seekers.

Emboldened by their win before the Supreme Court, the U.S. government later made clear that *Sale* empowers them not only to push-back at will on international waters, but to offshore asylum seekers.



Image licensed via AP Images

**Hangar where
Haitian asylum
seekers were
detained in
Guantánamo
Bay.**

As they stated before the Inter-American Commission on Human Rights,

“[Non-refoulement]... is a limited obligation, only relevant with respect to refugees who have reached the territory of a contracting state, and does not apply to persons interdicted on the high seas. In addition, the obligation does not prevent a contracting state from sending a refugee to any place other than the country of persecution.”²⁸⁴

Sale helped pave the way for the government to test further the boundaries of international obligations through various iterations of offshoring and externalization regimes.

Months after *Sale*, the Clinton administration continued re-directing asylum seekers to Guantánamo Bay after then- President Fidel Castro lifted the emigration ban and thousands of Cubans fled to the U.S.²⁸⁵ Until this point, Cuban refugees were granted asylum in the U.S., but thousands of Cuban asylum seekers were now intercepted and detained.²⁸⁶ The total detained population at Guantánamo Bay, including Haitian and Cuban refugees, peaked in 1994, when around 12,000 Haitians with credible fear of persecution were detained—the vast majority of whom were eventually denied asylum in the U.S.²⁸⁷

By 1994, political pressure mounted for then-President Clinton to wind-down detention at Guantánamo Bay and compel the military regime in Haiti to stop oppressing asylum seekers.²⁸⁸ Ultimately, the U.S. deported approximately 25,000 Haitians from 1991-94, subjecting them to brutal harm and repression.²⁸⁹

The exact human toll of these U.S. policies is unknown. However, the U.S. treatment of Haitians also cemented a new era of offshoring, long after the U.S. committed to non-refoulement under domestic and international law. The U.S. briefly reached agreements with Jamaica and the United Kingdom in the Caribbean and the West Indies²⁹⁰ to process interdicted Haitians on a boat off the coast of Jamaica and to the Turks and Caicos Islands. Under Operation “Safe Haven,” the U.S.

sought agreements with Honduras, Belize, and Venezuela, signaling a new infrastructure for offshoring asylum seekers far from the U.S. border.²⁹¹ Though intercepted in international waters, the U.S. Coast Guard took hundreds of Haitians to these Central and Latin American nations, all but dooming these asylum seekers' chances to obtain protection.²⁹² Far from the public eye and judicial scrutiny in domestic courts, the U.S. dubbed these sites "safe havens" to sidestep political fallout while bolstering deterrence practices.²⁹³

This deterrence policy was bipartisan. The Clinton administration employed the same tactics as its predecessors in the Bush administration while offshoring Haitians, warning on the radio that, "Leaving by boat is not the route to freedom."²⁹⁴ U.S. border enforcement became much more visible, involved interconnected militarization and policing practices in the Caribbean, discriminated against Black migrants, and forced migrants away from long-standing migration routes into more dangerous routes in their attempts to avoid detention.

Although Operation Safe Haven has since wound down, the U.S. continues to intercept Haitian refugees abroad to be held in detention offshore—though it primarily engages in such interceptions by proxy, externalizing its border enforcement.²⁹⁵ As of 2020, Panama detained many transcontinental asylum seekers, including 2,000 Haitians in its southern Darien province.²⁹⁶ Panama's migration enforcement apparatus receives significant support from the U.S. Department of Homeland Security (DHS). Under the guise of fighting crime and various forms of trafficking, DHS and Panama created a joint migration task force in 2018 to control the flow of migrants traveling from South America to the U.S.²⁹⁷

The unfettered use of push-backs in maritime interceptions that led to Guantánamo's first use as a migrant prison camp had another effect: pushing asylum seekers to journey through South America to try and enter the U.S. by land.²⁹⁸ This, in turn, brought the focus back to the fortification of the southern border, which became the locus of a new era of offshoring.

Haitian Interdictions in the 21st Century

Starting in the 1980s and peaking in the early 1990s, the U.S. Coast Guard intercepted tens of thousands of Haitians arriving by boat. Though this practice slowed down after 1994, it did not end. In the past two decades, the U.S. Coast Guard has routinely interdicted at sea more than 1,000 Haitian migrants, and sometimes more than 3,000 Haitian migrants, each year.²⁹⁹ Between fiscal years 2000 and 2004, sea interdictions rose from 1,113 to 3,229 Haitian migrants, respectively. In the next six years, interdictions at sea remained somewhat steady at a lower rate: the U.S. Coast Guard interdicted an approximate average of 1,500 Haitian migrants annually from fiscal years 2005–2010.

