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HAITIANS: SEEKING REFUGE IN THE UNITED STATES

JOYCE A. HUGHES* AND LINDA R. CRANE**

I. INTRODUCTION

[T]here is not an American here except a Native American, that doesn't have a story of how their people were seeking a better life, how America was that beacon That compassion has really made us a great nation and a great republic.¹

Although the United States ranks high in a comparison of the ratio of refugees admitted to a nation's total population,² its treatment of Haitians seeking refuge has not been compassionate. The United States has taken the harsh, unprecedented actions of interdiction and repatriation against Haitians alone. No other country has interdicted³ fleeing migrants⁴ on the high seas and repatriated⁵ them to their country of

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1. *Cuban and Haitian Immigration: Hearings Before the Subcomm. on International Law, Immigration and Refugees of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 20 (1991) [hereinafter *1991 Hearing*] (statement of Rep. Rangel).

2. U.S. COMM. ON REFUGEES, *WORLD REFUGEE SURVEY* 1992, 36 (1992). The United States refugee to population ratio is behind Sweden, Canada and Denmark, where the numbers of refugees admitted between 1975-1990 were about 121,000, 325,000, and 183,000, respectively. For the same period, the total number for the United States is almost 1.5 million. *Id.*

3. This article uses interdiction to mean interception of vessels on the high seas and prohibition of their further movement. "Interdiction is an entirely novel and unprecedented instrument for the enforcement of United States immigration laws." A.G. Miriam, *International Law and the Preemptive Use of State Interdiction Authority on the High Seas: The Case of Suspected Illegal Haitian Immigrants Seeking Entry into the U.S.*, 12 MD. J. INT'L L. & TRADE 211, 231 (1988); see also Louis B. Sohn, *Interdiction of Vessels on the High Seas*, 18 INT'L L. 411 (1984); Jon L. Jacobson, *At Sea Interception of Alien Migrants: International Law Issues*, 28 WILLAMETTE L. REV. 811 (1992).

4. The word migrate has been defined as "moving from one country, place or locality to another." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 753 (1984). Since United States law contains a specific definition of "refugee" and most Haitians were not granted asylum and thus are not "asylees," the more neutral term "migrant" is used.

5. This article uses the term "repatriate" in its ordinary dictionary definition: "to restore or return to the country of origin, allegiance or citizenship." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 727 (1972).

origin. Indeed, Haiti is the *only* country in the world with which the United States has an agreement permitting interdiction and repatriation. Haitians are significantly prejudiced by the policy. Unlike other aliens, who “disappear” into the United States when paroled after arrival,⁶ interdicted and repatriated Haitians are never permitted to enter the United States. Undocumented aliens who reach the United States are able to prolong their stay in this country while waiting for asylum hearings.⁷ Additionally, aliens are allowed to remain in the United States for extended periods of time pending the outcome of appeals from a denial of refugee status.⁸ Since asylum claimants are permitted to work in the United States,⁹ their parole obtains them months and even years to be gainfully employed. Haitians who are interdicted and repatriated never have the opportunity to pursue claims for asylum.¹⁰ Thus, interdiction of Haitians on the high seas not only returns them to the country from which they felt forced to depart, it also

6. The situation of Ming Son (a pseudonym) from China is illustrative. Upon arrival in San Francisco, California he was captured by the Immigration and Naturalization Service (INS), “applied for political asylum and was released on a \$2000 bond. The INS would never see him again.” George de Lama, *Chinese Are Cargo in a Deadly Trade*, CHI. TRIB., June 1, 1993, at 1.

Aliens who seek refugee status often enter the United States without documents. Aliens are required to have certain documents such as a passport and visa to enter the United States. Immigration and Naturalization Act, Pub. L. No. 82-412, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) § 221, 8 U.S.C. § 1201(a) [hereinafter INA]. While an undocumented alien is technically illegal, the law looks differently upon asylum seekers and illegal aliens who have no basis to claim asylum and who are not doing so. This Article will refer to those seeking asylum as aliens.

7. An alien may wait more than 18 months for an asylum hearing. Carol Jouzaitis, *Clinton: Shut the Door on Illegal Immigrants*, CHI. TRIB., Jul. 28, 1993, at 2. Those who do not come to asylum hearings do not obtain the right to live legally in the United States. Nonetheless, they remain in the United States. An INS official said that “when people are paroled on their own recognizance and told to be back . . . they simply do not and we never see them again . . .” *Haitian and Cuban Interdiction: Hearings before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 64 (1989) [hereinafter 1989 Hearing].

8. Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT’L L. 151, 156 (1984). Only three of 169 illegal Chinese aliens detained in California in December, 1992 were still in detention in June, 1993. Thus, most remained without restraint in the United States “pending their political asylum hearings.” de Lama, *supra* note 6, at 25.

9. THOMAS A. ALENIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 838-39 (2d ed. 1991). See also 8 C.F.R. §§ 208.7, 274a.13(d), 208.18(b). Requests are granted routinely.

10. Those who are permitted to claim asylum do not fare well. Only one percent of Haitians claiming asylum are granted it. Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 368 (1993). During the thirty years from 1950-1980, most Haitians were denied asylum. Malissa Lennox, Note, *Refugees, Racism and Reparations: A Critique of the United States’ Haitian Immigration Policy*, 45 STAN. L. REV. 687, 699 n.96 (1993). During the ten year period from 1981 to 1991, approximately 24,500 Haitians were interdicted and 28 were permitted to make asylum claims. However, only three were actually granted asylum. Susan Freinkel, *A Slow, Leaking Boat to Limbo*, AMERICA LAW. MEDIA, L.P., THE RECORDER, Dec. 19, 1991, at 1. After President Aristide was toppled in September, 1991 34,000 Haitians attempted to enter the United States. Of those, 27,000 were returned to Haiti and 11,000 were permitted to apply for asylum. Lennox *supra*, at 704.

deprives them of the opportunity to petition for asylum and to be paroled into the United States while legal proceedings are pending.¹¹

This Article concentrates on recent United States policy regarding Haitian refugees, a policy which has been criticized as being racist and discriminatory.¹² Haitians constitute only a small portion of illegal aliens,¹³ yet there have been extraordinary efforts to keep them out of the United States. This effort at exclusion should be viewed against the background of foreign intervention, including by the United States, into Haiti. Haiti, and United States involvement in its affairs, is briefly described in Section II. Section III summarizes governing immigration law and asylum principles and policies. It points out that the distinction between political persecution and economic hardship has been applied to the Haitians' detriment and that the Attorney General's parole authority previously was used as a political admissions device. Section IV demonstrates the hostility to Haitians evidenced by United States policy, including: asylum decisions beginning in the 1970s; the "Haitian Program" in the late 1970s; detention starting in the 1980s; interdiction under President Reagan's program, which began with a 1981 Executive Order; President Bush's 1992 Kennebunkport Order for repatriation of Haitians without any screening for asylum; and Clinton's support of the Bush policy after he became president in 1993. The treatment of Haitians seeking asylum is compared with Cubans, Salvadorans, and Chinese in Section V, which concludes that Haitians have not been

11. Until August, 1981 the INS did regularly release Haitians until their claims could be heard. Then the INS instituted a policy of detention. See *infra* text accompanying notes 164-186. In October, 1981 President Reagan's interdiction policy began and had the effect of repatriating migrants from Haiti. Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 LAW & CONTEMP. PROBS. 163, 189-90 (1982). Individual plaintiffs in a recent Supreme Court decision had already been repatriated by the time the Supreme Court decided the case. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993).

12. See Forester, *supra* note 10, at 368 n.99; Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 270 (1993); Lennox, *supra* note 10; 139 Cong. Rec. H1151, H1153, (daily ed. Mar. 10, 1993) (statement of Rep. Brown); *The Situation in Haiti and U.S. Policy: Hearings Before the Subcomm. on Human Rights and International Organizations and the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 102d Cong., 2d Sess. 16-17 (1992) [hereinafter *1992 Hearing*] (statement of Rep. Payne); *1991 Hearing*, *supra* note 1, at 107 (statement of Rep. Rangel); *1989 Hearing*, *supra* note 7, at 5-7, 17, 63, 108 (statements of Rep. Fascal, Rep. Smith, Rep. Morrison, and Ms. Jocelyn McCalla); see generally Larry F. Jennette, Comment, *The Discrimination Against Haitian Aliens Seeking Asylum in the United States*, 13 CUMB. L. REV. 593 (1983); see also Miriam, *supra* note 3, at 357. The various charges and countercharges on this issue are collected in ALEINIKOFF & MARTIN, *supra* note 9, at 69-91. See also Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 26 n.132 (1993); Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 451 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982) (suggesting that Haitians are treated differently from others fleeing harsh regimes because of their color).

13. Compare *infra* text accompanying note 137 with *infra* text accompanying notes 227-231. It is estimated that up to half a million illegal aliens come to the United States annually, with the Chinese accounting for 100,000. *Reno: Fix Immigration Agency Policy*, CHI. TRIB., June 21, 1993, at 4.

extended any of the benefits given to aliens from those countries. The United States Supreme Court decision in *Sale v. Haitian Centers Council, Inc.*¹⁴ is discussed in Section VI. That decision allowed the United States to interdict Haitians on the high seas and repatriate them to the country from which they fled, notwithstanding a United Nations policy of *nonrefoulement*, or nonreturn, of refugees. Section VII calls for an attitude toward Haitians which treats them as other aliens are treated. Finally, Section VIII concludes that like others fleeing persecution, Haitians should be permitted to seek refuge in the United States.

II. THE COUNTRY OF HAITI

As predictable as the torrential rains that lash the land, a succession of tyrants has shaped a culture of fear, corruption, class and even linguistic divisions in the 189 years since Haiti threw off French colonialism and slavery. A U.S. occupation from 1915 to 1934 did nothing to implant democratic values.¹⁵

Haiti is a small island in the Western hemisphere located a short distance east of Cuba¹⁶ and close to Florida.¹⁷ Its citizens are mostly Black;¹⁸ Haiti is the first country to have a successful Black slave rebellion.¹⁹ The original residents of the island were Taino Arawak Indians, who were there when Christopher Columbus and his band of Spaniards arrived in December, 1492.²⁰ Shortly after they arrived, the Spaniards shipped African slaves to the island.²¹ Two distinct languages, French and Creole, are spoken in Haiti, although the majority of the population speaks exclusively Creole.²²

France established a foothold in Haiti in 1659, more than 150 years

14. 113 S. Ct. 2549 (1993), *rev'g* Haitian Ctrs. Council, Inc., v. McNary, 969 F.2d 1350 (2d Cir. 1992).

15. Linda Robinson, *Caught in the Grip of Voodoo Politics*, U.S. NEWS & WORLD REP., June 28, 1993, at 34-35.

16. POPULAR WORLD ATLAS 35 (Rand McNally 1972).

17. The distance has been variously described. Compare Stepick, *supra* note 11, at 16 (720 miles) with Douglas Farah, *Haitians Preparing Boats Denounce Policy Shift by Clinton*, WASH. POST, Jan. 16, 1993, at A19 (600 miles). The distance was described as 800 miles in *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 450 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982), and in Martin M. Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees*, 31 U. MIAMI L. REV. 27 n.1 (1976).

18. The word Black is capitalized to indicate ethnic derivation.

19. HAITI, TODAY AND TOMORROW: AN INTERDISCIPLINARY STUDY 1 (Charles R. Foster & Albert Valdman, eds., 1984); DAVID NICHOLLS, FROM DESSALINES TO DUVALIER: RACE, COLOUR AND NATIONAL INDEPENDENCE IN HAITI 27-31 (1979).

20. ROBERT DEBS HEINL, JR. & NANCY GORDON HEINL, WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE 10 n.1 (1978). For an historical chart, see Forester, *supra* note 10, at 437-43.

21. *Id.* at 14.

22. DOMINICAN REPUBLIC AND HAITI: COUNTRY STUDIES 257-64 (Richard A. Haggerty, ed., 1991) [hereinafter COUNTRY STUDIES]. For Creole phrases, see Forester, *supra* note 10, at 445-50.

after the Spaniards first arrived.²³ A slave rebellion in 1791 ultimately led to a 1794 decision by the National Assembly in Haiti to end slavery.²⁴ Francois-Dominique Toussaint L'Ouverture, a prominent figure in the rebellion, became the first Black to govern colonial Haiti.²⁵ A constitution approved in 1801 gave him substantial power as Governor General for life; nonetheless, his term was short. The French, who had promised to allow L'Ouverture to resign in 1802, instead seized him and sent him to France, where he died in captivity.²⁶ Haiti remained under French domination until it declared its independence on January 1, 1804.²⁷ However, the United States did not diplomatically recognize Haiti until 58 years later, in 1862.²⁸

During the tumultuous period from 1843-1915, Haiti had twenty-two presidents, only one of whom served out his specified term.²⁹ "[T]hree died while serving, one was blown up with his palace, one presumably poisoned, one hacked to pieces by a mob, one resigned. The other fourteen were deposed by revolution. . . ."³⁰ In 1914 the United States began a twenty-year occupation of the island, which ended in 1935.³¹ Although one by-product of the occupation was the improvement of Haiti's infrastructure, overall, the occupation "brought little of lasting value to the country's political culture or institutions, in part because the Americans saw the Haitians as uncivilized lackeys and treated them as such."³² During the occupation, friction intensified between the minority mulatto elite and the more numerous Blacks. The Haitian army became internal oppressors rather than defenders against external threats; martial law was imposed; the legislature was dissolved; journal-

23. The current island on which Haiti sits is shared with the Dominican Republic. JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* 2 (1987). Thus, when the Treaty of Ryswick between Spain and France was promulgated in 1697 it recognized the eastern 2/3 of the island as the property of Spain. *Id.* This part would later become the Dominican Republic. *Id.* French sovereignty was recognized over the western 1/3 of the island which is now Haiti. *Id.*

24. COUNTRY STUDIES, *supra* note 22, at 210. The 1791 rebellion was preceded by a six year uprising by Black slaves against the white colonists in 1751-1757. *Id.* at 207-08.

25. *Id.* at 213; WENDA PARKINSON, *THIS GILDED AFRICAN: TOUSSAINT L'OUVERTURE* 30 (1978); JOHN R. BEARD, *TOUSSAINT L'OUVERTURE* 36 (1863).

26. COUNTRY STUDIES, *supra* note 22, at 212.

27. *Id.* at 213.

28. BRENDA GAYLE PLUMMER, *HAITI AND THE GREAT POWERS, 1902-1915* 20 (1988). The United States was not alone in its tardy recognition of Haiti:

The United States, its foreign relations hostage to Southerners in Congress, continued its ambiguous policy of dealing with Haiti through "commercial agents" while withholding political recognition. But the U.S. was hardly alone: not a single Latin American country sent so much as a consul to Haiti until, in 1865, Brazil broke the ice.

HEINL & HEINL, *supra* note 20, at 172.

29. COUNTRY STUDIES, *supra* note 22, at 219.

30. *Id.*

31. *Id.* at 224.

32. *Id.* at xviii-xix. Other results of the occupation included a 1918 rebellion and a resentment of the racist attitudes of white Americans. *Id.* at 225.

ists were imprisoned and peasants were killed.³³ The United States could veto all governmental decisions, and figureheads were installed in important offices.

A commission appointed by President Herbert Hoover denounced the exclusion of Haitians from positions of power, but lauded the material improvements made during occupation. When Franklin Delano Roosevelt became President, he affirmed an agreement to disengage from Haiti. By the time the United States finally left in 1934 the only "cohesive and effective institution" in Haiti was its military.³⁴ From the time of the United States' withdrawal until the Duvalier era began in 1957, Haiti had a number of rulers, many of whom had some alliance with the military.

The long, cruel Duvalier era began with Dr. Francois "Papa Doc" Duvalier, who held power from 1957 until his death in 1971.³⁵ He terrorized the population through a variety of means, including use of the *Tontons Macoutes*, a paramilitary force known for its cruelty.³⁶ In mid-1962 President Kennedy suspended aid to Haiti due to allegations that Papa Doc had misappropriated United States funds;³⁷ the United States also withdrew its ambassador.³⁸ However, Haiti's location near Cuba and the anti-communist orientation of the Duvaliers' regimes undoubtedly helped them curry favor with the United States.³⁹ Presidents subsequent to Kennedy maintained a cordial relationship with Haiti. Upon the death of Papa Doc in 1971, his son, Jean-Claude "Baby Doc" Duvalier, succeeded him.⁴⁰ Baby Doc left office and was exiled to France in 1986 when an uprising ended the twenty-nine year Duvalier rule.⁴¹

On February 7, 1991, five years to the day after Baby Doc Duvalier left, Jean-Bertrand Aristide was inaugurated as the first democratically elected President of Haiti.⁴² In his inaugural address, Aristide, a Roman

33. William G. O'Neill, *The Roots of Human Rights Violations in Haiti*, 7 GEO. IMMIGR. L.J. 87, 88 (1993).

34. COUNTRY STUDIES, *supra* note 22, at 226-27.

35. *Id.* at 226-32.

36. The term *Tontons Macoutes* means "bogeyman" in Creole. SIMON M. FASS, POLITICAL ECONOMY IN HAITI: DRAMA OF SURVIVAL 5 (1988). Threats by the *Tontons Macoutes* were alleged by many Haitians coming to the United States. See *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 474-510, (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982). See also Stepick, *supra* note 11, at 178.

37. COUNTRY STUDIES, *supra* note 22, at 234.

38. GILBERT LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS—REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 78 (1986).

39. *Id.* at 80. See also Johnson, *supra* note 12, at 12 n.44.

40. HEINL & HEINL, *supra* note 20, at 662.

41. O'Neill, *supra* note 33, at 105. Aristide received 67% of the vote. COUNTRY STUDIES, *supra* note 22, at xxiv.

42. In February, 1986 a United States plane went to Haiti and transported Baby Doc and his family to France. O'Neill, *supra* note 33, at 97. Previously the United States had "rejected a request to provide asylum for Duvalier . . ." COUNTRY STUDIES, *supra* note 22, at 237.

