Cubans, ¡Si!; Haitians, ¡No!: U.S. Immigration Policy, Cultural Politics, and Immigrant Eligibility

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Immigration has always been an issue in the United States and, since the 1990s, has attracted more attention because of revised immigration laws and procedures. Of particular interest is the impact of revised immigration laws on Haitian immigrants to the United States. While 9/11 is generally regarded as a milestone for increased security at our borders, previously enacted immigration laws, the 1991 Haitian coup, and key U.S. court cases present more relevance to Haitian immigration today than do many post-9/11 laws, which focus on terrorism and enemy combatants. For this reason, the present article will examine the legal concepts of asylum seekers, refugees, and immigrants as applied to Haitians who have sought entrance to the United States since the 1991 coup. The theoretical framework for this research is based on the premise that political forces and policy rather than adherence to (a) strict due process or (b) international law and custom strongly influence legal interpretation pertaining to Haitian immigrants, refugees, and asylum seekers.

Why Emigrate?

Haiti is the poorest country in Latin America and the Caribbean and ranks as one of the poorest countries in the world. Haiti’s per capita income has shown a steady decline since 2000 rather than the growth or stability experienced by the rest of Latin America. For example, its 2004 per capita gross domestic product was $390, which was a decrease from $438 in 2000, and placed it at the bottom of the developing world in economic terms (Economic Commission for Latin America, 2006, p. 88). From a political vantage, Haiti has fared only a little better. From 1957 until 1986 it endured harsh dictatorships, first by François “Papa Doc” Duvalier until 1971, and then by his son, Jean-Claude Duvalier. The overthrow
of Jean-Claude in 1986 marked a potential opportunity for the creation of a
democratic system, which would better express the will of the Haitian people. Such
a democracy has yet to truly take root, and Haiti, once again, finds itself mired
in political quagmires that offer little hope for a long-term, stable democracy.
The latest crisis occurred in 2005 when internal disputes regarding President
Aristide's ability to govern precipitated his ouster and subsequent transport, with
U. S. help, to a faraway exile in South Africa. Since political opportunism and
violence have become the norm in post-Duvalier Haiti, economic opportunity
has also suffered and investors have been scared away. It comes as no surprise
that political and economic factors form the basis for Haitian emigration to the
United States and are inextricably intertwined.

Overall unemployment is traditionally high in Haiti, and many local
entrepreneurs or farmers complain about the impact that structural adjustment
policies have had on their businesses. Especially hard hit is the agricultural sector
which has seen foreign imports especially from the United States undercut prices
of local products. The result is an increase in primary sector unemployment and
a push from rural to urban areas.

DeWind's analysis also points to "export-led economic strategy" as a major
contributor to Haitian emigration. He writes that export-led development increases
poverty and thus spurs steady emigration from Haiti. Rather than focusing on
pricing structures, DeWind asserts that "Haiti's agricultural and manufacturing
export industries must maintain wages at or below the levels in other exporting
countries to compete in international markets" (DeWind & Baldwin, 1990, p. 147).
This, according to DeWind, exacerbates poverty as well as the overall economic
and political conditions that cause emigration to the United States.

Buchanon's study on emigration concludes that Haitians emigrate largely for
the following reasons:

1. Sheer economic need calls for drastic measures, that is, emigration;
2. lack of opportunity inhibits economic and social mobility; (3)
remittances from abroad facilitate emigration; and (4) emigration is a
generally accepted option (Buchanon, 1981, p. 149).

DeWind analyzes the deep-seated reasons that contribute to Haitian
emigration while Buchanon offers more immediate reasons drawn from United
States Agency for International Development (AID) sponsored surveys. Both
authors offer valuable answers to the question, why emigrate? Baldwin adds
a further explanation, which parallels Buchanon's third and fourth points. He
states that "Haitian emigration patterns may be somewhat independent of
the economic and political factors that are often believed to cause migration"
and considers network formation to be one of the most important structural mechanisms contributing to emigration (DeWind & Baldwin, 1990, p. 149). Strong interpersonal ties among migrants and nonmigrants appear to be a noteworthy factor. One has but to board a Haiti-bound aircraft before the Christmas holidays, as this author has done several times, to witness firsthand these continued bonds between migrants to the United States and nonmigrants in Haiti. At that time of year the Haitians of the diaspora, as they are called, can be seen returning to Haiti laden with gifts purchased in their adopted homeland.

Another way to explain Haitian emigration is through “push-pull factors.” As rural migrants saturate Haiti’s urban areas, especially Port-au-Prince, an urban push develops toward more economically attractive foreign destinations such as the United States. Haitian migration patterns also include a significant exodus toward the Dominican Republic; however, for the purposes of this research, we will only examine the United States as a final destination. This stream of Haitian émigrés who go to the United States in search of a better life or to flee political persecution is an object of concern both from legal and public policy standpoints.