The deadly 2010 earthquake in Haiti and continuing political turmoil resulted in a higher rate of Haitian migrants trying to enter the U.S. in the following decade.³⁰⁰ Although various reports estimate different numbers of Haitian migrants interdicted each year,³⁰¹ data show that the U.S. Coast Guard has consistently interdicted more than 1,000 Haitian migrants annually in the last decade.³⁰² In 2013, for example, more than 2,100 Haitian migrants were interdicted at sea.³⁰³ Between fiscal years 2017 and 2019, interdictions increased from approximately 1,850 Haitian migrants in 2017 to more than 3,400 in 2019.³⁰⁴ The trend continues today: 181 Haitian migrants have been interdicted so far from October 2020 to February 2021.³⁰⁵ Four decades later, this deterrence policy has yet to achieve its intended goals.

Ongoing U.S. Coast Guard interceptions have not resulted in systematic use of Guantánamo Bay's asylum prison, named the Migrant Operations Center. However, the site remains open for the detention of migrants³⁰⁶ and held eight Cuban and Haitian asylum seekers as recently as March 2016, in conditions similar to those of their unfortunate predecessors in the early 1990s.³⁰⁷ Questions remain as to whether it will reopen for the offshoring of asylum seekers³⁰⁸—especially as DHS has retained private contractor MVM to service the Migrant Operations Center.³⁰⁹

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 287. Paik, "US turned away."
 288. Loyd et al., *Boats, Borders, and Bases*, 147-74.
 289. *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1045, 1035 (E.D.N.Y. 1993); Paik, "US turned away.;" Alex Stepick, "Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy," *U.S. Immigration Policy* 45, no. 2, 1982, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3657&context=lcp>.
 290. The agreement with Jamaica lasted mere weeks, while the Turks and