Catholic priest, eschewed a \$10,000 monthly salary, calling it a "scandal in a country where people cannot eat."⁴³ However, Aristide's time in office was brief. In September 1991, he was ousted by a military coup and exiled to Venezuela.⁴⁴ Aristide initially opposed amnesty for coup leaders,⁴⁵ but later relented.⁴⁶ This concession was intended to enable Aristide to return to Haiti, but military leaders rejected the offer of amnesty.⁴⁷ Also rejected was a plan for an international police force.⁴⁸

Shortly after Aristide was ousted, the Organization of American States imposed a trade embargo.⁴⁹ In June 1993, the United Nations voted to impose economic sanctions and to freeze the assets of the Haitian government and refused to issue visas to them.⁵⁰ The United Nations attempted to force Haiti's military leaders to relinquish power by imposing an oil and arms embargo and by freezing the Haitian government's financial assets.⁵¹ After imposition of the United Nations embargo, talks began in New York between Haiti's army commander and President Aristide, mediated by a United Nations envoy.⁵² As this Article is written, President Aristide remains in exile. However, the Haitian military commander Raoul Cedras agreed to a U.N. plan which calls for Cedras to resign and Aristide to return as President by October 30, 1993.⁵³ Under the agreement, referred to as the Governor's Island

43. COUNTRY STUDIES, *supra* note 22, at xxiv.

44. Howard French, *Haiti's Exiled Chief Seeks to Punish Coup Plotters*, N.Y. TIMES, Nov. 17, 1991, at 12.

45. *Aristide Refuses Haiti Amnesty Delaying Pact*, CHI. TRIB., Apr. 7, 1993, at 11. Aristide wanted the coup leader, Lt. Gen. Raoul Cedras, exiled from Haiti or punished. *Id.*

46. *Aristide Offers Foes Amnesty*, CHI. TRIB., Apr. 14, 1993, at 17.

47. *Haiti's Coup Leaders Reject Amnesty, Scuttling Accord*, CHI. TRIB., Apr. 17, 1993, at 2.

48. *Haiti Spurns U.S. Plan for UN Police Force*, CHI. TRIB. May 25, 1993, at 2.

49. Ron Howell, *Terror at Sea; Haitian Survivors Recall Wreck that May Have Killed 400*, NEWSDAY, Feb. 1, 1993, at 3.

50. Robinson, *supra* note 15, at 38. The Lawyers Committee for Human Rights had previously recommended that President Bush take freeze action and cancel or suspend visas. In addition, it called for revocation of the Bush interdiction policy. LAWYERS COMM. FOR HUMAN RIGHTS, HAITI: A HUMAN RIGHTS NIGHTMARE 61 (1992). Congressman Major Owens called for annulling visas and freezing international assets of coup leaders. 139 CONG. REC. H1151, H1152 (daily ed. Mar. 10, 1993).

51. Robinson, *supra* note 15, at 34. Earlier, President Aristide had argued that an economic embargo would be effective if arms and weapons were not delivered to Haiti. Jean-Bertrand Aristide, *Avoid a Blood bath in Haiti; Declare a Deadline*, N.Y. TIMES, Op-Ed, Mar. 16, 1993, at 21; Norman Kempster, *U.S. Pushes New Talks on Haiti*, CHI. SUN-TIMES, June 23, 1993, at 29; *Aristide Agrees to Meet General who Deposed Him*, CHI. TRIB., June 23, 1993, at 6.

52. *Haiti Democracy Talks off to Slow Start*, CHI. TRIB., June 28, 1993, at 7.

53. David Beard, *Haitians Wary About Deal to Return Aristide*, CHI. SUN-TIMES, July 5, 1993, at 8. A prime minister selected by Aristide was ratified by the Haitian parliament and the U.N. suspended its oil embargo at the end of August 1993. CHI. SUN-TIMES, Aug. 28, 1993, at 11. However, killings continued, CHI. SUN-TIMES, Sept. 9, 1993, at 36; CHI. SUN-TIMES, Sept. 12, 1993, at 38; and some ponder whether Aristide will survive upon his return to power. Charles D. Jaco, *Hope Awaits in Haiti if Aristide Survives His Return*, CHI. TRIB., Sept. 7, 1993, at 21. Even if he does avoid death, the problems he faces are tremendous. Nathaniel Sheppard, Jr., *Aristide's Return No Panacea—Haitian Leader Must Calm Foes, Retain Support of Poor*, CHI. TRIB., Oct. 21, 1993, at 6. The U.N. is to send military advisers to Haiti to teach engineering skills and first aid to Haitian soldiers. Part of the Governor's Island Plan is for the creation of a civilian controlled police force to supplant the military. CHI. SUN-TIMES, Sept. 24, 1993, at 33.

plan, U.N. military advisors are to assist in retraining the Haitian army. However the ship *Harlan County*, carrying American and Canadian non-combat military personnel, was turned away from Haiti in early October, 1993.⁵⁴ President Clinton then asked the U.N. to reimpose its economic sanctions,⁵⁵ and it complied, prohibiting the export of gas and petroleum to Haiti and banning arms sales.⁵⁶ Haitian military and police officials were prohibited from entering the United States, and assets in the country were frozen.⁵⁷ Before the October 30 deadline, the Haitian military sought “an amnesty law protecting members of the army for murders and other human rights abuses committed during the 1991 coup that toppled Aristide.”⁵⁸ In mid-October, 1993, Army commander Cedras refused to resign as envisioned by the Governor’s Island Plan.⁵⁹ The situation in Haiti was volatile and the UN special envoy asked world leaders to go to Haiti as observers.⁶⁰ The deadline of October 30, 1993 passed, and Aristide was unable to return to the office to which he was elected—President of Haiti.⁶¹ The United States was concerned that events of 1993 might prompt Haitians to seek refuge in the United States, as some did immediately after Aristide was overthrown in 1991.⁶²

In the aftermath of the 1991 coup, Haitian migrants tried to come to the United States. They fled abject poverty⁶³ and incredible mistreatment. Even before President Aristide was ousted, human rights

54. Kenneth Freed, *Haiti Mob Turn U.S. Troops Away*, CHI. SUN-TIMES, Oct. 12, 1993, at 3.

55. Terrence Hunt, *Troop Ship Leaves Haiti*, CHI. SUN-TIMES, Oct. 13, 1993, at 1.

56. Kenneth Freed & Stanley Meisler, *U.N. Okays Haiti Sanctions as Rebel Leader Balks*, CHI. SUN-TIMES, Oct. 14, 1993, at 10.

57. Ruth Marcus & Helen Dewar, *Clinton Won't Rule Out Military Force in Haiti*, CHI. SUN-TIMES, Oct. 19, 1993, at 8; *Haiti Grows Tense Over Lack of Fuel*, CHI. TRIB., Oct. 23, 1993, at 3.

58. Kenneth Freed, *“Aristide Foes” Proposal Falls Short: Envoys*, CHI. SUN-TIMES, Oct. 25, 1993, at 22.

59. Nathaniel Sheppard Jr., *Haiti Military Negotiates; Hope Raised*, CHI. TRIB., Oct. 24, 1993, at 3. It was argued that a previous Aristide decree granting amnesty for political crimes could be revoked and thus, a law of parliament was necessary. *Aristide Vows He'll Include Foes*, CHI. TRIB., Oct. 25, 1993, at 3.

60. Andrew Downie, *U.N. Envoy Calls for Carter, World Leaders to Visit Haiti*, CHI. SUN-TIMES, Oct. 26, 1993, at 20; Nathaniel Sheppard Jr., *U.N. Envoy Asks Carter, Others to Visit Haiti as Monitors*, CHI. TRIB., Oct. 26, 1993, at 4. Two U.S. immigration offices established in Haiti to hear political asylum requests were closed after lives of U.N. human rights monitors were threatened. Kenneth Freed, *Haiti's Day of Hope Gives Way to Fear*, CHI. SUN-TIMES, Oct. 31, 1993, at 36.

61. *Haiti Acts to Replace Aristide*, CHI. TRIB., Oct. 31, 1993, at 3. Aristide’s opponents called upon him to resign and vowed to appoint a president in his place.

62. Nathaniel Sheppard, Jr., *U.S. Fears Haiti Violence Could Trigger New Exodus*, CHI. TRIB., Oct. 22, 1993, at 1. From Aristide’s overthrow in 1991 until October, 1993 the total number of Haitians interdicted and repatriated is 54,032, according to United States Haitian embassy spokesman, Stanley Schragar. *Id.*

63. Haiti’s poverty is the worst in the Western hemisphere. William Steif, *New Terrorists Add to Haiti's Tale of Woe*, CHI. TRIB., Jan. 17, 1993, at 12. Ninety percent of the people earn, on average \$120 per year. One percent of the people own 90% of the arable land. Douglas Farah, *No Rights, No Relief for Rural Haitians*, CHI. SUN-TIMES, Oct. 18, 1992, at 47.

abuses in Haiti were documented in court testimony⁶⁴ and independent studies.⁶⁵ The Lawyers Committee for Human Rights, investigating events after the coup, noted that illegal arrests, executions, torture and mistreatment were prevalent, and concluded that "the human rights situation in Haiti is worse than at any time since the Duvalier era."⁶⁶

The removal of President Aristide spurred the departure of Haitians for the United States. During the eight months Aristide was in office, only 1351 Haitians were interdicted on the high seas⁶⁷ by the United States Coast Guard. However, during an eight month period *after* Aristide was overthrown, 34,000 people were interdicted.⁶⁸ Moreover, it was *after* Aristide was overthrown that interdiction and repatriation once again became the focus of United States policy toward Haitian migrants.

III. UNITED STATES IMMIGRATION LAW AND ASYLUM

[T]here is an inherent tension that runs through all political and legal decision making on refugee and asylum questions in the United States As more and more asylum-seekers from nearby nations like Haiti, Cuba, Nicaragua, and El Salvador have reached the United States, this built-in tension in American immigration law has become more glaringly apparent.⁶⁹

The Constitution vests in Congress the sole authority to promulgate, implement and enforce laws governing United States immigration policy.⁷⁰ This power "is absolute, [it is] vested in the political departments of the government and not subject to challenge."⁷¹ Congress has virtually unfettered discretion to establish the criteria upon which decisions to admit or exclude foreign nationals are based. The United

64. See, e.g., *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 450 (S.D. Fla. 1980), (describing accounts of torture, kidnapping, and murder in Haiti), *modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

65. See, e.g., LAWYERS COMM. FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS; BREAK-DOWN OF THE RULE OF LAW IN HAITI (1990). "The Creole proverb 'Law is paper; bayonet is steel' aptly summarizes the status of human rights in Haiti." *Id.* at 16. See generally O'Neill, *supra* note 33.

66. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 65, at 1.

67. "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." U.N. Conf. on the Law of the Sea, Convention on the High Seas, Apr. 29, 1958, Art. 1, 13 U.S.T. 2313, T.I.A.S. No. 5200.

68. O'Neill, *supra* note 33, at 117. From Aristide's overthrow in 1991 until October, 1993 the total number of Haitians interdicted and repatriated was 54,032, according to United States Haitian embassy spokesman Stanley Schragger. Sheppard, *supra* note 62, at 1.

69. ALENIKOFF & MARTIN, *supra* note 9, at 690.

70. See generally U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"); U.S. CONST. art. I, § 8, cl. 4 (granting Congress the authority to promulgate uniform rule of naturalization of citizens); see also *Edye v. Robertson* [The Head Money Cases], 112 U.S. 580, 591 (1884) (holding that the power to regulate immigration comes from Congress's power to regulate commerce with foreign nations).

71. IRVING J. SLOAN, LAW OF IMMIGRATION & ENTRY TO THE UNITED STATES OF AMERICA., at v (rev. 4th ed.).

States Supreme Court has given long-standing support to Congress' plenary authority over immigration matters.⁷² It was not until the passage of the Immigration and Nationality Act (INA),⁷³ however, that Congress placed all aspects of United States immigration policy into one statute.⁷⁴ The Immigration Act of 1990 is the most recent set of general amendments to the INA.⁷⁵

Historically, the United States has directed little or no attention toward the means of admitting refugees seeking protection from persecution in their home countries.⁷⁶ In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol), which defined the word "refugee" and established standards for acceptance of refugees by Contracting States.⁷⁷ In 1980,⁷⁸ Congress

72. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952) (upholding congressional act requiring deportation of legal resident alien due to communist party membership); *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976), (upholding validity of statute which denied medicare to certain alien residents).

73. Immigration and Naturalization Act, Pub. L. No. 82-412, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA] and also known as the McCarran-Walter Act. The INA contains definitions of several terms by which it classifies individuals who are subject to its jurisdiction. *Id.* This article adheres to the statutory scheme.

74. During the thirty years following the passage of the INA of 1952, various amendments to it removed most of the quotas which had favored immigrants from particular countries; see e.g., Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1966); Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1978); Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 107 (1981).

75. *Id.* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (in scattered sections of 8 U.S.C.) [hereinafter Immigration Act]; See CHARLES GORDON AND STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE, SPECIAL SUPPLEMENT, IMMIGRATION ACT OF 1990 § 102 (1993) amended.

76. AUSTIN T. FRANGOMEN & STEVEN C. BELL, IMMIGRATION PRIMER 193 (1985):

The result (of this lack of special consideration) was that the previously open doors were shut completely to refugees; the worst example of this policy came in the 1930's, when Congress refused on several occasions to enact legislative exceptions to the strict quota policy then in effect in order to permit the entry of refugees from Nazi terror, including proposed exceptions for groups of Jewish orphans."

Id. at 193. Following World War II, with the Displaced Persons Act of 1948, Act of June 25, 1948, 62 Stat. 1009 (1948), Congress gave its first official recognition to the then pressing need to admit into the United States persons designated as refugees. The Displaced Persons Act allowed entry by refugees only on a highly selective basis in emergency situations which required a United States response. It did not, however, effect a permanent overall United States refugee policy. This approach to addressing refugees issues on an as needed basis when intervening in specific crises was used several times following emergencies in various parts of the world including Europe (1948, 1950, 1951, 1952, and 1953), Hungary (1956); Cuba (early 1960s); China (middle and late 1960's); Czechoslovakia (middle and late 1960s); Indochina (1977). *Id.*

77. U.N. Protocol Relating to The Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Senate consented to ratification on Oct. 4, 1968. 114 CONG. REC. 29,607 (1968). The treaty obtained the force of law in the United States on Nov. 1, 1968. In 1951, the United States had refused to accede to the United Nations Convention Relating to the Status of Refugees of July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention] because it was limited in scope and designed primarily to address the refugee crisis in Europe following World War II. Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39 n.2 (1993) (citing S. REP. NO. 14, 90th Cong., 2d Sess. 6, 9 (1968) (statement of Lawrence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State)).

added a definition of "refugee" to the INA that required "a well-founded fear of persecution":

The term refugee means . . . 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.⁷⁹

Aliens who wish to obtain refugee status after departing their country of origin, but before arriving in the United States, must apply for overseas refugee admission at designated consular posts or INS offices abroad.⁸⁰ Once refugee status is granted, aliens are admissible to the United States and, after one year, become eligible for adjustment from refugee status to permanent resident status.⁸¹ Aliens at a United States port of entry or who have entered the United States may apply for asylum. Asylum applications are processed by the United States Immigration and Naturalization Service (INS). Aliens in the United States may also attempt to resist deportation or exclusion proceedings by applying for asylum.⁸² All asylum requests, including those which arise

78. Refugee Act of 1980, Act of Mar. 11, 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980).

79. INA § 203; 8 U.S.C. §§ 1101(a)(42)(A)(B), 1157 (e). According to its legislative history, Congress intended that the definitions of "refugee" in the 1980 Act should have the same meaning and effect as the definition found in the Protocol. S. Rep. No. 590, 96th Cong., 2d Sess. 1, 19 (1980); See also Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981).

80. INA § 207, 8 U.S.C. § 1157 (1992). After consulting with Congress, 8 U.S.C. § 1157(d)-(e), and taking into account the "foreign policy interests" of the United States, 8 U.S.C. § 1157(e)(6), the president establishes the total annual number of refugees to be admitted and allocates that quota among refugees from various areas. President Clinton established the fiscal year 1994 limit (which begins October 1, 1993) at 121,000, 11,000 less than the previous fiscal year. 70 INTERPRETER RELEASES 1331 (1993); see also 58 Fed. Reg. 52,213-14 (Oct. 7, 1993). Within the allocations, the Attorney General is given discretionary authority to admit individual refugees who are "of special humanitarian concern to the United States." 8 U.S.C. § 1157(c)(1). During fiscal year 1994 Haitians are among those who are entitled to "special humanitarian concern." Nationals of Cuba, Vietnam, and the former Soviet Union are also included. 70 INTERPRETER RELEASES at 1331. The numerical ceiling does not apply to those who apply for asylum from within the United States, but does apply to asylum applications made outside the country. Requiring Haitians to apply for asylum in Haiti may not only expose them to danger, as the INS admitted, *id.*, it also subjects them to a regional limit of 4000 for all of Latin America and the Caribbean. *Id.*

81. INA § 209(a), 8 U.S.C. § 1159(a). "It has been said that obtaining lawful permanent resident status is one of the most important steps in a foreigner's effort to stay in this country." RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW, CASES AND MATERIALS 465 (2d ed. 1992). With permanent resident status one is not subject to summary expulsion, is eligible to work, can travel to and from the United States and can apply for naturalization.

82. INA § 208(a), 8 U.S.C. § 1158(a); INA § 243(h), 8 U.S.C. § 1253 (h)(1); See also note 99 *infra* and accompanying text. This mechanism is known as "withholding of deportation." 8

in deportation proceedings, require a showing of a well-founded fear of persecution.⁸³

In 1987, the Supreme Court provided insight into the meaning of the “well-founded fear” criterion in *INS v. Cardoza-Fonseca*.⁸⁴ Writing for the Court, Justice Stevens⁸⁵ rejected the government’s argument that applicants for asylum should be required to prove a “clear probability” of persecution upon return to their country of origin. However, while conceding that “[t]here is obviously some ambiguity in a term like ‘well-founded fear,’ ” the Court provided little further illumination of its meaning beyond saying that the term could “only be given concrete meaning through a process of case by case adjudication.”⁸⁶

Any assessment of the merits of an asylum claim requires an inquiry into both the subjective perspectives and fears of the applicant, and an objective finding of facts about the background and circumstances creating a basis for the applicant’s fear.⁸⁷ Several recent lower court decisions have ruled that asylum applicants must show that a “reasonable person” would have a “well-founded fear of persecution” under the circumstances,⁸⁸ and must validate the fear with specific, concrete facts.⁸⁹

U.S.C. as amended in 1980, provides for asylum requests to be raised in connection with deportation hearings:

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.

Id.

83. *Id.* See *INS v. Stevic*, 467 U.S. 407 (1984); Michael Cavosie, *Defending the Golden Door: The Resistance of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 425 (1992).

An applicant for asylum must also meet the eligibility requirements for admission as a “refugee” as defined by the Refugee Act of 1980. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987); see also Kevin Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 299. Because the criteria to be a refugee and to receive asylum are the same, most disputes are over the threshold issue of whether an applicant for asylum or refuge has a “well-founded fear of persecution.” AUSTIN T. FRANGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 6.1(b) (1992 ed.).

84. 480 U.S. 421 (1987).

85. *Id.* Joined by Justices Brennan, Marshall, Blackmun and O’Connor. *Id.*

86. *Id.* see also Cavosie, *supra* note 83, at 430.