Harris elaborates on the political aspect of push-pull factors and notes that, because of political unrest, civil wars, and violence, many Latin Americans have sought emigration as a solution to their countries’ domestic turmoil. This is especially true of persons from Guatemala, El Salvador, Nicaragua, and Haiti. Such individuals do not choose to emigrate to the United States solely for economic reasons. Often they are “pushed” from their country of origin by high levels of violence and are “pulled” to the most logical alternative in the greater area—one that also offers greater economic benefits and a preexisting social network. That alternative for many Haitians is the United States (Harris, 1993, p. 276).

Cost-Benefit, Due Process, and Political Influence

Tackling the push factors, whether economic or political, at their place of origin is the most logical solution to stemming the tides of immigration to the United States—it is also the most difficult to achieve. Desperate situations usually result in desperate emigration related solutions. To alleviate the desperate situations, massive assistance and support for Haiti are required, but they are not politically popular in the U.S. Congress due to the additional monies required for implementation and the chronic problem of establishing a viable rule of law.

It thus becomes easier to interpret domestic law and international law to stem the tide of immigrants than it is to help solve Haiti’s deep-rooted problems. Understandably, congressional proponents of solving Haiti’s problems tend to come from active-immigration states such as Florida. That state has become
the final destination for many Haitian immigrants, so it is understandable that Florida Senator Bob Graham would tell the House Committee on International Relations' hearing on policy toward Haiti that "turning our backs on Haiti is not an option (as cited in "Haiti Problems May Spill," 1999 p. A7). Graham pointed out that thousands of Haitians will continue to be pushed from Haiti to avoid "political and economic disaster" if the United States refuses to assist Haiti's needed reforms. A discussion of the types of reforms needed is not the object of this paper. Suffice it to say that financing such reforms is perceived by many in the United States to cost more money than interdiction of potential immigrants to prevent their entrance in the first place.

In addition, stricter deportation requirements for legal residents convicted of crimes are also perceived to be more cost effective than funding reforms abroad. The growing perception by many throughout the United States is that immigrants create an undue burden on already overtaxed state infrastructure. California's Proposition 187 translates this perception into reality. However, the critical issue can be couched in the following questions: Who is prevented from entering the United States, and is the prevention mechanism driven by politics in violation of international law and domestic concepts of due process of law?

From a legal standpoint many scholars ask whether Haitian émigrés are afforded due process under existing immigration laws or are mere political pawns within an immigration pecking order that favors Cubans and Central Americans who are regarded as fleeing Communist oppression, past Marxist inspired civil wars, or even natural disasters. The case of Cuban youngster Elian Gonzalez once again brought the issue of fair application of law versus politically motivated action to the forefront. To answer these questions we must examine the major U.S. immigration laws and their application.

Refugees, Asylum Seekers, and Refoulement

The overthrow of President Jean-Bertrand Aristide in September 1991 forced the United States government to revisit immigration laws and practices as they apply to Haitian émigrés. The 1991 coup thus became a pivotal point that shaped Haitian immigration policy for the long term in the United States and, in 2007, still continues to shape policy. It is also a safe assumption that Haiti will continue to see periodic political crises, as it did recently in the 2005 coup; hence, politically based emigration will continue, albeit to a lesser degree, amid the steady stream of economic émigrés. However, before examining the 1991 postcoup crisis, we must define key terms and provide background, which is relevant to the situation. Particular concern centers on the meaning of the terms refugee, asylum seeker, and refoulement. All three terms were applied within the
context of a controversial U.S.-Haitian agreement negotiated in 1981 during the Reagan administration. That agreement is often referred to as the U.S.-Haitian Interdiction Agreement, or simply the Interdiction Agreement. Because of the nuanced importance of these legal terms, it is important to define them and then to explain the Interdiction Agreement.

Congress accepted the same definition of refugee used in the United Nations Convention Relating to the Status of Refugees to which the United States is a party. An identical definition also appears in Article 33 of the Protocol Relating to the Status of Refugees (U.S. Department of State, 2005). The Immigration and Nationality Act (1951), as codified in 8 U.S.C. section 1101(a) (42)(A), defines a refugee as:

Any person outside any country of such person's nationality ... 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. (Immigration and Nationality Act, 1951)

The definition of refugee does not extend to persons who flee their country of nationality for economic reasons and thus precludes them from seeking asylum. As we see, these definitions muddle the situation, particularly of the Haitian boat people, who fled between 1991 and 1994.