- Caicos sites were never utilized. See Ghezlbash, *Refugee Lost*, 110; Loyd et al., *Boats, Borders, and Bases*, 158; Steven Greenhouse, "U.S. Seeks New Process Sites For Wave of Fleeing Haitians," *NY Times*, June 29, 1994, <https://www.nytimes.com/1994/06/29/world/us-seeks-new-process-sites-for-wave-of-fleeing-haitians.html>.
291. Loyd et al., *Boats, Borders, and Bases*, 27 ("As the numbers of Haitians and Cubans held at Guantánamo exceeded 40,000, the United States opened camps for Cubans on its military base in Panama and built additional "safe haven" sites in other countries in the Caribbean.")
 292. Bill Frelick, "Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection." *Cornell International Law Journal* 26, no. 3, (1993): 686, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1324&context=cilj> ("Conditions for the 250 Haitians in Honduras were harsh. Honduras is not a signatory to the United Nations Refugee Convention and Protocol, and has a deplorable record with respect to Salvadoran refugees who were kept as virtual prisoners in closed camps during the 1980s. There are well-substantiated reports of abuse of refugees by Honduran military personnel. The Haitians were held in a school building surrounded by barbed wire and guarded by soldiers. Within a short period of time, nearly all of the Haitians in Honduras "voluntarily" repatriated.")
 293. Loyd et al., *Boats, Borders, and Bases*, 150-151 ("The use of GTMO was the first in a series of legal geographical maneuvers that would create tiers of asylum-seeking on boats and bases across the Caribbean, restricting access among those distanced through detention offshore. Bush also sought to establish additional "safe havens" across the region. While the Bahamas and Dominican Republic refused, Honduras, Belize, and Venezuela agreed"); Ghezlbash, *Refugee Lost*, 111.
 294. Loyd et al., *Boats, Borders, and Bases*, 152.
 295. Seapower Staff, "Coast Guard Interdicts 146 Haitian Migrants," *Seapower*, August 14, 2019, <https://seapowermagazine.org/coast-guard-interdicts-146-haitian-migrants/>; Howard Cohen, "Coast Guard repatriates 110 Haitians aboard overloaded boat on the Caribbean coast," *Miami Herald*, December 23, 2020, <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article248050925.html>.
 296. Associated Press, "Panama proposes flying Haitian migrants home after clash," *Washington Post*, August 3, 2020, https://www.washingtonpost.com/world/the_americas/panama-proposes-flying-haitian-migrants-home-after-clash/2020/08/03/126472b0-d5cc-11ea-a788-2ce86ce81129_story.html; Associated Press, "Migration Resumes After Pandemic Lockdown," *U.S. News*, February 10, 2021, <https://www.usnews.com/news/world/articles/2021-02-10/migration-through-panama-resumes-after-pandemic-lockdown>; Caitlyn Yates, "As More Migrants from Africa and Asia Arrive in Latin America, Governments Seek Orderly and Controlled Pathways," *Migration Policy Institute*, October 22, 2019, <https://www.migrationpolicy.org/article/extracontinental-migrants-latin-america> (discussing Panama's controlled migration policy, akin to Trump-era metering, of letting approximately 100 migrants journey to the U.S. per day).
 297. While DHS would provide Panamanian migration authorities with "non-border inspection teams" (suggesting a crime-control purpose), this agreement also purports to create "a new mechanism to ensure more effective and complete coordination to address illegal immigration in the region." See, "The government agrees with the US to create a Joint Migratory Task Force," *nodal*, June 7, 2018, <https://www.nodal.am/2018/06/el-gobierno-acuerda-con-eeuu-la-creacion-de-una-fuerza-de-tarea-conjunta-migratoria/> (includes press release from Panama); Calah Schlabach and Cronkite Borderlands Project, "Torn between humanitarian ideals and U.S. pressure, Panama screens migrants from around the world," *Cronkite News (CN)*, July 2, 2020, <https://cronkitenews.azpbs.org/2020/07/02/humanitarian-flow-panama-migrants/> ("For many migrants, Panama is their first encounter with the U.S. immigration system, which is working with Panama's border patrol to track entrants.")
 298. Loyd et al., *Boats, Borders, and Bases*, 147-74; Julian Borger, "US steps up deportation of Haitians ahead of election, raising Covid fears," *Guardian*, October 29, 2020, <https://www.theguardian.com/us-news/2020/oct/29/us-steps-up-deportation-haitians-coronavirus>.
 299. See U.S. Census Bureau, "Section 10: National Security and Veterans Affairs," *United States Census Bureau*, July 18, 2020, 345 (table 534), <https://www.census.gov/library/publications/2011/compendia/statab/131ed/national-security-veterans-affairs.html>; see also Sabrina Lolo, "Authorities Interdict 23 Migrants off the Coast of Delray Beach," *CBS 12 News*, July 20, 2020, <https://cbs12.com/news/local/authorities-interdict-23-migrants-off-the-coast-of-delray-beach>.
 300. Georges E. Fournon, "Haiti's Painful Evolution from Promised Land to Migrant-Sending Nation," *Migration Policy Institute*, August 19, 2020, <https://www.migrationpolicy.org/article/haiti-painful-evolution-promised-land-migrant-sending-nation>.
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 302. See, e.g., U.S. Coast Guard, "Annual Performance Report: Fiscal Year 2018," *United States Coast Guard*, June 12, 2019, <https://www.uscg.mil/Portals/0/documents/budget/FY%202018%20USCG%20APR%20Signed%206-12-19.pdf>.
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 304. Seapower Staff, "Coast Guard Interdicts;" Lolo, "Authorities interdict 23 migrants."
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 306. "Housing Officers for Migrants and Other Vulnerable Populations at the Migrant Operations Center at Guantanamo Bay, Cuba," *GovTribe*, May 25, 2017, <https://govtribe.com/opportunity/federal-contract-opportunity/housing-officers-for-migrants-and-other-vulnerable-populations-at-the-migrant-operations-center-at-guantanamo-bay-cuba-hscedm16r00005>.
 307. See, J. Lester Feder, Chris Geidner and Ali Watkins, "Would-Be Asylum Seekers Are Struck At Guantanamo Bay," *BuzzFeed News*, March 20, 2016, <https://www.buzzfeednews.com/article/lesterfeder/would-be-asylum-seekers-are-struck-at-guantanamo-bay>. ("Today,

just eight people are held in what the government calls the Migrant Operations Center in Guantanamo, a building reminiscent of a budget hotel on an isolated side of the base far from its commercial district and the military detention center.... If they had managed to set foot on dry land in Florida, they would have a right to request asylum in the United States and would be entitled to lawyers and other legal protections as their claims were processed. But since they were picked up at sea, they have no right to asylum in the United States and instead have their cases processed at Guantanamo Bay, where they have no access to lawyers or courts. If they prove their persecution claims to the satisfaction of a U.S. official, they are resettled abroad, not in the U.S.")

308. Azadeh Dastyari, "Immigration Detention in Guantánamo Bay (Not Going Anywhere Anytime Soon)," *The International Journal of Research into Island Cultures* 6, no. 2, 2012.
309. "Housing Officers for Migrants," 2017.