87. See *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256-58 (9th Cir. 1992).

88. See *Huaman-Cornelio*, 979 F.2d 995, 999 (4th Cir. 1992) (citing *M.A. v. INS*, 899 F.2d 304, 311 (4th Cir. 1990) (en banc)); see also *Klawitter v. INS*, 970 F.2d 149, 153 (6th Cir. 1992); *Berroteran-Melendez*, 955 F.2d 1251, 1256 (9th Cir. 1992); *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1001, 1002 (9th Cir. 1988); *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

89. *Anker & Posner*, *supra* note 79, at 66. However, under the 1980 Refugee Act, an alien who manages to meet the eligibility requirements for refugee status is not automatically entitled to admission. 480 U.S. at 443. To the contrary, the 1980 Refugee Act amended the INA to give the Attorney General discretion in admitting refugees. INA § 208, 8 U.S.C. 1158. Thus, even after an alien satisfies the statutory definition of a refugee he or she simply becomes eligible for asylum and will gain admission only if the Attorney General chooses to grant it. 480 U.S. at 443-44 (noting that an alien who meets the stricter “clear probability” standard in a § 243(h)

In addition to adopting the Protocol's definition of "refugee" and establishing procedures for selecting and admitting refugees, the 1980 Refugee Act also adopted one of the Protocol's most important principles: *nonrefoulement*.⁹⁰ Under the Protocol and Article 33 of the U.N. Convention Relating to the Status of Refugees (Convention), *nonrefoulement* is "an absolute obligation on signatory nations not to return persons to a country where their life or freedom would be threatened."⁹¹ By ratifying the Protocol the United States agreed not to "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 race, religion, nationality, membership in a particular social group or political opinion."⁹²

The concept of "entry" is of pivotal importance to United States immigration law.⁹³ The INA defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise."⁹⁴ The Board of Immigration Appeals (BIA) uses a three-part test to determine whether an alien has "entered" the United States: first, the alien must be physically present within the territorial limits of the United States; second, the alien must either be admitted and inspected by an INS official or actually and intentionally evade such inspection; and third, the alien must show that he or she has been free from official restraint, however briefly.⁹⁵

withholding of deportation claim becomes automatically entitled to mandatory suspension of deportation, barring certain exceptions).

90. FRANGOMEN & BELL, *supra* note 83, at 197; see Vázquez, *supra* note 77, at 39 (noting that under Article I(1) of the Protocol, the United States agreed to adopt as law Articles 2 through 34 of the Convention); see also Suzanne Gluck, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 866 (1993) (concluding that *nonrefoulement* is an extraterritorial obligation); Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67 (1993).

91. FRANGOMEN & BELL, *supra* note 83, at 197.

92. Article 33 (1) of the Convention as modified by the Protocol, art. 1, § 2. See Vázquez, *supra* note 77, at 39; John A. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME L. REV. 618 (1981).

93. FRANGOMEN & BELL, *supra* note 83, § 1.5(b). In June, 1993 the Supreme Court decided *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993), a case involving the issue of whether the *nonrefoulement* obligation applied to aliens who had not yet entered the United States.

94. See FRANGOMEN & BELL, *supra* note 83, at §1.5 (c) (citing § 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13)). "Entry" is not the same as "admission." The phrase "admitted and inspected" is used throughout the INA and refers to official "admission" as opposed to "entry", but is not defined. Admission "is an important concept, particularly with regard to the conferral of privilege, granted to some aliens, of obtaining permanent resident status without leaving the United States in order to apply for an immigrant visa at a U.S. consulate." *Id.*

95. *Id.*; see, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 186-9 (1958) (entry is not accomplished unless the alien is free from official restraint); *U.S. v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980) (release on parole did not alter status as excluded alien, not within the United States); *In re Dubbiosi*, 191 F. Supp. 65, 66 (E.D. Va. 1961); *In re Chin & Chen*, 19 I. & N. Dec. 203 (B.I.A. 1984); *In re Lin*, 18 I. & N. Dec. 219, 224 (B.I.A. 1982); see generally Noble F. Allen, *Habeas Corpus and Immigration: Important Issues and Developments*, 4 GEO. IMMIGR.

An alien who has entered the United States, legally or illegally, has significantly greater substantive and procedural rights—both constitutional and statutory—than an alien who has not entered.⁹⁶ For example, upon entering the United States an alien becomes deportable.⁹⁷ A deportable alien is entitled to a hearing on the issue of whether he or she may remain in the United States.⁹⁸ On the other hand, an alien who has not entered the United States is excludable. The rights of an excludable alien are decided in the course of an exclusion proceeding.⁹⁹ Moreover,

the INA . . . has the effect of rewarding aliens who break the law by granting them: (1) a right to appeal the deportation in a circuit court of appeals, and (2) if under custody, a right to file a writ of habeas corpus at the district court level. However, excludable aliens who [present themselves to INS officials upon arrival have not “entered” and] are entitled to just one singular form of relief, a petition for habeas corpus.¹⁰⁰

The legislative history of the 1980 Refugee Act reveals that Congress aspired to remove politics and ideology from consideration of claims for refuge and asylum.¹⁰¹ In many respects, the act was an improvement over the INA's reactive, ad hoc approach to refugee admission.¹⁰² However, time has proven that the 1980 Refugee Act “is not the apotheosis envisioned by its drafters.”¹⁰³ Despite their best efforts,

L.J. 503, 503-16. *But see* Haitian Ctrs. Council v. Sale, 817 F. Supp. 336 (E.D.N.Y. 1993). The anomaly of United States law on entry can be seen by comparing two cases, one involving Haitians and the other involving Chinese. The Haitians had been on a small boat which became distressed and was then towed into a United States port by an American vessel. After the boat had crossed into United States waters the Haitians waited on board for immigration inspectors. The Board of Immigration Appeals (BIA) held they had not entered. *In re Pierre*, 14 I. & N. Dec. 467 (B.I.A. 1973). Chinese aliens who had been refused admission at an airport abandoned their passports and baggage and escaped from a detention lounge into the United States. The BIA ruled they had entered. *In re Ching and Chen*, 19 I. & N. Dec. 203 (B.I.A. 1984).

96. FRANGOMEN & BELL, *supra* note 83, § 1.5(b). “Ironically, an alien who entered the United States illegally and is later deemed to be deportable is granted *more* procedural rights than an alien who presents herself to the INS, and is later held to be excludable.” Allen, *supra* note 95, at 507.

97. FRANGOMEN & BELL, *supra* note 83, § 1.5 (b).

98. *Id.*

99. *Id.* The *Pierre* decision demonstrates the significance of a finding of no entry. *In re Pierre*, 14 I. & N. Dec. 467 (B.I.A. 1973). In that case, the Haitians were not allowed to claim asylum because it was ruled that “§ 243(h) relief is . . . unavailable to applicants in exclusion proceedings.” *Id.* at 470. *See also supra* text accompanying note 82 regarding asylum requests in deportation hearings. One who has entered is entitled to a deportation hearing. When there has been no entry, exclusion proceedings can be undertaken.

100. Allen, *supra* note 95, at 507 (citing INA §§ 106(a)-(b), 279, 8 U.S.C. §§ 1105a(a)-(b), 1329 (1988)).

101. *INS v. Stevic*, 467 U.S. 407, 425 n.20; *see also Cavosie, supra* note 83, at 412.

102. Cavosie, *supra* note 83, at 412.

103. Cavosie, *supra* note 83, at 428 (citing S. REP. NO. 256, 96th Cong., 1st Sess. 1, 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141).

political and ideological concerns continue to influence the development of United States refugee policy.¹⁰⁴

A. *Politics and Parole Authority*¹⁰⁵

Politics can affect decisions about refugee admissions through section 212(d)(5) of the INA, which grants the Attorney General discretionary parole authority.¹⁰⁶ Since at least 1956, parole authority has been used by the President, through the Attorney General, to inject political considerations into immigration matters.¹⁰⁷

The legislative history of parole authority indicates that it was originally intended to allow the Executive to grant temporary admission to the occasional individual alien, who was otherwise inadmissible, in an emergency situation.¹⁰⁸ Parole authority represented one statutory mechanism which had sufficient flexibility to allow the Executive to circumvent Congress' quantitative and geographic restrictions on refugee admissions.¹⁰⁹ However, the Executive's "use of parole authority [to] camouflage an unstated, hidden and *ad hoc* refugee admission policy" violated the spirit and intent of the INA.¹¹⁰ Thus, one of

104. See generally Cavosie, *supra* note 83, at 412-13, 424-35; see also *infra* text accompanying notes 105 to 120. In asylum application cases, INS district directors and immigration judges are to obtain an advisory opinion from the Bureau of Human Rights of the State Department. 8 C.F.R. § 208.8. For an analysis of the opinion letter process, see LAWYERS COMM. FOR HUMAN RIGHTS, THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 29-32 (1990).

105. This section discusses the use of parole authority as a political or ideological admission device, initiated by the Executive, by either welcoming or inviting favored foreigners to enter the United States. This use of parole is distinct from parole as release, an alternative to detention. See *infra* note 106 and text accompanying notes 178-86.

106. INA § 212(d)(5); 8 U.S.C. § 1182(d)(5) (1952) (amended 1980).

The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any applicant for admission to the United States.

Id. (emphasis added).

107. Parole authority was first used in 1956, at the request of President Eisenhower, to accomplish the otherwise impossible task of admitting 21,500 Hungarian refugees following the Soviet invasion. United States law provided for the issuance of only 6500 visas for the entire group of more than 200,000 refugees fleeing Hungary. By 1962, the practice of wholesale parole of refugees was officially recognized. See Anker & Posner, *supra* note 79, at 15 (quoting H.R. Doc. No. 85, 85th Cong., 1st Sess. 1 (1957); Pub. L. No. 85-316, 71 Stat. 639 (1957)); SEN. COMM. ON THE JUDICIARY, A REPORT UPON THE FORMATION OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY: U.S. IMMIGRATION LAW AND POLICY: 1952-1979, 96th Cong., 1st Sess. 18 (Comm. Print 1979). For a discussion of the use of parole authority to facilitate the admission of Cubans, see *infra* note 235.

108. Anker & Posner, *supra* note 79, at 15 (citing Comment, *Refugee-Parole: The Dilemma of the Indochinese Refugee*, 13 SAN DIEGO L. REV. 175 (1975)).

109. See generally Anker & Posner, *supra* note 79.

110. Anker & Posner, *supra* note 79, at 19. The law now prohibits the Attorney General

Congress' stated objectives when promulgating the permanent admissions provisions of the 1980 Refugee Act was to limit the use of parole authority.¹¹¹ It was not abolished, however, and remains available as a device through which politically motivated admissions of non-refugees may be accomplished.¹¹²

B. *Refugee Policy and Communism*

Under the Protocol and the INA, the word "refugee" is defined without reference to the politics of the government of an applicants' country of origin.¹¹³ Nevertheless, the United States routinely applies a less restrictive refugee admissions policy to aliens from communist

from using the parole authority to bring refugees into the United States unless there are "compelling reasons" relating to that particular refugee. INA § 212, 8 U.S.C. § 1182(d)(5)(B) provides:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than admitted as a refugee under section 1157 of this title.

111. Public Law 96-212, Mar. 17, 1980, amended INA § 212(d)(5) by redesignating the original section as § 212(d)(5)(A) and adding § 212(d)(5)(B) as follows:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

Id. The only reason that § 212(d)(5) was not repealed was that Congress recognized that the parole authority must remain available for use in extreme circumstances, such as in cases where the admission of refugees was necessary in the national interest of the United States. Anker & Posner, *supra* note 79, at 18-19 (quoting S. REP. NO. 748, 89th Cong., 1st Sess. 3335 (1965); 111 CONG. REC. 24,237 (1965) (statement of Sen. Thurmond)).

112. Anker & Posner, *supra* note 79, at 18-19. This result is aided by the fact that because parole authority was never designed to function as a major mechanism for refugee admissions, there were never any standardized procedures developed to provide structure and/or guidelines for its implementation.

In partial mitigation . . . a practice evolved whereby the Attorney General would consult with . . . the Judiciary Committees of the House and Senate. Gradually (this) consultation procedure became more institutionalized and hearings were often held on specific parole requests. No formal guidelines, however, existed on the conduct of the consultation or the dimensions of the congressional role."

Id. at 19-20 (citing *Proposed Amendments to the Immigration and Nationality Act: Hearings on H.R. 9112, H.R. 15092 and H.R. 173370 Before Subcomm. No.1 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 40 (1970)*). Parole authority had no defined eligibility requirements and all pre-conditions were entirely within the discretion of the Attorney General. *Id.* at 49.

Parole thus became a highly politicized admission device. For example, the Hungarians were admitted under liberal eligibility criteria consisting of flight from Hungary after October 23, 1956, and qualification under the regular provisions of the immigration law. . . . Chinese refugees paroled from Hong Kong in 1962, on the other hand, were subjected to far more restrictive requirements.

Id. (citing Swing, *Hungarian Escapee Program*, 6 I. & N. Rep. 43 (1965); *In re Chai*, 12 I. & N. Dec. 81 (1967)).

113. Johnson, *supra* note 83, at 290.

countries.¹¹⁴ The prevailing norm is for Congress to tolerate the Executive's apparent inclination to provide protection to refugees from countries that are hostile to the United States, but to deny similar protection to "equally worthy refugees from friendly countries."¹¹⁵

Since persecution is a requirement for asylum, granting asylum to refugees from communist regimes permits the United States to equate a communist political orientation with persecution of those who live under such regimes. Comparing the number of those from the Soviet Union, or other communist countries, who are granted asylum with those from Haiti¹¹⁶ suggests that this type of foreign policy objective does influence refugee admissions.¹¹⁷ This ideologically-based policy is disadvantageous to applicants from oppressive, but noncommunist, regimes such as Haiti's. Haitians are often denied refugee status because Haitian regimes have historically been anti-communist and staunchly supportive of the United States' attempts to end communist rule in Cuba.¹¹⁸ Despite the fact that it is widely known that the Haitian government practices systematic and pervasive oppression of political opposition,¹¹⁹ the implicit policy of the United States government, is to "tolerate human rights violations as long as the violator loudly denounces communism."¹²⁰

C. *Political v. Economic Persecution*

Another issue in the debate over whether to grant refugee status is the conflict between economic disadvantage and political persecu-

114. See Johnson, *supra* note 12, at 7; Lennox, *supra* note 10, at 710-14; Cavosie, *supra* note 83, at 412 n.9 (noting "[t]hat political ideology permeated United States refugee law, at least until 1980, is a well-established theme"; citing S. REP. NO. 256, 96th Cong., 1st Sess. 1, 4 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 144); see also *infra* text accompanying notes 232 to 251 for a comparison of United States treatment of Haitians and Cubans; Ira Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 872 (1982).

115. Kuvzban, *supra* note 114, at 872.

116. Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 458 (1985) (noting that from 1965-1980 95% of refugee asylum claims went to aliens from communist countries). Between 1983-1989 the approval rate of Haitians applying for asylum was only 42.1%, compared with a rate of 75.6% for those from the Soviet Union. Data compiled by Amnesty International USA show that of the nine countries whose citizens were granted asylum at a rate of 37% or greater between June, 1983 and September, 1989, five were under communist rule (Soviet Union, 75.6%; Romania, 70.3%; Czechoslovakia, 47.4%; China, 43.5%; and Poland, 37.0%). See Thomas David Jones, *Haitian Refugee Center, Inc. v. James Baker, III: The Dred Scott Case of Immigration Law*, 11 DICK. J. INT'L L. 1, 40-42 (1992) (citing United States Department of Justice, Immigration and Naturalization Service, *Refugee Reports*, Dec. 20, 1989; AMNESTY INT'L USA, REASONABLE FEAR: HUMAN RIGHTS AND UNITED STATES REFUGEE POLICY 17-18 (Mar. 1990)). Guatemala and Haiti ranked last, with a 2% and 2.1% success rate, respectively. *Id.*

117. Cavosie, *supra* note 83.

118. Johnson, *supra* note 12, at 4, 7; see also Lennox, *supra* note 10, at 712; *infra* note 250 and accompanying text.

119. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980) (uncontradicted evidence that Haitians classified as political opponents face grave danger), *aff'd as modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

120. Lennox, *supra* note 10, at 712.

tion.¹²¹ The U.N. definition of “refugee” does not include persons whose primary motivation for migrating is economic.¹²² This limitation has been sharply criticized because it fails to acknowledge that governments routinely impose economic sanctions against individuals for purely political reasons.¹²³ It also “perpetuates the myth that asylees are not fleeing their own country but simply seeking to come to the United States.”¹²⁴

The distinction between economic disadvantage and political persecution supports the current attitude toward aliens from noncommunist, as opposed to communist, regimes. Conceptually, aliens fleeing communist regimes are political refugees, while those who have left countries governed by noncommunist regimes, no matter how oppressive, are mere economic refugees.¹²⁵ This conception is a particularly potent weapon when applied to Haitian refugees: “persons who flee Haiti long have been classified as ‘economic migrants’ coming to the United States for material wealth, rather than ‘political refugees’ eligible for humanitarian relief.”¹²⁶

D. *Anti-Refugee Sentiment*

Political and ideological factors directly influence refugee policy when government treatment of aliens responds to calls by the American (voting) public to reduce the flow of aliens into the United States. The United States has historically been perceived, both here and abroad, as a haven for refugees.¹²⁷ This perception is changing, however, as many

121. See generally *Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter *1977 Hearings I*]; *Admission of Refugees, Part II: Indochinese Refugees and U.S. Refugee Policy*, 95th Cong., 1st & 2d Sess. (1977-78) [hereinafter *1977 Hearings II*].

122. Anker & Posner, *supra* note 79, at 39 (citing H.R. 3056, 95th Cong., 1st Sess. § 207(a), 123 CONG. REC. 3413 (1977)); see also Paul v. INS, 521 F.2d 194, 199 (5th Cir. 1975); see generally Dennis, *supra* note 17.

123. Anker & Posner, *supra* note 79 at 39; see also Berdo v. INS, 432 F.2d 824, 846-847 (6th Cir. 1970); Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

124. Ira J. Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 97 (1981).

125. See Note, *supra* note 116, at 462.

126. Johnson, *supra* note 12, at 4 (citing *United States Refugee Program: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980)). “If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc’s Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes.” *Id.* at 4 n.12 (quoting Sen. DeConcini).

127. See Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740, 740 (1989); Little, *supra* note 12, at 269. There are “four basic courses a sovereign country can follow in formulating its immigration policy—unrestricted immigration, qualitative restriction, quantitative restriction, and prohibition of all immigration . . .” Prior to 1875, Congress had passed only two immigration-related laws, the Alien and Sedition Act of 1798 and 1 Stat. 570; 12 Stat. 340 (1862). Neither of these early laws were designed to decrease or control flow of foreign nationals into this country. “On the contrary, early legislation tended to encourage immigration by improving transportation facilities” by, for example, “requiring steamship lines to improve the conditions on vessels by limiting the number of passengers in proportion to the tonnage of the vessels and by requiring

more refugees attempt to enter the United States than the general public wants to admit.¹²⁸ Moreover, the fact that Haitians are Black has not gone unnoticed,¹²⁹ and has elicited charges of racism.¹³⁰ Political and ideological influences notwithstanding, United States policy toward Haitians has been especially harsh when compared to its generally more accommodating treatment of aliens from other nations.