An asylum seeker, or potential asylee, is defined by the Immigration and Naturalization Service (INS) to be:

Any person who is in the United States or applying for admission at a port of entry and is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution. (U.S. Department of Justice, 1999b, p. 3)

Refugee status is thus applied for individuals abroad, while asylum status is applied only in the United States or at ports of entry (Turansick, 1999, p. 9). At issue in the determination of refugee status is the notion of refoulement, or return, of persons before their potential refugee status is determined. Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees adheres to the principle of non-refoulement, which forbids the involuntary return of persons who demonstrate eligibility criteria for refugees. Article 31 is explicit in stating that refugees "cannot be penalized for illegally entering a country if they have fled from a place where their life or freedom was threatened" (Harris, 1993, p. 275). At issue from 1991 through 1994 are (a) whether refugee status
was determined at all; and, (b) where refugee status can legally be determined or chosen not to be determined. Consequently, the question is, Is refoulement on the high seas permissible? This is important when applied in conjunction with the Interdiction Agreement as President George H. W. Bush did during his administration (1988-1992).

The Interdiction Agreement

The memorandum of understanding signed on September 23, 1981, between U. S. Ambassador Ernest H. Preeg and Haitian Foreign Minister Edouard Francisque created a cooperative interdiction relationship between the United States and Haiti on the high seas. The Haitian government of Jean-Claude Duvalier granted permission for the U. S. government to interdict and return Haitians and vessels involved in the illegal transport of Haitian nationals. The memorandum recognized the legal status of the 1967 Protocol Relating to the Status of Refugees, but also specified:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port. ... (Leich, 1982, pp. 374-375)

Despite the extensive discretion to return Haitians on the high seas, the agreement also recognized that the U. S. government would not return Haitians determined to qualify for refugee status. To implement this agreement, President Reagan issued Executive Order 12324, Interdiction of Illegal Aliens, on September 29, 1981, and reiterated that "no person who is a refugee will be returned without his consent" (Exec. Order 12324, 1981). This clause implied the need for a screening process to determine eligibility for refugee status. The presumption was that the screening would be undertaken in international waters.
The 1991 Coup Against Jean-Bertrand Aristide

One of the most contentious immigration issues in recent years was the decision made by former President George Bush to return Haitian émigrés who were intercepted by the United State Coast Guard in international waters. While upheld by the U. S. Supreme Court, this action raised serious concerns about whether it constituted a violation of international law. In addition, the action brought into question the fair treatment of Haitians who unquestionably comprised a less than fully effective lobbying force in domestic American politics.

Following the September 1991 coup to overthrow President Jean-Bertrand Aristide, political repression escalated and, in turn, provoked an exodus of Haitians to other countries. Approximately 30,000 Haitians are estimated to have fled to the Dominican Republic while another 40,000 sought refuge in the United States. Their final destination of choice was Miami (Ortmayer & Flinn, 1993, p. 1). The Organization of American States trade embargo imposed on October 8, 1991, was intended to squeeze out the military junta led by General Raoul Cedras. These sanctions also had the unintended consequence of driving unemployment to an all-time high of 80%. While inflation was rampant and political violence continued unabated, conditions were ripe for emigration. Media coverage of impoverished Haitian boat people in overloaded vessels invoked an image of chaos that soon alarmed Florida's state officials and prompted the Bush administration into drastic action.

Until September 1991, the Coast Guard boarded suspected vessels, and INS officers would screen passengers to determine whether they had a valid refugee claim based on fear of persecution in Haiti.

The “Guantanamo Solution”: A Breach of International Law?

While only 9,941 Haitians were intercepted at sea for the entire year 1991, the figures rose to approximately 28,603 from January to June 1992. Screening thousands of fleeing Haitians was no longer possible on board Coast Guard vessels, so a temporary detention center was erected at Guantanamo Bay Naval Base, Cuba, for the purpose of temporarily housing approximately 4,000 Haitians before deciding their status. (This facility later acquired the name Camp X-Ray and served as the initial detention center for Al-Qaeda enemy combatants captured abroad.) In this overburdened environment, tensions escalated and many Haitians at Guantanamo who were denied refugee status refused to return to Haiti. Forcing their return to Haiti would have been a violation of Article 33 of the Protocol Relating to the Status of Refugees. The situation was clearly getting very muddled as more Haitians were brought to Guantanamo. By May 1992,
nearly 8,500 Haitians were being held at Guantanamo (Ortmayer & Flinn, 355A, 1993, p. 9). The situation was not only creating negative publicity for the Bush, Sr., administration, but was also regarded as an expensive undertaking (Germani, 1991, p. 7; Ortmayer & Flinn, 355A, 1993, p. 10).

The provisions of Executive Order 12324 were deemed inadequate to stem the waves of Haitians attempting to enter the United States while the Guantanamo holding area was the object of continued bad press. On May 24, 1992, President Bush chose to forgo the general screening process and force repatriation of Haitians intercepted on the high seas. This policy shift was expressed in Executive Order 12807, which would suspend Reagan era Executive Order 12324.