IV. UNITED STATES POLICY AND HAITIAN MIGRANTS

The interdiction program is part of a pattern of discrimination practiced against Haitians by the U.S. government since the late 1970s. Through improper screening and arbitrary detention, the government has consistently demonstrated its bias against Haitians.¹³¹

Substantial Haitian migration to the United States coincided with the beginning of the Duvalier era in 1957. Most immigrated legally, but those who came in small boats in the early 1970s were often undocumented.¹³² As early as 1963, some Haitian boat people presented themselves in Florida seeking political asylum but they were returned to Haiti.¹³³ Under the "Haitian Program," asylum applications were subject to accelerated processing.¹³⁴ Haitian aliens were detained, rather than paroled. President Reagan instituted a policy of interdiction and repatriation after initial screening for asylum.¹³⁵ President Bush's policy, continued by President Clinton, is one of interdiction and repatriation without any asylum screening.¹³⁶ Thus the United States has a long history of antagonism to Haitians.

that sufficient supplies of food and water be carried on board." In fact, for almost one hundred years following its independence, the United States policy was one of unrestricted immigration.

128. Little, *supra* note 12, at 269; The American public has grown increasingly concerned about domestic issues such as crime and the sagging economy and has developed fears about sharing scarce jobs and other resources with new arrivals. *Id.* See also Johnson, *supra* note 12, at 5.

129. Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 451 (S.D. Fla. 1980), *aff'd as modified sub. nom.* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

130. Lennox, *supra* note 10, at 717, 718 n.234 (quoting, among others, Cheryl Little of the Haitian Refugee Center, Inc.: "Haitians are discriminated against because of the color of their skin. I think racism is alive and well in our immigration policies"). See also *supra* note 12.

131. LAWYERS COMM. FOR HUMAN RIGHTS, REFUGEE REFOULMENT—THE FORCED RETURN OF HAITIANS UNDER THE U.S.-HAITIAN AGREEMENT 49 (1990).

132. See Miriam, *supra* note 3, at 214-20.

133. LOESCHER & SCANLAN, *supra* note 38, at 80. See also *infra* text accompanying notes 137-146.

134. See *infra* text accompanying notes 147-163.

135. See *infra* text accompanying notes 187-202.

136. See *infra* text accompanying notes 203-225.

A. *Haitians and Asylum*

Approximately 50,000 Haitians sought asylum in the United States between 1972 and 1980; only twenty-five succeeded.¹³⁷ Cases from the Fifth Circuit are illustrative of the problems faced by Haitian migrants. *Paul v. INS*,¹³⁸ upheld an immigration judge's ruling that required applicants to prove fear of persecution "beyond a troubling doubt"; refused to take administrative notice of conditions in Haiti; and denied the requests for asylum.¹³⁹ The dissent objected that the burden of proof was impermissively strenuous.¹⁴⁰ In another instance, the Fifth Circuit contradicted itself regarding the materiality of an Amnesty International report detailing brutal conditions in Haiti. In *Coriolan v. INS*,¹⁴¹ the court directed the INS to reconsider denied Haitian asylum claims in light of the report, after finding it relevant and material to individual claims for asylum.¹⁴² A year later, in *Fleurinor v. INS*,¹⁴³ another Fifth Circuit panel found that the report was not material.¹⁴⁴ In *Pierre v. United States*¹⁴⁵ Haitian refugees claimed denial of equal protection because they were unable to assert claims for asylum in an exclusion hearing before an immigration judge, while those in deportation proceedings were allowed to make such claims. The INS district director had rejected the aliens' asylum applications; the aliens wanted that rejection to be reviewed in exclusion proceedings, but the immigration judge refused to hear the asylum claims. The Haitian's complaint was mooted when INS promulgated new regulations providing for such review.¹⁴⁶

B. *The Haitian Program*

In June, 1978 the Miami office of the INS, faced with approximately 7000 unprocessed Haitian asylum claims, decided to institute new procedures designed to eliminate the backlog in an accelerated manner.¹⁴⁷ The resulting method for processing Haitian asylum claims became known as the Haitian Program. "The Haitian program was

137. Lennox, *supra* note 10, at 700.

138. 521 F.2d 194 (5th Cir. 1975).

139. *Id.* at 199. The court said the failure to take administrative notice was not an abuse of discretion. *Id.* For a case in which administrative notice was taken of changes in Nicaragua, see *Rhoa-Zamora v. INS*, 971 F.2d 26 (7th Cir. 1992).

140. 521 F.2d at 201.

141. 559 F.2d 993 (5th Cir. 1977).

142. *Id.* at 1004.

143. 585 F.2d 129 (5th Cir. 1978).

144. *Id.* at 133.

145. 547 F.2d 1281 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977). See also *Pierre v. United States*, 570 F.2d 95 (5th Cir. 1978) (on remand).

146. Jennette, *supra* note 12, at 605 n.74.

147. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 511-13 (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

planned during July and August, 1978. . . . [Its] goal . . . was to expel Haitian asylum applicants as rapidly as possible."¹⁴⁸ "None of the over 4000 Haitians processed during this program were granted asylum."¹⁴⁹ The measures taken during the program included scheduling simultaneous hearings involving the same attorney: "[i]t was not unusual for the few attorneys available to represent Haitians to have three hearings scheduled at the same hour in different buildings."¹⁵⁰ The number of hearings held each day increased from one to ten to an average of fifty-five per day.¹⁵¹ Attorneys were unable to prepare adequately,¹⁵² spending as little as fifteen minutes per client in interviews.¹⁵³

District court Judge King said in *Haitian Refugee Center v. Civiletti*,¹⁵⁴ the "Haitians came to the United States seeking freedom and justice . . . [but] were confronted with an Immigration and Naturalization Service determined to deport them."¹⁵⁵ The district court in *Civiletti* found it incredible that "a group of poor, black immigrants"¹⁵⁶ could threaten a community. That supposed threat was the underlying basis for the Haitian Program.¹⁵⁷ The court noted that the Haitians were "part of the first substantial flight of *Black* refugees from a repressive regime to this country"¹⁵⁸ and concluded that "[t]he goal of the Program was to expel Haitian asylum applicants as rapidly as possible."¹⁵⁹ The court further found that the Program was discriminatory:¹⁶⁰ programs set up for other aliens, notably Cubans and Indochinese, "al-

148. *Id.* at 512-13. The court reviewed the inquiries and recommendations made by and on behalf of the INS, which culminated in suggestions which "illustrate[d] two basic viewpoints on Haitian asylum claims. First, in order to dispose of the backlog of deportation cases, the processing . . . would be expedited . . . regardless of the cost to due process. Second, Haitians were to be treated differently. They were not to receive the same protection as others." *Id.* at 513.

149. *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1032 (5th Cir. 1982).

150. LAWYER'S COMM. FOR HUMAN RIGHTS, *supra* note 131, at 51.

151. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. at 517.

152. The district court noted that there were only 13 attorneys available to represent Haitians and that if they did nothing but complete forms for Haitian asylum claims, they could only spend 2 hours for each client. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. at 522.

153. LAWYER'S COMM. FOR HUMAN RIGHTS, *supra* note 131, at 51.

154. 503 F. Supp. at 442. See Margaret J. Wynne, Comment, *An Analysis of Haitian Requests for Political Asylum After Haitian Refugee Center v. Civiletti*, 33 HAST. L.J. 1501, 1501 (1982).

155. 503 F. Supp. at 532.

156. *Id.* at 517.

157. The court articulated its views about prejudice in discussing the supposed threat which the INS thought the Haitians posed to the community:

Prejudice of any type is seldom overt. It often expresses itself in conclusions reached without sufficient basis. A seemingly illogical jump is made from a premise to a conclusion. Something necessary to the logical thread is missing, supplied by the speaker's mind. In that diversion from logic, from what has been shown, lies prejudice. For what the speaker supplies is his own emotional view, his own prejudice.

503 F. Supp. at 517.

158. *Id.* at 451.

159. *Id.* at 512-13.

160. *Id.*

low[ed] aliens to stay in the United States”¹⁶¹ while the goal of the Haitian Program, which determined in advance that Haitian refugees did not qualify for asylum, was “expedited expulsion.”¹⁶² The court conducted an extensive review of conditions in Haiti and said that “the pattern of harassment and abuse . . . has been found by every group which has investigated the treatment of returnees, with the notable exception of the State Department.”¹⁶³ The district court dismissed the State Department report as “unworthy of credence,” but was chastised by the Fifth Circuit Court of Appeals for substituting its judgment for that of the district director of the INS.¹⁶⁴

C. Detention

From as early as 1892, detention of aliens was the norm.¹⁶⁵ In 1954 the INS discontinued the general use of detention and began to release newly arrived persons under the concept of parole.¹⁶⁶ However, in the 1980s detention¹⁶⁷ was revived to apply *particularly* to Marielito Cubans¹⁶⁸

161. *Id.* at 516.

162. *Id.* at 514.

163. *Id.* at 481. The fact that the State Department was at odds with other groups illustrates the political nature of its approach. Of course, the State Department is organized as a political department. The question is whether it should be involved in determining whether persons are refugees. See *supra* text accompanying notes 113 to 130.

164. 676 F.2d at 1042-43.

165. Arthur Helton, *The Legality of Detaining Refugees in the United States*, 14 REV. LAW & SOC. CHANGE 353, 354; see generally AMERICAN CIVIL LIBERTIES UNION, DETENTION OF UNDOCUMENTED ALIENS (1990).

166. Parole is provided for under INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A), which gives discretion to the Attorney General to release aliens who are applying for admission to the United States. An undocumented alien is eligible for parole while his or her case is being adjudicated. INA § 242, 8 U.S.C. § 1252(a) (1993). Parole was not statutorily authorized until 1952 but it has been used by the executive branch since 1875 as a means of getting persons into the United States. RICHARD A. BOSWELL, IMMIGRATION & NATIONALITY LAW 41 (2d ed. 1992). For a discussion of parole used as a political entry tool, see *supra* text accompanying footnotes 105 to 112.

167. The Supreme Court upheld the use of indefinite detention for an excludable alien in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). For the statute authorizing detention, see INA § 232, 8 U.S.C. § 1222 (1993).

168. ALEINIKOFF & MARTIN, *supra* note 9, at 412-13. The port of Mariel, Cuba was the place of departure for 125,000 Cubans who came to the United States from April-September, 1980. The boatlift which brought them has been called the “Freedom Flotilla” or the “Mariel Boatlift.” The Marielitos, as they became known, left Cuba with the blessings of Fidel Castro, and included persons who had been convicted of crimes as well as persons with mental problems. See FELIX ROBERTO MASUD-PILOTO, WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES 71-109 (1988); Jennette, *supra* note 12, at 593 n.4. In *Gisbert v. United States Attorney General*, the court said “[We] align ourselves with . . . cases that have upheld the Attorney General’s authority to detain Mariel Cubans indefinitely.” 988 F.2d 1437, 1447 (5th Cir. 1993). See generally Sandra B. Reiss, *The International Covenant on Civil and Political Rights: Can It Free the Cuban Detainees?*, 6 EMORY INT’L L. REV. 577 (1992); Phillip Erickson, Note, *The Saga of Indefinitely Detained Mariel Cubans: Garcia Mir v. Meese*, 10 LOY. L.A. INT. & COMP. L.J. 271 (1988); Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT’L L. 925 (1984).

Initially Castro would not accept Marielitos back into Cuba. ALEINIKOFF & MARTIN, *supra* note 9, at 412-23. In 1993 an accord was reached with Cuba under which about 1500 Marielitos who had committed crimes in the United States are to be returned. *U.S. Returning 1500 Cuban*

and Haitians.¹⁶⁹ Once detained, many were sent to areas of the United States that were “desolate, remote, hostile, . . . and which had a paucity of available legal support and few, if any, Creole interpreters.”¹⁷⁰

The change in policy away from parole and back to detention was in part directed at Haitians, and was made initially without any formal rule-making.¹⁷¹ The United States Supreme Court held that the INS’ subsequent compliance with rule-making requirements rendered moot a challenge to detention brought by Haitian detainees.¹⁷² In *Jean v. Nelson*, the Eleventh Circuit ruled that discrimination in parole “would not violate the Fifth Amendment to the United States Constitution because of the Government’s plenary authority to control the Nation’s borders.”¹⁷³ The Supreme Court found that the constitutional basis of the circuit court’s decision was unnecessary, as the new rules were not facially discriminatory.¹⁷⁴

*Haitian Centers Council v. Sale*¹⁷⁵ pertained to Haitians who were detained at the United States Naval Base in Guantanamo Bay, Cuba.¹⁷⁶

Prisoners to Castro, CHI. TRIB., Sept. 29, 1993 at 12. There are about “4500 Cuban prisoners in 37 federal prisons.” *Id.*

169. ALEINIKOFF & MARTIN, *supra* note 9, at 412-13. Detention of Haitians would conclude “either with deportation to Haiti or release into the United States with status as an asylee” *Id.* at 413. In July, 1984 the second highest number of persons in detention were Haitians. Salvadorans were ranked first. See Helton, *supra* note 165, at 365 n.90. Many of the Salvadorans were in detention pending a decision on asylum applications. Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 296-297 n.8 (1985). For a discussion of treatment of Salvadorans claiming asylum, see *infra* notes 253 to 275 and accompanying text. See also Elizabeth Stewart, Note, *International Human Rights Law and the Haitian Asylum Applicant Detention Cases*, 26 VA. J. INT’L L. 173 (1985).

170. *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981). For a description of INS detention facilities, see AMERICAN CIVIL LIBERTIES UNION, *supra* note 165, at 98-112. Conditions and length of confinement are discussed in Helton, *supra* note 165, at 363-65.

The decision to detain rather than parole was at issue in *Bertrand v. Sava*, in which the Second Circuit found that the district court “improperly concluded that the INS District Director abused his discretion” in denying parole to Haitians. 684 F.2d 204, 213 (2d Cir. 1982). The appellate court saw the district court’s comparison of Haitians and non-Haitians as a substitution of the court’s judgment for that of the INS. *Id.* at 217.

171. See *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982), *aff’d in part*, 711 F.2d 1455 (11th Cir. 1983), *aff’d*, 472 U.S. 846 (1985).

172. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff’d*, 472 U.S. 846 (1985). See generally Mary Jane LaPointe, Note, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L. REV. 127 (1986).

173. This characterization of the decision was by the Supreme Court in *Jean v. Nelson*, 472 U.S. 846, 848 (1985).

174. *Id.* at 852.

175. 817 F. Supp. 336 (E.D.N.Y. 1993). For a discussion of HIV positive Haitians prior to the decision in *Haitian Ctrs. Council*, see Elizabeth Mary McCormick, Note, *HIV-Infected Haitian Refugees: An Argument Against Exclusion*, 7 GEO. IMMIGR. L.J. 149 (1993).

176. Pursuant to an agreement, the base “is subject to the exclusive jurisdiction and control of the United States.” *Haitian Ctrs. Council*, 823 F. Supp. at 1041. For a comparison of Guantanamo Bay to other United States military facilities, see *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated sub. nom.*, *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 3028 (1993). The court in *Haitian Ctrs. Council* did not explicitly rule the Haitians had “entered” the United States. For a discussion of entry, see *supra* notes 93-100 and accompanying text. Nonetheless, the court treated them similar to those who have entered since it found

The detainees had already been pre-screened for asylum and found qualified,¹⁷⁷ but were detained because they were HIV-positive.¹⁷⁸ Their two-year detention ended in June, 1993 when District Court Judge Sterling Johnson ordered their release.¹⁷⁹ The court noted that “[t]he Haitians are the only group of asylum seekers to be medically tested for HIV.”¹⁸⁰ Moreover, the court said that the government “admitted that the ban on the admission of aliens with communicable diseases has not been strictly enforced against every person seeking entry,”¹⁸¹ and that “each year other individuals carrying the HIV virus

that the Haitians were entitled to due process. Persons who have entered the United States are entitled to due process. In addition to being on territory controlled by the United States, an additional positive fact was that the Haitians had been “screened-in,” by meeting a preliminary standard for asylum. The Haitians’ release did not by itself effect an entry since parole does not mean entry. See *infra* note 183.

The barracks on Guantanamo Bay were said to “resemble modern chicken coops” CHI. SUN-TIMES, Jan. 25, 1993, at 1. *Haitian Ctrs. Council* described the conditions:

[The Haitians] live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to pre-dawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear.”

823 F. Supp. at 1037. The Guantanamo Bay camp opened in October, 1991 and at one time held 12,500 refugees. *Embittered Haitians Leave HIV Camp for U.S.*, CHI. TRIB. June 15, 1993 at 8. After *Haitian Centers Council* it was closed.

177. “Most had been low-level political organizers for Aristide in their local communities.” CHI. SUN-TIMES, Jan. 25, 1993, at 1. The approximately 200 Haitians detained at Guantanamo Bay can be contrasted with 10,500 other Haitians who also met preliminary asylum tests in initial screening after being interdicted. The group of 10,500 was allowed in the United States. *Haitian Ctrs. Council v. Sale*, 823 F. Supp. at 1035. Some of the Guantanamo Haitians addressed by *Haitian Centers Council* were HIV negative adults and minors not tested for HIV. CHI SUN-TIMES, June 9, 1993 at 8.

178. It has been noted that “economic homosexuality” (engaging in homosexual activity for financial reward) is a factor in the spread of HIV to heterosexuals in Haiti. McCormick, *supra* note 174, at 155. Haitians were not always prepared to accept the medical judgment of Americans. “One in detention indicated, ‘They say I’m HIV positive. I’m not a doctor, so I don’t know if it’s true. . . . But as long as I’m here, I will never believe anything they tell me.’” CHI. DEFENDER, Feb. 20, 1993, at 16. The World Health Organization estimated that 10 million people have the HIV virus. See Rona Morrow, Comment, *Aids and Immigration: The United States Attempts to Deport a Disease*, 20 U. MIAMI INTER-AM. L. REV. 131, 132 n.4 (1988).

179. In June, 1992 the United States stopped processing cases of the Guantanamo Bay Haitians. One hundred fifteen of them had met the asylum standard of “well-founded fear of persecution” during a second interview, but they had been in detention for nearly two years. *Haitian Ctrs. Council*, 823 F. Supp. at 1045.

180. 823 F. Supp. at 1035. Under the INA arriving aliens are subject to physical and mental examinations. INA § 234, 8 U.S.C. § 1224 (1993). They can be detained long enough for examination and observation. INA § 233, 8 U.S.C. § 1222 (1993). However, Judge Johnson specifically found that others seeking *asylum* in the United States are *not* tested for HIV. Treating Haitian asylum seekers differently from others lends credence to the charge of racism. See *supra* note 157. Haitians who had been in the United States for over 10 years were also targeted for AIDS testing. See Morrow, *supra* note 178, at 143.

181. 823 F. Supp. at 1048. Under the INA an alien is excludable from admission into the United States if he or she has a communicable disease listed by the Secretary of Health and Human Services. INA § 212, 8 U.S.C. § 1182(a)(1)(A)(i). In the regulations the HIV virus (human immunodeficiency virus) was listed as a communicable disease, along with leprosy and tuberculosis. 42 C.F.R. § 34.2(b)(4) (1992). However, HIV is not a disease itself. Morrow, *supra*

are allowed to enter the United States. . . .”¹⁸² However, the Haitians were *not* admitted to the United States, but were merely paroled.¹⁸³ Judge Johnson acknowledged congressional action making infection with the HIV virus a disqualifier for admission,¹⁸⁴ but underscored that “there is no mandatory HIV exclusion for . . . parole . . . or the grant of asylum”¹⁸⁵ The court concluded that detaining the Haitians “deviates from established parole policy”¹⁸⁶ Detaining the Haitians was also inconsistent with preexisting law allowing persons with serious medical conditions to be released from detention, even though they may be excludable.¹⁸⁷

note 178, at 140. In his campaign and after election President Clinton promised to remove the ban against admission of persons afflicted with HIV. *Clinton to Reverse Ban on Foreigners with AIDS*, CHI. TRIB., Feb. 10, 1993 at 16. The Center for Disease Control determined that infectious tuberculosis should be the only disease on the list because it “can be transmitted by air or through casual conduct.” UPI, Feb. 17, 1993 available in LEXIS, Nexis Library, OMNI File. However, in March, 1993 the Congress decided to add to the law a specific ban on admission of persons with the HIV virus. See *infra* note 183. Of course, admission is distinct from entry or parole.

182. 823 F. Supp. at 1048. HIV is the virus that infects persons who develop AIDS. Douglas Scott Johnson, Comment, *The United States’ Denial of the Immigration of People With AIDS*, 6 TEMP. INT’L & COMP. L.J. 145 n.3 (1993). Apparently, the number of persons excluded from the United States because of AIDS is very small. “As of January, 1991, thirty-seven immigrants have been denied entry because of their AIDS status.” *Id.* at 150 n.43. The situation of the detained Haitians was *not* about persons with AIDS; it was about the condition of being HIV positive. Thus, Judge Johnson compared the Haitians to others with the HIV virus.

183. Parole is specifically not considered being admitted to the United States. INA § 212, 8 U.S.C. § 1182 (d)(5)(A). Also, parole does not mean that one has “entered” the United States. *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

Here again, Haitian immigrants were treated differently from others. The court found that “other individuals carrying the HIV virus are allowed to enter the United States” 823 F. Supp. at 1048.

184. 823 F. Supp. 1028. See *supra* text accompanying note 8.

In March, 1993 by a 356-58 vote the House of Representatives joined the Senate, which had voted 76-23, to prohibit the admission into the United States of persons with the HIV virus. *House Votes to Ban HIV-infected Immigrants*, UPI, Mar. 11, 1993, available in LEXIS, Nexis Library, OMNI File; Carol Innerst, *Senate Passes HIV ban*, WASH. TIMES, Feb. 19, 1993 at A1. The action amended INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i) to state specifically that diseases of public health significance which can exclude aliens from admission to the United States and which are to be specified by the Department of Health and Human Services “shall include infection with the etiologic agent for acquired immune deficiency syndrome.” H.R. 103-100, 103d Cong., 1st Sess. 93 (1993). The amendment was attached to a funding bill for the National Institutes of Health. Because the statute makes exclusion mandatory, neither the President nor HHS can determine otherwise for persons with the HIV virus.

185. 823 F. Supp. at 1049.

186. *Id.* at 1048.

187. INA § 212, 8 U.S.C. § 1182(d)(5)(A) (1993). See also 8 C.F.R. § 212.5(a)(1). The court said:

Defendants’ refusal to release plaintiffs from detention due to their medical status and HIV infection departs from the INS own stated policy respecting release of persons who have demonstrated a credible fear of persecution. . . . [I]ndeed the only pertinent parole regulation explicitly provides that “serious medical conditions” constitute “emergent reasons,” such that “continued detention would not be appropriate.

823 F. Supp. at 1048. The court cited 8 C.F.R. § 212(a)(1) and found that the defendants “deviated from their own regulations and hence abused their discretion.” 823 F. Supp. at 1049.

The court’s ruling was both hailed and criticized by persons in Congress. Compare 139 Cong. Rec. H4006, (daily ed. June 23, 1993) (statement of Rep. Meeks) with 139 Cong. Rec. H4017

D. *The Reagan Interdiction Program*

Interdiction as immigration policy was unprecedented prior to President Reagan's initiative¹⁸⁸ targeting Haitian aliens arriving over the high seas.¹⁸⁹ The proclamation calling for interdiction referred to "cooperative arrangements with certain foreign governments;"¹⁹⁰ Haiti is the only country with which the United States has such an arrangement.¹⁹¹ Under the Reagan program, officers of the INS interviewed interdicted Haitians aboard Coast Guard cutters to determine if the migrants had a "credible fear of persecution"—a preliminary standard by which to gauge whether a person could enter the United States and apply for asylum.¹⁹² Persons found to have a credible fear were "screened in," while those who did not were "screened out" and repatriated.¹⁹³

(daily ed. June 24, 1993) (statement of Rep. Hutchinson). If the legislative purpose in precluding admission of persons infected with HIV was to continue detention of Haitians at Guantanamo Bay or to deny them parole, Congress did not succeed. It should have directed its attention differently. It should have excluded *all* persons with HIV from even making an entry and excluded them from amnesty and/or parole.

It has been suggested that it is impossible to close the borders against a disease like AIDS. See Morrow, *supra* note 178. Of course, American citizens can travel outside of the United States and upon return bring back a virus. See generally Note, Donna E. Manfredi & Judith M. Riccardi, *Aids and United States Immigration Policy: Historical Stigmatization Continues with the Latest 'Loathsome' Disease*, 7 ST. JOHN'S J. LEGAL COMMENT. 707 (1992).

188. See Miriam, *supra* note 3, at 222. "No government has ever before taken to the high seas to intercept fleeing refugees and return them, forcibly and without process, to their persecutors." Respondent's Opposition to Petition for Cert. to 2nd. Cir. at 2, McNary v. Haitian Ctrs. Council, No. 92-344 (U.S.) (Dec. 21, 1992) (decided as Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993)) [hereinafter Respondents' Brief].

The first interdiction occurred on October 12, 1981 when the Coast Guard cutter *Chase* stopped the *Exoribe* with 56 Haitians aboard. 1989 *Hearing*, *supra* note 7, at 219 (report of National Coalition for Haitian Refugees).

189. See Jacobson, *supra* note 3, for a discussion of the various water benchmarks. Twelve miles out from the shore of a county is considered territory of that country. Article 3 of the U.N. Convention on the Law of the Sea provides that "every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles . . ." U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261. Thus, interception of vessels carrying Haitians must be outside the 12 mile limit; within that limit, the vessel is in the United States.

190. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted* in 8 USC § 1182 (1993). The program is also set forth in an executive order. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *amended* in 8 U.S.C. § 1182 (f) and 1185 (a)(i); INA § 212(P) and 215(a)(1) (1993). Reagan's proclamation claimed that "illegal migration by sea of large numbers of undocumented aliens into the southeastern United States . . . threatened the welfare and safety of communities in that region." *Id.* Prior to its institution, 125,000 Marielito Cubans had come to the United States and were allowed to enter the country.

191. Agreement Between the United States of America and Haiti, Sept. 23, 1991, U.S.-Haiti, 33 U.S.T. 3359, T.I.A.S. No. 10,241. President Reagan's Executive Order was revoked by President Bush's Executive Order but the agreement with Haiti still exists. In his few short months in office, President Aristide of Haiti did not renounce the agreement.

192. The "credible fear of persecution" was a standard adopted to pre-screen Haitians. See generally Sarah Ignatius, *Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps*, 7 GEO. IMMIGR. L.J. 119, 125 (1993). The U.S.-Haiti agreement noted that "[t]he United States government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." 1989 HEARING *supra*, at 219.

193. Ignatius, *supra* note 192, at 125.

INS Guidelines governing the program cautioned that its officers should "ensure United States compliance with its obligation not to return refugees to a country where they have a well-founded fear of persecution."¹⁹⁴ However, between 1981 and 1991 fewer than one percent of "Haitians intercepted at sea were 'screened in.'"¹⁹⁵

The Reagan interdiction program was upheld by the District of Columbia Circuit in *Haitian Refugee Center v. Gracey*,¹⁹⁶ in which the court found that the President has "both statutory and inherent constitutional authority to establish the interdiction program."¹⁹⁷ The district court relied on section 212 of the INA, which gives the President the right to suspend the entry of aliens,¹⁹⁸ and on the President's inherent power to "protect the United States from harmful illegal immigration."¹⁹⁹ The district court further noted that, as interdiction occurs on the high seas, statutory protections governing deportation and exclusion proceedings, such as the right to counsel and freedom from return, are not available to the Haitians.²⁰⁰ The court of appeals affirmed the district court's dismissal of the challenge but on different grounds, finding that the Haitian Refugee Center lacked standing to sue.²⁰¹ Judge Edwards

194. Gutekunst, *supra* note 8, at 165. The *nonrefoulement* principle of the U.N. Protocol Relating to the Status of Refugees mandates that a refugee is not to be returned (*refouler*) to any place "where his life or freedom would be threatened." Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 entered into force Oct. 4, 1967 [hereinafter Protocol]. There is a U.N. Convention Relating to the Status of Refugees dated as of July 28, 1951, 189 U.N.T.S. 150. The United States is not a party to the convention but is a party to the Protocol which incorporates Articles 2-34 of the Convention. See Vázquez, *supra* note 77, at 39. The Reagan Justice Department seemed to believe it had an obligation not to repatriate any interdicted Haitian who was a refugee. Then in 1991 the Justice Department changed its view. See *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1364 (2d Cir. 1992) *rev'd sub. nom Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993). Dissenting in the *Sale* case on the Bush program which repatriated Haitians without screening, Justice Blackmun said:

Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return, because the opposite of "within the United States" is not outside the United States. I believe that the duty of nonreturn expressed in both the Protocol and the statute is clear.

113 S. Ct. 2549, 93 U.S. Lexis 4247, *54.

195. McCormick, *supra* note 175, at 166.

196. 600 F. Supp. 1396 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987). See generally Mary F. Nevans, Comment, *The Repatriation of the Haitian Boat People: Its Legal Justification under the Interdiction Agreement Between the United States and Haiti*, 5 TEMP. INT. & COMP. L.J. 273, 290-95 (1991).

197. 809 F.2d at 838.

198. The term alien is defined in INA § 101, 8 U.S.C. § 1101 (a)(3) (1993). Authority for the President to suspend entry of aliens is in INA § 212, 8 U.S.C. § 1182(f)(1970).

199. 600 F. Supp. at 1400.

200. See INA § 208, 8 U.S.C. § 1158(a) (1993) (asylum applications); INA § 236, 8 U.S.C. § 1226 (1970) (exclusion); INA § 241, 8 U.S.C. § 1251 (1993) (deportation); INA § 243, 8 U.S.C. § 1253(h) (asylum); INA § 292, 8 U.S.C. § 1362 (counsel in exclusion or deportation proceedings).

201. All 1800 Haitians involved had been interdicted and repatriated to Haiti. 809 F.2d at 797, 822. Thus there were none in the United States to mount a challenge to interdiction. Striking down the standing of the Haitian Refugee Center meant a Haitian advocacy organization could not represent the returned Haitians.

dissented from the finding of lack of standing, but concurred that the claim had to be dismissed because “the President indubitably possessed both statutory and inherent constitutional authority to establish the interdiction program.”²⁰² Edwards’ view, that the *nonrefoulement* obligation of the U.N. protocol did not operate extraterritorially, later became the majority position of the United States Supreme Court. Judge Edwards’ dissent concluded: “[t]his 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.”²⁰³

E. *Repatriation & Denial of Lawyer Access under the Reagan Program*

The Reagan interdiction program had been in existence for ten years before it was suspended for approximately one month following the coup which toppled Haitian President Jean-Bertrand Aristide in September, 1991.²⁰⁴ When interdiction began again in November, 1991, Haitian migrants were screened at the United States military facility Guantanamo Bay, Cuba.²⁰⁵ A series of cases, *Baker I*, *Baker II*, and *Baker III*, decided within a two-month time span, dealt with denial of attorney access to Haitians detained at Guantanamo Bay and with the issue of forced repatriation.²⁰⁶ The district court attempted to redress the

202. 809 F.2d at 838.

203. *Id.* at 841.

204. Brief for Petitioners, *McNary v. Haitian Ctrs. Council*, No. 92-344 (U.S.) Nov. 12, 1992 (decided as *Sale v. Haitian Ctrs. Council* 113 S. Ct. 2549 (1993)) at 3, 4 [hereinafter *Petitioner's Brief*].

205. Ignatius, *supra* note 191, at 122. Just after the Reagan interdiction program resumed in November, 1991 the Haitian Refugee Center, Inc., sought declaratory and injunctive relief against the United States government in response to its policy of interdicting Haitian refugees on the high seas. A complaint filed in the United States District Court for the Southern District of Florida raised various allegations including the following: 1) that the Reagan Executive Order did not permit the forcible return to Haiti of the refugees; the INS guidelines for protecting refugees had been ignored; 2) that the defendants were in violation of the *nonrefoulement* provisions of the U.N. Protocol; 3) that the Haitian refugees had been denied access to legal representation; and 4) that the Administrative Procedure Act (APA) allows judicial review of the government's behavior “pursuant to . . . the Protocol, Executive Order 12,324 (Reagan's interdiction order), the INA, the Refugee Act of 1980, the INS Guidelines, and the First and Fifth Amendments.” Jones, *supra* note 116, at 3 (citing the Verified Complaint for Declaratory and Injunctive Relief).

206. 789 F. Supp. 1552 (S.D. Fla 1991), *remanded* 949 F. 2d. 1109 (11th Cir. 1991), *cert. denied* 112 S. Ct. 1245 (1992). *Baker I* was decided on Dec. 17, 1991 with rehearing denied on Jan. 28, 1992; *Baker II* was decided Dec. 19, 1991. *Haitian Refugee Ctr. v. Baker*, 950 F.2d. 685 (11th Cir. 1991); *Baker III* was decided Feb. 4, 1992 and certiorari was denied February 24, 1992. *Haitian Refugee Ctr. v. Baker*, 953 F.2d. 1498 (11th Cir. 1992) *cert. denied* 112 S. Ct. 1245 (1992).

For a discussion of *Baker III*, see Jones, *supra* note 116; Jason A. Golden, Note, *Human Rights—Haitian Refugees—Haitian Refugees Housed at Guantanamo Bay Naval Base Held to Have no Valid Constitutional or International Law Claims to Challenge Forced Repatriation by the U.S. Government*, 22 GA. J. INT'L & COMP. L. 515 (1992); Siobhan Shea & Richard Tannen-

Haitians' grievances by issuing injunctions prohibiting repatriation and ordering that the detainees be allowed access to attorneys and advocacy groups. However, the Eleventh Circuit repeatedly overruled the district court and finally instructed the district court to dismiss the action. Haitians detained and questioned at Guantanamo Bay were scheduled for repatriation. They attempted to prevent that from occurring and also complained that no attorneys were permitted to come on base to meet with them. In *Haitian Refugee Center v. Baker (Baker I)*,²⁰⁷ the district court found that the Haitians should be given access to attorneys and entered a preliminary injunction preventing repatriation. However, the Eleventh Circuit could not see how prevention of repatriation was a remedy for denial of attorney access. The injunction was dissolved, with Judge Hatchett dissenting. Once again, in *Haitian Refugee Center v. Baker (Baker II)*²⁰⁸ the district court attempted to prevent Haitians from being repatriated, but the Eleventh Circuit stayed and suspended a temporary restraining order pending appeal, with Judge Hatchett again dissenting. When the district court in *Haitian Refugee Center v. Baker (Baker III)*²⁰⁹ once again enjoined repatriation, the Eleventh Circuit specifically instructed the lower court to dismiss the action. Judge Hatchett again dissented.²¹⁰ This case also involved claimed First Amendment rights of a Haitian advocacy center to access Haitians at Guantanamo Bay and a challenge to the government's failure to follow interview guidelines. The Haitian Refugee Center sought review of the case in the Supreme Court. The Court denied certiorari after the Solicitor General indicated that the United States would screen "intercepted aliens followed by full consideration of asylum rights."²¹¹ Justice Blackmun dissented from the denial of certiorari.²¹² Two months later, President Bush issued the "Kennebunkport Order," which allowed no screening of Haitians at all.

F. *The Kennebunkport Order*

On May 24, 1992, President George Bush issued an Executive Order

baum, *The First Amendment Right of Access to Clients and Counsel: Haitian Refugee Center v. Baker*, 23 U. MIAMI INTER-AM. L. REV. 771 (1992).

207. 949 F.2d 1109 (11th Cir. 1991), *reh'g denied*, 954 F.2d 731 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

208. 950 F.2d 685 (11th Cir. 1991).

209. 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

210. *Id.* The question of persecution of repatriated Haitians was involved in the *Baker* cases. Another action attempted to "test the accuracy of the Government's assertion that undocumented Haitian nationals have not been persecuted upon their return to Haiti." *Dep't of State v. Ray*, 112 S. Ct. 541, 544 (1991). An attempt was made to obtain State Department interview reports with repatriated Haitians, but the Supreme Court struck down the effort. *Id.*

211. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1357 (2nd Cir. 1992) *vacated sub. nom.*, *Sale v. Hatian Ctrs. Council*, 113 S. Ct. 3028 (1993).

212. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S.Ct. 1245 (1992).

that provided for “return of vessels and its passengers to the country from which it [sic] came”²¹³ The Order later became known as the “Kennebunkport Order.” It specifically stated that it was not to be “construed to require any procedures to determine whether a person is a refugee.”

When the Kennebunkport Order was issued, the Reagan interdiction program was still in effect; after boats were stopped by the Coast Guard, “screened-in” persons were sent to the United States naval facility at Guantanamo Bay, Cuba.²¹⁴ However, due to overcrowding at Guantanamo Bay,²¹⁵ the Coast Guard planned to interdict only where there was some danger. The Bush Executive order provided that the commanding officer of a Coast Guard vessel could determine not to interdict one who was in grave physical danger. After giving temporary refuge, the commanding officer was to seek direction from a higher authority. After the Kennebunkport Order migrants were returned to Haiti without screening, and were encouraged to apply for refugee status in their own country.²¹⁶ The Bush policy contributed to a decline in boat traffic from Haiti to the United States.²¹⁷ After its adoption on May 24, 1992 all migrants were returned to Haiti.²¹⁸

The Second Circuit considered Bush’s policy in *Haitian Centers Council v. McNary*²¹⁹ and found that the President’s power to order repatriation was limited.²²⁰ The court also affirmed the injunction against repatriating any Haitian who had not had an opportunity to

213. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992), reprinted in 8 U.S.C. § 1182 (1993). While Bush revoked his predecessor’s executive order, his action still focused upon Haiti by providing for interdiction of “vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.”

214. Jim Loney, *Haitian Refugee Tide at Record High*, CHI. SUN-TIMES, May 19, 1992, at 20.

215. Petitioner’s Brief, *supra* note 203, at 7; *U.S. to pick up only Haitians in grave danger*, CHI. SUN-TIMES, May 22, 1992, at 8.

216. INA § 297, 8 U.S.C. § 1157 (1993) provides for overseas refugee applications. During a 5 month period, 15,566 Haitian asylum applications were made, and 2505 adjudicated. Of those only 245 had been approved for asylum as of October 30, 1992. Petitioner’s Brief, *supra* note 203, at 8. Overseas refugee approvals are subject to the President’s annual ceiling. *See supra* note 80. The number granted asylum in the United States is not capped by any ceiling.

217. Pete Yoft, *Supreme Court OKs Continued Return of Haitians Halted at Sea*, CHI. SUN-TIMES, Aug. 2, 1992, at 10.

218. Schoenholtz, *supra* note 90, at 71.

219. 969 F.2d 1350 (2d Cir. 1992), *rev’d sub. nom. Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993). For a discussion of this case prior to the Supreme Court’s decision, see Lowenstein Int’l Human Rts. Clinic, *Aliens and the Duty of Nonrefoulement*; Haitian Centers Council v. McNary, 6 HARV. HUM. RTS. J. 1 (1993); Raymond W. Valori, Note, *Substantive Rights Accorded Refugees Interdicted on the High Seas: Haitian Centers Council v. McNary*, 24 U. MIAMI INTER-AM. L. REV. 368 (1992).

220. In a separate decision, the Second Circuit ruled that the Eleventh Circuit decision in *Baker III* did not collaterally estop the complainants; affirmed the district court’s injunction against the government interviewing, screening, or making a decision on asylum claims for Haitians denied the right to communicate with counsel; and affirmed the injunction against repatriating any Haitian until he or she had an opportunity to communicate with an advocacy group. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

communicate with an advocacy group. The decision conflicted with the Eleventh Circuit's decision in *Baker III*, upholding repatriation. The conflict between the decisions of the Second and Eleventh Circuit Courts of Appeal was resolved in *Sale v. Haitian Centers Council*, discussed in Section VI of this Article. The Supreme Court resolved the circuit conflict by vacating the Second Circuit decision.²²¹

G. *President Clinton's Continuation of the Bush policy*

As a candidate for President, Bill Clinton promised to halt forced repatriation of Haitians.²²² But before he was inaugurated, Clinton broadcast a message to Haitians telling them to stay at home, noting that "most of the vessels that leave Haiti are overloaded, unseaworthy, and lack even rudimentary navigational and lifesaving equipment."²²³ He then listed steps he would take as president to "make it easier and safer" for Haitians to apply for refugee status in Haiti.²²⁴ As president, Clinton conceded he may have been "too harsh" in his criticism of President Bush.²²⁵ Thereafter his administration argued in the Supreme Court to uphold the Bush policy.²²⁶

V. HAITIANS COMPARED WITH CUBANS, SALVADORANS, AND CHINESE

[R]efugees from Cuba, from Nicaragua, from El Salvador, from many, many other countries have been allowed into this [sic] United States without the kind of hysteria, harassment, demagoguery and seeming racism that has faced the Haitians.²²⁷

It has been estimated that 100 million people are involved in migrating from one country to another—about two percent of the total world

221. *Id.*

222. 70 INTERPRETER RELEASES 85 (Jan. 15 1993).

223. *Id.* Because of the small, unseaworthy craft, the Coast Guard has analogized interdiction to a search and rescue mission. 1991 *Hearing, supra* note 1, at 3 (statement of Adm. Leahy). "Search and rescue" is provided for in the Convention on the High Seas. Art. 12, Para. 2 provides that "every coast State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea. . . ." U.N. Convention on the Law of the Sea, Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200.

224. 70 INTERPRETER RELEASES 86 (Jan. 15, 1993). The steps included rapid refugee determinations in Haiti; procedures for refugee application outside of Haiti's capital; additional asylum officers assigned to Haiti; and encouragement to various bodies to expand monitoring of the human rights situation in Haiti. *Id.*

225. Mark N. Hornung, *Clinton Fails Own Test on Haiti*, CHI. SUN-TIMES, Mar. 5, 1993, at 35. Clinton broadcast a message to the Haitians telling them to stay at home. Jeffrey Stinson, *Clinton to Haitian People: Stay Put*, CHI. SUN-TIMES, Jan. 15, 1993, at 12.

226. Linda Greenhouse, *Court is Asked to Back Haitians' Return*, N.Y. TIMES, Mar. 3, 1993, at 16.

227. 139 Cong. Rec. H4006, H4010 (daily ed. June 24, 1993) (statement of Rep. Meek).

population.²²⁸ During the 1980s, seventeen million aliens came to the United States, an estimated ten million of them illegally.²²⁹ Cubans came to the United States in large numbers after Fidel Castro came to power in 1959;²³⁰ Salvadorans did so during a civil war which raged from 1980 to 1992.²³¹ In 1993 it was estimated that 500,000 illegal aliens come to the United States annually, of which 100,000 are estimated to be Chinese.²³² Like Cubans and Salvadorans, many Chinese seek asylum in the United States. It is instructive to compare the United States' treatment of Cuban, Salvadoran, and Chinese asylum seekers with its treatment of Haitian claimants.

A. Cubans

Cubans have been the beneficiaries of United States policies favoring their entry since the Castro regime began in 1959.²³³ Until the United

228. Stanley Meisler, *U.N. Cites Looming Migration Crisis*, CHI. SUN-TIMES, July 7, 1993 at 10.

229. *Id.*

230. "The revolutionary triumph of 1959 triggered the largest migration ever of Cubans to the United States." MASUD-PILOTO, *supra* note 168, at 12. Fidel Castro has been in power in Cuba since January, 1959. *Castro Elected to 4th Term as Cuban President*, CHI. SUN-TIMES, Mar. 26, 1993, at 26. Between January, 1959 and 1985 approximately 800,000 Cubans came to the United States. MASUD-PILOTO, *supra* note 168, at 128. This figure includes the 125,000 known as Marielitos. For a general discussion of legal issues surrounding Cubans, see J. Patton Hyman III, *The Status of Cuban Refugees in the United States*, 21 U. FLA. L. REV. 73 (1968).

231. Morgan Power, *War in Peace*, CHI. TRIB., Mar. 29, 1993, at 1. The war caused 1.3 million nationals of El Salvador to leave the country and a large contingent came to the United States. Douglas Farah, *Government Ran Death Squads*, CHI. SUN-TIMES, Mar. 16, 1993, at 12.

232. *Reno: Fix Immigration Policy*, CHI. TRIB., June 21, 1993, at 4.

233. See generally John Scanlan & Gilbert Loescher, *U.S. Foreign Policy 1959 -80: Impact on Refugee Flow from Cuba*, 467 ANNALS (1983).

The disparity in the United States' treatment of Haitians and Cubans has been noted. See, e.g., 1992 Hearing, *supra* note 12, at 3; 1991 Hearing, *supra* note 1, at 77.

A clear "double standard" which governed the acceptability of migrants from particular countries emerged as the principal feature of American refugee policy. Cubans were the principal beneficiary of this double standard. The Haitians were the principal losers.

LOESCHER & SCANLAN, *supra* note 38, at 69. See also MASUD-PILOTO, *supra* note 168, at 111-15; Johnson, *supra* note 12, at 4 n.12, 12 n.47; Lennox, *supra* note 10, at 715-16 nn. 224-28. A poignant incident occurred in August, 1992 when

[A] Haitian boat was coming in off the coast of Miami about five miles out. There were 131 Haitians on the boat. They stopped and picked up two Cubans who were drowning. Their boat had capsized and they were about to die. They then came into the port in Miami. The Haitians were all interned . . . and sent back to Haiti. The two Cubans were marched around on the shoulders of their fellow cubans [sic] in Little Havana and are eligible for citizenship in one year.

1991 Hearings, *supra* note 1, at 3 (statement of Rep. Johnston).

In a letter associated with a 1993 hunger strike, Haitians detained at the Krome Detention Camp in Miami said, "We want our freedom like the Cubans." Mike Clary, *Cubans Get Preference From U.S., Haitians Say*, CHI. SUN-TIMES, Jan. 4, 1993, at 44. The Haitians were apparently motivated in part by the television appearances and designation as parade grand marshal at Disney World of Cuban Orestes Lorenzo who flew a small plane to Cuba from the United States, landed on a roadway and captured his wife and children. See *Love and Guts: Cuban returns for family*, CHI. TRIB. Dec. 21, 1992, at 3. See also Peter Michelmore, *Rendezvous*

States consular office in Cuba closed in January, 1961 Cubans could obtain visas to the United States.²³⁴ Thereafter, visas were waived.²³⁵ Between 1962 and April, 1979 690,000 Cubans were paroled into the United States.²³⁶ In 1966, Congress passed the Cuban Adjustment Act (CAA) allowing Cuban nationals in the United States to achieve permanent resident status through a special process.²³⁷ None of these steps have been taken for Haitians. The only instance in which Haitians and Cubans were treated comparably in the law was when President Carter created the Cuban-Haitian Entrant status after the Marielito Cubans²³⁸ came.

Haitian migrants who arrived around the same time as the Marielitos were denied refugee status. To grant refugee status or asylum to Cubans, or otherwise to treat Cubans and Haitians differently, would have been politically unseemly.²³⁹ Thus, President Carter created the category of Cuban/Haitian entrant without any specific statutory authority.²⁴⁰ That category allowed migrants from both groups to remain in the United States and, after two years, adjust their status to permanent resident alien. The Immigration Reform and Control Act of 1986

in Cuba, READER'S DIG., May 1993, at 67-73. There was also a difference in approach between Cubans who commandeered a commercial plane and brought it to the United States and a Haitian who did the same thing. It was said the Haitian would be charged with air piracy while the United States pondered the case of the Cubans, trying to determine how to exonerate them. *Compare 48 Cubans take Miami getaway*, CHI. TRIB., Dec. 30, 1992, at 1 with *Hijacker Who Fleed Haiti Surrenders in Miami*, CHI. SUN-TIMES, Feb. 19, 1993, at 11.

234. MASUD-PILOTO, *supra* note 168, at 34. See also S. REP. NO. 1675, 89th Cong., 2d Sess. 2 (1966)[hereinafter HEARING 10/4/66].

235. H.R. 1978, 89th Cong., 2d Sess. (1966) at 2 [hereinafter cited as HEARING 9/01/66]. Waivers are authorized by INA § 212(d)(3), 8 U.S.C. § 1182 (1993). Hyman, *supra* note 230, at 75 (notes that the visa waiver is for "nonimmigrants" and should not have been applicable to Cubans who intended to remain indefinitely).

236. Kurzban, *supra* note 114, at 187 n. 31. For a discussion of how the parole authority has been used as a politically influenced entry mechanism, see *supra* text accompanying notes 105 to 112. See also Hyman, *supra* note 230, at 77 n.272 ("[P]arolee status is an administrative means to effect a refugee program for an indefinite period of time.") *Id.* at 79.

237. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1990), 8 U.S.C. § 1255 [hereinafter CAA]. Under then existing law a person from the Western Hemisphere who was in the United States had to leave, obtain an immigrant visa at a United States consular office abroad and then come back to the United States as a permanent resident. HEARING 9/01/66, *supra* note 235, at 3. The CAA was to save Cubans the expense of going to Canada to meet the requirements. The Federation for American Immigration Reform (FAIR), a conservative immigration organization, argued that the Attorney General was required to count against quotas Cuban nationals who received benefits under the CAA, but that argument was rejected. *Federation for American Immigration Reform v. Meese*, 643 F. Supp. 983 (S.D. Fla. 1986).

238. See *supra* note 168.

239. MASUD-PILOTO, *supra* note 168, at 5. The 1980 Miami riots may have prompted President Carter's efforts to equalize treatment of Haitians and Cubans. See *Comp. of Weekly Doc of the President*, April-June, 1980. Those who transported the Marielitos were indicted for violating United States laws, but the cases were dismissed. *United States v. Anaya*, 509 F. Supp. 289 (S.D. Fla. 1980), *aff'd*, 685 F.2d 1272 (11th Cir. 1982 (en banc)) *sub. nom.* U.S. v. Zayas-Morales.

240. See Kevin T. Creedon, Note, *Refugee Act of 1980 and the 'Cuban-Haitian Entrants' Status Pending*, 5 SUFFOLK TRANSNAT'L L.J. 213, 227 (1981).

(IRCA) codified President Carter's policy by providing for adjustment of status to "alien lawfully admitted for permanent residence" for Cubans and Haitians who arrived before 1982.²⁴¹ Haitians arriving after President Aristide was deposed in 1991 receive no benefit from this enactment.²⁴²

The Cubans have been called "special favorites" of the United States,²⁴³ "self-imposed political exiles,"²⁴⁴ and "consumer refugees."²⁴⁵ They have also been viewed as people fleeing communism by "voting with their feet."²⁴⁶ United States policy can be defended if one thinks it is politically advantageous to side with those considered anti-communist. Welcoming Cubans, who fled a communist country,²⁴⁷ while repelling Haitians fleeing an anti-communist government,²⁴⁸ was arguably justified in the 1970s.²⁴⁹ But such a policy makes little sense when applied to Haitians fleeing the military regime which overthrew President Aristide. Indeed, just as Cubans were favored when the United States believed Castro would not last,²⁵⁰ so too Haitians could have been welcomed even as the United States worked to displace the military leaders who led the coup that deposed President Aristide. In addition, while the initial Cuban arrivals may have had a political motivation, it is not clear that Marielitos of the 1980s and those that came subsequently were fleeing political persecution.²⁵¹ The most significant difference between the two groups is that Cubans are permitted to enter the United States, while Haitians are not. It is important that

241. Pub. L. No. 99-603, INA § 202, 8 U.S.C. § 1255a (1993).

242. For a tabulation showing 793,856 Cubans arrived by September 30, 1980, see MASUD-PILOTO, *supra* note 168, at 3, table 1.1.

243. LOESCHER & SCANLAN, *supra* note 38, at 66.

244. *Id.* at 244 n.75

245. *Id.* at 75. This phrase was coined by Virginia Dominguez as noted in Scanlan, *supra* note 92, at 125.

246. *Id.* at 76.

247. There was a close relationship between Cuba and the Soviet Union. The Cuban missile crisis occurred in October, 1962 and ended with an agreement between the Soviet Union and the United States under which the latter terminated its naval blockage of Cuba and the former withdrew its missiles. LOESCHER & SCANLAN, *supra* note 38, at 245 n.94. However, after more than 25 years in Cuba, Soviet troops departed permanently in June, 1993. CHI. SUN-TIMES, June 16, 1993 at 8. The Soviet Union no longer exists and some entities formerly considered part of it are now called the Commonwealth of Independent States. U.S. COMM. ON REFUGEES, *supra* note 2, at 78.

248. Lennox, *supra* note 10, at 697 n.77; LOESCHER & SCANLAN, *supra* note 38, at 78-81.

249. See Cavosie, *supra* note 83, at 412 ("Bluntly put, refugees from countries hostile to the United States have invariably been accorded United States protection while equally worthy refugees from friendly countries have met with far less success").

250. HEARING 10/4/66, *supra* note 234, at 5; HEARING 9/01/66, *supra* note 235, at 4. Contrary to initial expectations, the 40th anniversary of the Cuban revolution was celebrated in July, 1993. Castro: 'Miracle' cure not expected, CHI. TRIB. July 27, 1993 at 4.

251. MASUD-PILOTO, *supra* note 168, at 93. For the view that the Cuban economy contributed to some migration, See Scanlan, *supra* note 92, at 125. Indeed, it has been noted that Cubans are not required to meet the usual tests of whether or not one is a refugee or merits asylum. *Id.* at 130 n.63.

Haitians be allowed to enter the United States to be considered for asylum, permanent residency, or citizenship.²⁵²

B. *Salvadorans*

It has been suggested that under United States policy “those escaping left-wing repression” are welcomed, “while those escaping right-wing repression” are repelled.²⁵³ This would explain the situation of the Salvadorans, who initially faced some resistance to their claims for political asylum.²⁵⁴ However, the Immigration Act of 1990 specifically designated El Salvador as a country from which persons are entitled to Temporary Protected Status (TPS),²⁵⁵ a successor concept to Extended Voluntary Departure (EVD).²⁵⁶

Extended Voluntary Departure allows an individual to delay departure from the United States if the country to which he or she would return is undergoing strife. It is thus a form of “safe haven.”²⁵⁷ Prior to 1990, decisions to grant EVD were made on an ad hoc basis by the Attorney General, without explicit statutory authority. Extended Voluntary Departure was renamed Temporary Protected Status and specifically listed in the Immigration Act of 1990 which “codifie[d], for the first time, criteria and procedures for granting entire classes of deportable

252. As Commissioner of the INS, McNary argued that Cuban nationals must be accepted in the United States as Cuba will not accept their return. *1991 Hearing, supra* note 1, at 73. This approach makes the return of Haitians and the non-return of Cubans related to the policy of the country from which the alien fled, rather than United States policy.

253. MASUD-PILOTO, *supra* note 168, at 130.

254. A 1991 settlement of a class action suit required termination of deportation proceedings while asylum determinations were being held, including de novo adjudications. See *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). For a discussion of Salvadorans generally, see Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295 (1985).

255. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat 4968, § 303 (1990) (amending scattered sections of 8 U.S.C.) [hereinafter Immigration Act]. Section 303(a) of the Act which provides that “El Salvador is hereby designated under section 244A(b)” is not codified. *Id.* Temporary protected status is provided for under INA § 244A, 8 U.S.C. § 1254a. See generally Peter C. Diamond, Comment, *Temporary Protected Status Under the Immigration Act of 1990*, 28 WILLAMETTE L. REV. 857 (1992); Pamela M. Martin, Note, *Temporary Protected Status and the Legacy of Santos-Gomez*, 25 GEO. WASH. J. INT’L L. & ECON. 227 (1992); Ari Weitzhandler, Comment, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249 (1993).

256. Extended Voluntary Departure (EVD) allows a person to delay departure from the United States while the country to which he/she would return is undergoing strife. Prior to 1990, the decision to grant EVD was ad hoc by the Attorney General without explicit statutory basis. An INS staff study indicated that from 1960-1982 EVD had been granted 15 times. ALEINIKOFF & MARTIN, *supra* note 9, at 830 n.43.

257.

The term safe haven has been used since the early 1980s to describe various measures designed to allow certain classes of aliens in the United States either to remain in the United States beyond their visa expiration dates or, if the aliens entered illegally, to suspend temporarily their deportation proceedings for a period of time.

Diamond, *supra* note 255, at 858.

aliens temporary stays in the United States until conditions improve in their countries of origin.”²⁵⁸ Section 303 of the 1990 Act designates TPS for Salvadorans in the United States as of September, 1990.²⁵⁹

President Reagan saw El Salvador as a country where a stand could be made “against the spread of communism.”²⁶⁰ Due to a civil war in the years 1980 to 1991, many Salvadorans left²⁶¹ the country and came to the United States.²⁶² However, granting asylum to Salvadorans would have suggested that the United States, which provided \$6 billion in aid to the government of El Salvador,²⁶³ was supporting a government that was persecuting its own nationals.²⁶⁴ The effort to obtain EVD status for Salvadorans was not successful for over ten years.²⁶⁵ It was not until the Immigration Act of 1990 that specific provision was made for Salvadorans. Temporary Protected Status helps aliens in the United States who have not been granted asylum, but does not help Haitians, who are not allowed to enter United States.

An individual is eligible for TPS when his or her country of origin has been designated because it is engaged in “ongoing armed conflict,” has suffered natural disasters, or where the Attorney General finds that “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety”²⁶⁶ El Salvador is unique in being the only country to be granted special temporary protected status by Congress.²⁶⁷

The American Bar Association has suggested that Haiti be designated as a country from which persons could obtain TPS.²⁶⁸ In November, 1991 Senator DeConcini introduced the Temporary Protected

258. *Id.* at 858.

259. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 303.

260. Morgan Powell, *War in Peace*, CHI. TRIB. Mar. 29, 1993, at 1.

261. *Coping with the Truth in El Salvador*, CHI. TRIB. Mar. 17, 1993, at 20.

262. Between 1980-1991, 268,026 Salvadorans came to the United States and in 1991 and 1992 there were 73,542. Telephone Interview with Statistical Information Center of the Immigration and Naturalization Service (June 23, 1993). It is also estimated that between 500,000 and 750,000 Salvadorans came to the United States as illegal aliens in a ten year period. H.R. 244, 101st Cong., 1st Sess. at 8-13 (1989).

263. Douglas Farah, *Government Ran Death Squads*, CHI. SUN-TIMES, Mar. 16, 1993 at 12.

264. MASUD-PILOTO, *supra* note 168, at 120. See Weitzhandler, *supra* note 255, at 251-253 nn.12-24. Only three percent of Salvadorans were approved for asylum. *Providing for a GAO Study on Conditions of Displaced Salvadorans and Nicaraguans, and for Other Purposes: Hearings on H.R. 618 Before the Subcomm. on Rules of the House, 100th Cong., 1st Sess. 5* (1987).

265. See Martin, *supra* note 255, at 233 nn.49-72.

266. INA § 244A(b)(1)(A)-(C), 8 U.S.C. § 1254a(b)(1)(A)-(C).

267. The rationale for including El Salvador in Temporary Protected Status (TPS) was the country was undergoing civil strife. *Providing for a GAO Study on Conditions of Displaced Salvadorans and Nicaraguans, and For Other Purposes: Hearing on H.R. 618, 100th Cong., 1st Sess. 2* (1987). Naming El Salvador specifically is understandable since Congress tried for almost 10 years to enact legislation to suspend deportation of Salvadorans. Diamond, *supra*, note 255, at 863. It should be noted that TPS is a designation to be made for an entire country and then individual nationals from that country apply for protection. *Id.* at 866-70.

268. Letter from the ABA Government Affairs office to the Department of Justice (Nov. 18, 1991), *reprinted in 1991 Hearing, supra* note 1, at 55. It was also suggested by the United States Committee for Refugees. See U.S. COMM. ON REFUGEES, *supra* note 2, at 89.

Status for Haitians Act, a bill to protect Haitians “on board United States flag vessels, and those at Guantanamo Bay, Cuba” and others in the United States.²⁶⁹ The bill was defeated, but even had it been successful it would not have provided much benefit. An individual must be present in the United States to qualify for TPS; repatriated Haitians obviously cannot meet that standard.²⁷⁰ Moreover, Temporary Protected Status is just that—temporary.²⁷¹ Haitians who were allowed into the United States prior to the Kennebunkport Order were able to meet a preliminary standard of a “credible fear” of persecution.²⁷² Temporary Protected Status would not have been necessary to keep those individuals in the United States, since the pendency of an asylum application permits a stay. Other drawbacks to TPS have been identified,²⁷³ but the principal detriment for Haitians is that TPS is of limited utility as long as interdiction remains United States policy.

Just as Congress took action to favor nationals from Cuba and El Salvador, it can do something for Haitians. If President Aristide is restored to power perhaps that will diminish the number of Haitians that will seek refuge in the United States.²⁷⁴ However, the Kennebunkport Order still exists. To date, the number of Haitians interdicted is small compared with the number of Cubans and Salvadorans in the United States.²⁷⁵ The Haitians’ need for protection is as great as that of the more numerous Cubans and Salvadorans.

C. Chinese

At one time, explicit statutory provisions excluded Chinese from the United States.²⁷⁶ However, there is no longer a statutory prohibition, and in the 1990s, smuggling Chinese aliens became a three-billion-dollar-

269. 137 CONG. REC. S18,409 (daily ed. Nov. 26, 1991) (statement of Sen. DeConcini). See Temporary Protected Status for Haitians Act of 1991, § 2091.

270. INS § 244A(c)(1)(A)(i), 8 U.S.C. § 1254(c)(1)(A)(i).

271. The provision for Salvadorans only lasted eighteen months. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5036-38, § 303.

272. See *supra* notes 192 to 193 and accompanying text.

273. Diamond, *supra* note 255, at 868.

274. A Haitian worker commented that “[p]eople are poor and were poor before the elections. But after [Aristide’s] election, they had hope for a better future and could express themselves.” Douglas Farah, *No Rights, No Relief for Rural Haitians*, CHI. SUN-TIMES, Oct. 18, 1992, at 47. But see Mike Billington, *Aristide Would Be No Panacea for Haiti*, CHI. TRIB., Feb. 14, 1993 at 3 (noting that Haitians will continue to leave even if President Aristide is restored. Billington points out that the United States gave billions to the Haitian military but “almost nothing for the country’s roads, schools, hospitals and utilities” and commenting that even if “ideally qualified” Aristide “would probably be unable to solve his country’s problems”). *Id.*

275. During a ten year period the United States had a minimum of 500,000 illegal Salvadorans. See *supra* text accompanying note 262. From 1959 to 1985, 800,000 Cubans came to the United States. See *supra* text accompanying notes 233 to 238. In an eleven year period, from 1981 to May, 1992 approximately 70,000 Haitians were interdicted. Petitioners’ Brief, *supra* note 204, at 3-4.

276. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

a-year business.²⁷⁷ It has been suggested that the situation of Haitians is analogous to that of the massacre of Chinese after the June, 1989 pro-democracy protest in Tiananmen Square.²⁷⁸ It was after that event that President George Bush issued an Executive Order encouraging asylum for those who claim to be persecuted by China's family planning policy.²⁷⁹ Due to China's burgeoning population, it adopted a policy of one child per couple and free abortions.²⁸⁰ Although the Tiananmen Square pro-democracy protest was not about family planning, the Bush Executive Order linked asylum to it.²⁸¹ It has been contended that the Order makes asylum "a sure thing for virtually anyone who can reach the United States and claim they were victims of coercive family planning."²⁸² After the Executive Order, the number of Chinese asylum seekers exploded, increasing 400% in 1992 from 1991 levels.²⁸³ The link between family planning and political persecution has been questioned.²⁸⁴ However, Chinese seeking asylum continue to arrive.²⁸⁵

In June, 1993 a ship carrying Chinese aliens, the *Golden Venture* hit a

277. David Devoss, *A New Chinese Export: Labor So Cheap*, ASIA, INC., May 1993, at 40. Most are poor Fujianese who agree to pay \$30,000 to be smuggled to the United States. *Id.*

278. Forester, *supra* note 10, at 366.

279. Exec. Order 12,711, 55 Fed. Reg. 13,897 (1990). Section 4 of the Order provides:

The Secretary of State and the Attorney General are directed to provide for *enhanced consideration* under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization

(emphasis added). Also provided is a directive to the Secretary of State and the Attorney General to waive the necessity of a valid passport for nationals of the Peoples Republic of China.

280. China has a population of 1.2 billion people, in contrast to an ideal of 700 million. See Uli Schmetzer, *A Growth Spurt of Brats*, CHI. TRIB., Apr. 27, 1993, at 4.

281. One view was that after Tiananmen Square President Bush wanted to save China's most-favored-nation (MFN) status, and that he agreed to issue the Executive Order for asylum if congress would leave China as an MFN. Devoss, *supra* note 277, at 41.

282. *The Great Paradox*, ASIA, INC., May, 1993, at 41. Most of the illegal Chinese aliens found in California in June, 1993 were men ranging in age from 16 to 40. *26 Smuggled Chinese Held in California*, CHI. TRIB., June 9, 1993 at 14. The absence of women seems to suggest that family planning adversely affects only men.

283. 1990, the year following Tiananmen Square, saw a doubling of asylum seekers over the prior year; the number has continued to grow.

Year	Number of Asylum Seekers
1989	561
1990	1287
1991	860
1992	3440

Richard Pyle, *Illegal Chinese Immigrants Pawns of N.Y. Asian Gang*, CHI. SUN-TIMES, June 13, 1993 at 26. In October, 1992 Congress passed the Chinese Student Protection Act which extends indefinitely coverage of the 1990 Executive Order.

284. "Chinese are political refugees because they want to raise large families. This is nonsense." Otis Pike, *America Needs an Immigration Policy That's Rational*, CHI. SUN-TIMES, June 9, 1993 at 35.

285. For an account of boats with Chinese aliens which arrived in California in June 1993, see de Lama, *supra* note 6, at 1.

sandbar off New York.²⁸⁶ An immigration judge subsequently ruled that a passenger on the *Golden Venture* had “entered” the United States, an important concept under immigration law.²⁸⁷ Those Chinese who can enter the United States can thus claim benefits from the Bush Executive Order.²⁸⁸ Because of the United States policy of interdiction and repatriation, Haitians on boats cannot even enter and claim asylum under general rules. Unlike the Chinese, the Haitians have no Executive Order favoring asylum for them. Instead, their repatriation, despite a U.N. policy against the return of refugees, was upheld by the United States Supreme Court in the case discussed in the next section.

VI. 1993 SUPREME COURT REPATRIATION DECISION

I can think of only one precedent for our current policy. Fifty years ago [June, 1939] our government refused to let the *St. Louis* dock in Florida. Hundreds of Jewish refugees who were fleeing Nazi occupied Europe were forced back to face Hitler’s death camps. . . . It was one of the darker episodes of our history and certainly not an event that any of us ever thought that we might see repeated.²⁸⁹

In 1993 the Supreme Court upheld United States repatriation of Haitian refugees. However, this was not the first time Haitian migrants had been before the Court. In earlier cases dealing with asylum claims procedures and detention instead of parole, the Court found the issues to be moot;²⁹⁰ in another case Haitians were not allowed to challenge denial of asylum based upon lack of Creole interpreters or witnesses.²⁹¹ The district court was determined to have jurisdiction to decide issues

286. Richard Pyle, *N.Y. Boat Tragedy: ‘No One to Save Us’*, CHI. SUN-TIMES, June 7, 1993, at 18.

287. *Matter of Chen*, No. A72-863-158 (July 20, 1993), 70 INTERPRETER RELEASES 1133 (August 30, 1993). For a discussion of the entry concept, see *supra* text accompanying notes 94-101.

288. In July, 1993 there was a reported instance in which the United States Coast Guard apparently interdicted boats in Mexican waters that were carrying Chinese aliens. Mexico repatriated them to China. For a fuller discussion of this event, see *infra* note 335. “Though boatloads of asylum seekers attract the most attention, the majority of Fujianese illegally entering the U.S. do so by air” Devoss, *supra* note 277, at 43.

289. *U.S. Policy Toward Haitian Refugees: Hearings on H.R. 5360 Before the House Comm. on Foreign Affairs*, 102d Cong., 2d Sess. 2 (1992) [hereinafter *June 1992 Hearing*] (statement of Rep. Berman).

290. When Haitians challenged the denial of the right to assert asylum claims in exclusion proceedings, the INS adopted new procedures. Thus the result in *Pierre v. United States*, 434 U.S. 962 (1977) was to vacate and remand. When the decision to reinstitute detention without a rule change was challenged, the INS then promulgated new rules. The Supreme Court case was remanded to the district court to consider whether INS officials exercised their discretion without regard to race. *Louis v. Nelson*, 472 U.S. 846 (1985). See Mary Jane LaPointe, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L.J. 127 (1986).

291. *Haitian Refugee Ctr., Inc., v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff’d*, 872 F.2d 1555 (11th Cir. 1989), *aff’d sub nom. McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991).

under the Special Agricultural Worker's Program.²⁹² Haitian advocates were rebuffed in a decision seeking identification of those repatriated under the Reagan interdiction program.²⁹³ Certiorari was denied in one of the *Baker* cases after the Solicitor General's representation favorable to asylum screening, which was later abrogated.²⁹⁴ In 1993 the Haitian advocates lost again. With only Justice Blackmun dissenting, the Court held the law against nonreturn of refugees (*nonrefoulement*) does not apply extraterritorially.²⁹⁵ Thus, the United States could send Haitians back to Haiti.

In March, 1992 a lawsuit was filed in federal district court in New York complaining, *inter alia*, that Haitians were denied access to lawyers.²⁹⁶ In May, the complaint was amended to include a challenge to the Bush Kennebunkport Order.²⁹⁷ In July, 1992 the Second Circuit affirmed the district court injunction, holding the obligation of *nonrefoulement* applied to Haitians interdicted on the high seas.²⁹⁸ A month later the Supreme Court stayed the appellate court's decision and the district court's injunction against repatriation.²⁹⁹ Almost one year later, in *Sale v. Haitians Centers Council, Inc.*³⁰⁰ the high court ruled that the duty of *nonrefoulement* did not apply extraterritorially. Justice Stevens wrote for the majority that to "gather fleeing refugees and return them to the one country they had desperately sought to escape . . . may . . . violate the

292. *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991). Stephen Anthony Torres, *Immigration Reform and Central Act of 1986—Judicial Review Under Special Agricultural Workers Program*, 22 VA. J. INT'L. L. 173 (1985).

293. Haitians claiming political persecution sought to get the names of persons returned to Haiti so their situation after repatriation could be documented. The Supreme Court reversed the Eleventh Circuit, which had allowed access to the names. *Department of State v. Ray*, 112 S. Ct. 541 (1991), *rev'g* 949 F.2d 1549 (11th Cir. 1990).

294. In *Haitian Ctrs. Council v. McNary*, it was noted that the Solicitor General indicated the United States would screen "intercepted aliens followed by full consideration of asylum rights." Certiorari was then denied in a case seeking review of dismissal of an action, *rev'd Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993), challenging denial of access to attorneys and advocacy groups and refusal to halt repatriation. 969 F.2d 1350, 1357 (2d Cir. 1992), *rev'd Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993). Five days after the denial, the United States changed its policy, eliminating that which the Solicitor General had pledged to do. Respondents' Brief, *supra* note 188, at 6.

295. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

296. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated sub. nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). The second circuit affirmed a prohibition against repatriation of "screened-in" Haitians unless they were given an opportunity to communicate with an attorney. It did not uphold the district court's injunction with gave advocacy organizations access to Haitians on Guantanamo.

297. The existing lawsuit was ultimately divided into two different cases. *June 1992 Hearing*, *supra* note 288, at 74 (statement of Prof. Harold Koh). Those complaining of the Bush policy were: 1) repatriated "screened-in" Haitians; 2) interdicted, unscreened and Guantanamo Bay detained Haitians; 3) those who would be interdicted and qualified for "screened-in" status but for the Bush policy; and 4) advocacy organizations. By the time the case was decided by the second circuit, the individual Haitian plaintiffs had all been returned to Haiti. 969 F.2d at 1354.

298. Judges Newman and Pratt ruled that INA § 243(h)(1), 8 U.S.C. § 1253 (1993) obligation did apply extraterritorially. Judge Walker dissented.

299. Petitioner's Brief, *supra* note 203, at 10.

300. 61 L.W. 4684 (June 22, 1993).

spirit”³⁰¹ of the U.N. Convention Relating to the Status of Refugees, but did *not* violate United States law. Dissenting, Justice Blackmun found it “extraordinary” that the Executive branch “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.”³⁰²

The Supreme Court’s pronouncement in *Haitian Centers Council* resolved a conflict between the Second and Eleventh Circuits.³⁰³ However, *Haitian Centers Council* did not consider legal issues arising from interdiction alone;³⁰⁴ rather, the central question was whether forced repatriation of Haitians violated the *nonrefoulement* obligation of United States law or the U.N. Protocol. The Court first looked to section 243(h)(1) of the INA, which prohibits the return of any alien to a country where it is determined that the alien would be threatened. It provides:

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.³⁰⁵

This section is in the above form after an amendment by the Refugee Act of 1980, which eliminated the words “within the United States” modifying the term alien; added a prohibition on returning of aliens; and made the prohibition on return mandatory by eliminating the Attorney General’s discretion. Since the Haitians were interdicted before they entered the United States, the Court had to determine whether section 243(h) applied extraterritorially.³⁰⁶ The majority noted the ordinary presumption against extraterritoriality and found that the section was amended in 1980 to ensure that both deportable and excludable aliens would be protected against return to persecution. However, the Court concluded that the obligation did not apply extrater-

301. 113 S.Ct. 2549.

302. *Id.* at 61 L.W. at 4693.

303. See Judge Edwards in *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 820 (D.C. Cir. 1987) (concurring in part and dissenting in part); *Haitian Refugee Ctr. v. Baker (Baker III)*, 953 F.2d 1498 (11th Cir. 1992); *Haitian Ctr. Council v. McNary*, 969 F.2d 1350, *rev’d sub. nom. Haitian Ctrs. Council v. Sale*, 113 S. Ct. 2549 (1993). In *Haitian Refugee Ctr. v. Baker (Baker I)*, 949 F.2d 1109 (11th Cir. 1991) Judge Hatchett dissented and concluded that the *nonrefoulement* obligation applies extraterritorially. *Id.* at 1114. See generally Gluck, *supra* note 90, at 865; Vázquez, *supra* note 77; Abigail D. King, Note, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U. L. REV. 773 (1988).

304. In dissent Justice Blackmun stated that the Haitians were not arguing that the government had no right to intercept boats. 113 S. Ct. 2579, 61 L.W. at 4698.

305. INA § 243(h)(1), 8 U.S.C. § 1153(h)(1) (1993).

306. The Haitian plaintiffs acknowledged that the section did not apply extraterritorially before the 1980 amendment since it explicitly said no alien “within the United States” could be returned. Thus the question was the proper interpretation of INA section 243(h) as amended.

ritorially. Justice Blackmun protested that to deny extraterritoriality was “[t]o read into § 243(h)’s mandate . . . the very language that Congress removed”³⁰⁷

Today’s majority . . . decides that the forced repatriation of the Haitian refugees is perfectly legal, because the world “return” does not mean return, because the opposite of “within the United States” is not outside the United States and because the official charged with controlling immigration has no role in enforcing an order to control immigration. I believe the duty of nonreturn expressed in both the Protocol and the statute is clear.³⁰⁸

Because the INA section at issue codified the principle of *nonrefoulement* from the U.N. Refugee Convention,³⁰⁹ both the majority and dissent relied on it for support. Article 33 of the Convention states:

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.³¹⁰

The majority ruled that “both the text and negotiating history of Article 33 affirmatively indicate that it was not intended to have extraterritorial effect.”³¹¹ The dissent argued that “[t]he language is clear, and the command is straightforward; that should be the end of the inquiry.”³¹² Both sides relied on statements by the U.N. High Commissioner for Refugees. The dissent sided with the present Commissioner’s conclusion that the principle of *nonrefoulement* applied extraterritorially,³¹³ while the majority relied on prior rulings that it did not.³¹⁴ The opposing views of the Reagan and Bush administrations were also noted in the decision. Reagan’s Executive Order directed the Attorney General to ensure “the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland,”³¹⁵ while

307. 113 S. Ct. at 2574.

308. *Id.* at 2568.

309. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577 [hereinafter *Refugee Convention*]. The United States is not a party to the Convention but in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees which incorporates Article 33 of the Convention. Thus, the Protocol is actually the governing document. However, as the Supreme Court did, this Article will refer to the Convention. 113 S. Ct. at 2549 n.19.

310. Refugee Convention, *supra* note 309, 19 U.S.T. at 6276.

311. 113 S. Ct. at 2549, 2563.

312. *Id.* at 2568.

313. *Id.* at 2572 n.8.

314. *Id.* at 2564 n.40.

315. Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981).

President Bush's Executive Order announced that the *nonrefoulement* obligation does not extend to persons outside the United States.³¹⁶

The government's brief in *Haitian Centers Council* argued that President Bush had to choose between allowing Haitians to come to the United States for screening or returning them to Haiti. The first choice was assumed to lead to an "outflow of a magnitude as yet unknown . . ." ³¹⁷ The government further argued that the Kennebunkport Order was a considered response to a life-threatening crisis on the high seas. ³¹⁸ Finally, the government argued that the judiciary improperly "interfered . . . with the operation of military vessels under [the President's] command on the high seas and upset the delicate balance of diplomatic and other measures he instituted to resolve the broader crisis concerning that country." ³¹⁹ The effect can only be to encourage yet another massive outmigration from Haiti."

Haitian advocates countered that the stated purpose of the Kennebunkport Order was "to improve the internal management of the Executive Branch," and that the Order was not dictated by "foreign policy exigencies" ³²⁰ as claimed by the government. The Respondents' brief also downplayed the military and foreign policy rationale, noting the limited scope of the prohibition on the government. ³²¹ Moreover, advocates for the Haitians argued that "ours is a foreign policy conducted under law. Nothing in our immigration laws gives executive officials carte blanche, in the name of foreign policy, to respond to refugee flight by returning fleeing refugees to their persecutors." ³²²

Haitian Centers Council illustrates that there are credible arguments on both sides of the question. Significantly, the Supreme Court majority concluded by quoting Circuit Court Judge Edwards: "[a]lthough the human crisis is compelling, there is no solution to be found in a judicial remedy." ³²³ Dissenting Justice Blackmun pointed out that the Haitians did not "claim a right of admission" and did not "argue that the

316. Exec. Order No. 12,807 said:

2. The International legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (T.I.A.S. No. 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.

317. Petitioner's Brief, *supra* note 204, at 7.

318. *Id.* at 10.

319. *Id.* at 11-12.

320. Respondent's Brief, *supra* note 188, at 6 n. 5.

321. "The Second Circuit's order does not require petitioners to admit any Haitians to this country; nor does it bar Haitians from sailing to third countries, from being brought to Guantanamo naval base, or even from being interdicted, so long as *bona fide* refugees are not returned." *Id.* at 10.

322. *Id.*

323. 113 S. Ct. at 2567 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 837-41 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

Government has no right to intercept their boats.”³²⁴ He thought their claim to be free from repatriation was “a modest plea” that should have been vindicated under INA section 243(h) and the U.N. Convention.

By the time *Haitian Centers Council* arrived at the Supreme Court, some individual Haitian plaintiffs had already been repatriated.³²⁵ Even if the majority had found a right not to be repatriated, those litigants would not have been protected.³²⁶ Justice Blackmun noted that the statutory provisions on nonreturn were “enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II.”³²⁷ Although the Supreme Court recognized the “high purpose”³²⁸ of the obligation of *nonrefoulement* and acknowledged the desperation of the Haitians, it quoted with approval Circuit Court Judge Edwards in concluding “there is no solution to be found in a judicial remedy.”³²⁹

VII. A NEW ATTITUDE IS NEEDED

The dilemmas facing the country in the field of immigration challenge some of its most fundamental assumptions and value systems as symbolized [sic] by the Statue of Liberty. Nowhere is this more true than in the question of how to respond to the plight of refugees being tossed up on American shores in their flight from persecution in their home-lands.³³⁰

The United States Supreme Court has said that a “judicial remedy” is not available to assist interdicted and repatriated Haitians. The political process should be used to terminate the agreement with Haiti which implements interdiction and to eliminate forced repatriation of Haitians. The Kennebunkport Order applies to “vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.”³³¹ The “foreign nation” to which the Order refers is Haiti. Because that agreement was made when Jean-Claude Duvalier was the country’s leader, and because Haiti is the only country

324. 113 S. Ct. at 2577.

325. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992) *rev’d subnom* *Sale v. Haitian Ctrs. Council*, 113 S.Ct. 2549 (1993). The government based an argument on the fact that the “subject plaintiffs are now back in Haiti.” *Id.* at 1354.

326. After the Kennebunkport Order of May 24, 1992 the “Haitian migrant crisis . . . largely dissipated.” It was argued that barring repatriation “will recharge that crisis, with all of its attendant problems . . .” Petitioner’s Brief, *supra* note 203, at 56.

327. 113 S. Ct. at 2549, 61 U.S.L. W at 4698.

328. *Id.* at 4693.

329. *Id.* at 4698.

330. 1989 *Hearing*, *supra* note 7, at 128 (statement of Bryan O. Walsh).

331. Exec. Order 12,807 § 2(b)(3), 57 Fed. Reg. 23,133 (1992).

with which we have such an arrangement, the United States should terminate it.³³²

If the agreement with Haiti is nullified, the question becomes whether the United States can interdict Haitian refugees in the absence of such an agreement.³³³ The district court in *Gracey*, Judge's Edwards' dissent in *Gracey* on appeal, and Justice Blackmun's dissent in *Haitian Centers Council*, note the president's authority to suspend entry under existing law³³⁴ and his inherent authority to protect against harmful illegal immigration. It is unclear if the authority to interdict (as opposed to the authority to repatriate) exists in the absence of an agreement, and if so, whether it applies extraterritorially.³³⁵ While interdiction under the

332. While Haitian President Aristide did not take steps to abrogate the agreement, he was in office for only a few months before he was deposed. The United States should take the leadership in this matter.

333. "What makes the interdiction presumptively lawful as a matter of the law of the sea, as distinct from international refugee law, is the interdiction agreement itself of September 23, 1981, between the United States and Haiti." 1989 Hearing, *supra* note 7, at 187 (statement of Prof. Richard Steinhardt).

334. The district court in *Gracey* found authority to suspend entry in INA §§ 212, 215, 8 U.S.C. §§ 1182(f), 1185(a)(1), as well as from "inherent authority" to protect against "harmful illegal immigration." 600 F. Supp. at 1400. The court found that "the President's power to suspend the entry of illegal aliens from the high seas by interdiction has a clear constitutional basis." 600 F. Supp. at 1400. Judge Edwards said the President "indubitably possessed both statutory and inherent constitutional authority to establish the interdiction program." 809 F.2d at 838. Dissenting in *Sale*, Justice Blackmun said the President could "establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." 113 S.Ct. 2549, 61 L.W. at 4693. The Reagan proclamation associated with the 1981 interdiction Executive Order said "the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying aliens."

335. "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles . . ." U.N. Convention on the Law of the Sea, Art. 3, 21 I.L.M. 1272 (Jan. 1982) [hereinafter Law of the Sea].

The United States was involved in maneuvers with a vessel loaded with Chinese aliens off the coast of Mexico in July, 1993. The Coast Guard surrounded the boats and allowed the Mexican government to send the aliens back to China. According to the Department of State's Office of Public Affairs, there is a news "black out" on this situation so detailed information was not available. Telephone interview with Office of Public Affairs, United States Department of State, July 26, 1993. Media reports indicate that Chinese aliens were on "three ships that sailed into Ensenada Harbor . . . [that] were surrounded off the Mexican coast by United States Coast Guard boats for 13 days." CHI. SUN-TIMES, July 17, 1993, at 6. It is assumed that vessels carrying the Chinese were in Mexican waters and that the Coast Guard stopped them at the "invitation" of Mexico. See Tod Robberson, *Credibility Gap for Mexico?*, CHI. SUN-TIMES, July 25, 1993, at 37 (noting that INS officials helped Mexico process the Chinese). Other boats carrying Chinese apparently headed toward Hawaii "to preclude the option of being handed off to another country." William Claiborne & Tod Robberson, *More Chinese Refugees Head to Hawaii*, CHI. SUN-TIMES, July 17, 1993, at 6. It may be that the United States was concerned about the legality of a high seas interdiction involving China, a country with which it does not have an interdiction agreement.

Aliens who reach United States territory or are at a port of entry are allowed to apply for asylum. INA § 208, 8 U.S.C. § 1158 (1993). Apparently the United States did not wish for Chinese aliens to reach its territory and become eligible to apply for asylum. Because of a Bush Executive Order, Chinese aliens receive "enhanced consideration" for asylum based on a fear of persecution related to family planning. See Exec. Order No. 121,711, 55 Fed. Reg. 13,897 (1990). Mexico has not acceded to the U.N. Convention or Protocol regulating *nonrefoulement*. U.S. COMM. ON REFUGEES. See, *supra* note 2, at 108. So it could and did send the Chinese back. However, if United States high seas interdiction were lawful, it could also repatriate under the rule announced in *Sale* which denies extraterritorial effect to the principle of *nonrefoulement*.

Kennebunkport Order is "authorized to be undertaken only beyond the territorial sea of the United States,"³³⁶ perhaps such a limitation was not legally necessary. As Supreme Court Justice Blackmun pointed out, the President could "establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores."³³⁷

Freedom of the high seas is a recognized principle of international law. A vessel on the high seas is subject to the *exclusive* jurisdiction of the State under whose flag it sails.³³⁸ It has been argued that interdiction abrogates the freedom of navigation.³³⁹ However, complaint regarding such violations may only be raised by the ship's flag country; individual passengers of an interdicted vessel may not bring a challenge.³⁴⁰ It has also been noted that "the President has power to disregard a rule of customary international law or treaty . . ."³⁴¹ If so, then the United States can breach international obligations on freedom of the high seas.³⁴²

The interdiction of Haitians on the high seas accomplished United States policy by preventing them from entering into the United States and applying for asylum.³⁴³ While decisions about what immigrants the United States will accept can arguably be based on political considerations,³⁴⁴ granting asylum should be a humanitarian act. Even if political considerations affect asylum decisions, it is unconscionable for the

That the United States did not interdict on the high seas suggests that it is not confident of the authority to interdict absent an agreement.

336. Exec. Order 12,807 § 2(d), 57 Fed. Reg. 23,133 (1992). Since December 1988 the United States territorial sea is 12 miles off the shore, after being 3 miles prior thereto. 1989 *Hearings*, *supra* note 7, at 188 (statement of Prof. Richard Steinhardt). See also Jacobson, *supra* note 3, at 811-13.

337. 61 L.W. at 4693. Blackmun relied on INA § 212, 8 U.S.C. § 1182(f). That provision allows the President to suspend entry of aliens into the United States. The Reagan proclamation associated with his 1981 interdiction program said "the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying aliens." INA § 212; 8 U.S.C. § 1182 (f). The U.S. apparently has concerns about political repercussions from suspending entry and repatriation at its own territorial sea demarcation point. The United States Coast Guard was in the Windward Passage close to Haiti when engaged in the interdiction and repatriation campaign for Haitians. It was also removed from proximity to its own borders when dealing with Chinese aliens.

338. Law of the Sea, *supra* note 335, at arts 2, 6.

339. Jacobson, *supra* note 3, at 812.

340. *Id.* at 816.

341. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

342. However, interdiction alone would not accomplish the goals of refugee policy; aliens must be repatriated to their country of origin.

343. As noted by Eleventh Circuit Court of Appeals Judge Hatchett, "The primary purpose of the [interdiction] program was, and has continued to be, to keep Haitians out of the United States." *Haitian Refugee Ctr. v. Baker* (Baker I), 949 F.2d 1109, 1112 (11th Cir. 1991) (Hatchett, J., dissenting). In order to apply for asylum, aliens must have "entered" the United States as that term is construed under immigration law, or be at a port of entry. INA § 208, 8 U.S.C. § 3358 (1993). Consequently, interdiction and repatriation prevented Haitians from claiming asylum.

344. "[I]mmigration controls are not subject to the constitutional limitations applicable to congressional acts generally . . ." Henkin, *supra*, note 341, at 858.

United States to side with a military regime that deposed a democratically elected president.

By launching interdiction and by allowing repatriation the executive and judicial branches respectively have acted unfavorably toward Haitians. Congress can now make it clear that the Haitians are entitled to reach the United States and claim asylum.³⁴⁵ It is unconscionable for executive action and prior judicial decisions to treat Haitians so differently from others.³⁴⁶

At one time, the United States excluded Chinese aliens by statute;³⁴⁷ there is now an Executive Order that facilitates their claims for asylum.³⁴⁸ At one time, the entry of Japanese laborers was suspended.³⁴⁹ The United States has taken other actions that show a change from disfavoring to favoring a group of people. During World War II persons of Japanese ancestry were interned.³⁵⁰ Now they are the beneficiaries of a federal law providing for reparations and an apology.³⁵¹ The United States can also change its policy toward Haitian refugees. Some deep thinking is required about United States immigration law.³⁵² But unless and until changes are made for all refugees, Haitians should not be repelled from seeking entry.³⁵³

VIII. CONCLUSION

Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send

345. The judiciary usually acquiesces to the executive and legislative branches in immigration matters. See Johnson, *supra* note 12. Cf. the Haitian Refugee Protection Act of 1993, a bill proposed prior to the decision in *Sale*. It sought to prohibit the return of Haitians prior to asylum hearings. H.R. 1307, 103d Cong., 1st Sess. (1993).

346. The United States government required a \$10 million bond from the Haitian plaintiffs in *Haitian Ctrs. Council v. McNary*, 789 F. Supp. 541, 547 (E.D.N.Y. 1992). Counsel for the Haitians said that it was "the largest bond ever requested in the history of the New York federal courts and ten times the size of the bond in the *Texaco-Pennzoil* case." *June 1992 Hearing, supra*, note 289, at 74. The district court rejected that request and ordered a bond of \$5000. *Haitian Ctrs. Council v. McNary*, 1992 WL 155853 at *3 (E.D.N.Y. 1992).

347. See statutes collected in Henkin, *supra* note 341, at 856 n.12.

348. Exec. Order 12,711, 55 Fed. Reg. 13,897 (1990).

349. See *Akiro Ono v. United States*, 267 Fed. 359 (9th Cir. 1920).

350. Exec. Order 9066, Pub. L. No. 77-503, 3 C.F.R. 1092 (March, 1942). See Joanne Hirase, Comment, *The Internment of Japanese Americans: The Constitutional Threat Fifty Years Later*, 19 J. CONTEMP. L. 14 (1993).

351. Pub. L. No. 100-383, 102 Stat. 903 (1988).

352. President Clinton has proposed changes in immigration procedures, stating, "We must not and we will not surrender our borders to those who wish to exploit our history and compassion and justice." CHI. TRIB., July 28, 1993 at 2. Among the reforms suggested is expedited asylum processing. See also Carlos Ortiz Miranda, *An Agenda for the Commission on Immigration Reform*, 29 SAN DIEGO L. REV. 701 (1993).

353. Haitians who attempt to come to the United States by sea are unlike aliens who arrive across a land border. Aliens who cross undetected have "entered" the United States, even though they may be illegal. See Helton, *supra* note 165. Also, asylum applicants are different from illegal aliens.

these, the homeless, tempest-tost to me, I lift my lamp beside the golden door.³⁵⁴

It is estimated that up to 500,000 illegal immigrants settle in the United States each year, and that over 200,000 people are awaiting asylum determinations.³⁵⁵ Haitians are not the cause of United States immigration problems, and repatriation has not solved those problems. To treat Haitians differently than other refugees is not defensible. Like others, Haitians should be free to seek refuge in the United States.

354. EMMA LAZARUS, *THE NEW COLOSSUS* (1883). "It deeply offends me . . . to contemplate that these words . . . might apply to white Europeans but not to black Central Americans." *June 1992 Hearing, supra* note 289, at 92 (statement of Rabbi Haskel Lookstein).

A recent cartoon by Auth shows the statue of liberty in front of a barbed wire fence and a notice tells those listed in the current inscription "Need not apply." *CHI. SUN-TIMES*, July 5, 1993, at 15. To the opposite effect are the remarks by Senator Kennedy in debate on the 1990 Immigration Act. He said "[w]e can't afford to put a sign on the Statue of Liberty that says, 'No Vacancy.'" 1989 CONG. Q. REP. 1785.

355. *Reno: Fix Immigration Agency Policy*, *CHI. TRIB.*, June 12, 1993, at 4.