In a drastic measure to halt uncontrolled illegal Haitian immigration, President Bush, Sr., reinterpreted the Protocol Relating to the Status of Refugees and concluded that “the legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees ... do not extend to persons located outside the territory of the United States” (Exec. Order 12807, 1992).

While the previous executive order had provided assurance that no refugee would be returned without his or her consent, the new executive order simply gave the attorney general “unreviewable discretion” to decide that a person deemed to be a refugee “will not be returned without his consent” (Exec. Order 12807, 1992). In short, the screening process that determined refugee status was terminated. As Hight, Kahale, and Jones (1994) note “the minimal due process rights granted Haitian refugees on the high seas ...[were] effectively rescinded” (p. 15). Most Haitians were forcibly returned to Haiti without asking whether they had a credible fear of persecution in Haiti (Hight, Kahale, & Harris, 1993, p. 112). The policy was an attempt to turn away Haitians en masse before they made it to the United States—regardless of potential refugee status. Given the strained relations between the United States and the Haitian military junta, it was unreasonable to expect that the illegitimate Haitian government would contest this executive order. At the same time, President Aristide was in no position to criticize the administration that granted him exile in Washington, D.C.

The decision to invoke a refoulement (return) policy was made more palatable since the Bush administration regarded those fleeing Haiti to be economic migrants and not victims of political persecution (Harris, 1993, p. 281). At issue was whether this interdiction effort was legal under 8 U.S.C. section 243(h)(1) of the immigration code. That is, did the code, which prohibits the return of aliens who face a credible fear of persecution as determined by the attorney general, apply to individuals intercepted beyond U.S. borders?

This question came before the courts in several significant cases. In Haitian Refugee Center, Inc. v. Baker, cases I, II, III (1991 and 1992), the Eleventh Circuit Court of Appeals opined that 243(h)(1) does not apply beyond the borders of the
United States. The Haitian Refugee Center had sought to prevent the return of Haitians interdicted on the high seas. The plaintiffs argued that Article 33 of the 1967 Refugee Protocol required screening for political refugee status. The Eleventh Circuit Court saw the situation differently. It noted that, since Congress did not pass legislation that would incorporate Article 33 into domestic law, no rights could be invoked based on that article of international law. Moreover, the court ruled that immigration rights only apply to aliens within U.S. borders. Haitians interdicted on the high seas had no recourse to judicial review of administrative decisions made by the INS.

A different opinion was issued by the Second Circuit Court of Appeals in Haitian Centers Council, Inc. v. McNary (1992). The court reasoned that "Congress made no mention of where the alien must be returned ‘from’" (Highet, Kahale, & Harris, 1993, p. 114). Thus, section 243(h)(1) must be upheld even as it applied in international waters. Executive Order 12807 (1992) was then struck down because it did not call for a blanket screening, or general determination, of refugee status while on the high seas.

The conflicting Second Circuit opinion in Haitian Centers Council, Inc. v. McNary was superseded by the United States Supreme Court decision on August 1, 1992, to grant the Bush administration “interim authority” to continue forced repatriation without refugee screening. The court made its final decision on March 2, 1993, in Sale v. Haitian Centers Council, Inc. (1993). This time the highest court of the land favored the Eleventh Circuit Court’s opinion and decided that acts of Congress do not apply outside of U.S. borders. While acts of Congress would not apply outside the United States, thereby negating a due process argument, the breach of international law would still apply.

Yet the court ruled that Article 33 does not apply on the high seas and refoulement implies repulsing, or driving back persons, “at a border rather than an act of transporting someone to a particular destination” (Highet, Kahale, & Jones, 1994, p. 121). This opinion prevailed despite numerous amicus curiae briefs submitted by the United Nations High Commissioner for Refugees to persuade the court that “Article 33 prohibits the return of refugees ‘in any manner whatsoever’” (Highet, Kahale, & Jones, 1994, p. 125).

Even if the Article 33 argument was negated as it was, the principle of upholding international treaty commitments should have entered into the decision. We are reminded that the U.S.–Haitian Interdiction Agreement was still in effect and that agreement called for a strict determination of refugee status prior to refoulement.

Unfortunately, respect for international law was dealt a major defeat in the Sale case. The case also proved a decisive blow for Haitians seeking refugee status. This meant that U.S. presidents could legally continue forcible returns on the high seas of one group (Haitians) that was singled out in an unprecedented manner.
This policy continued during William Jefferson Clinton's administration until it was met with outcries from various black lobbies and legal scholars. As a presidential candidate, Clinton sternly criticized Bush's refoulement policy for its undue harshness. This criticism came back to haunt Clinton as president. His perceived Haitian sympathies were interpreted by many as encouraging hordes of unwanted boat people who also happened to be black. When Clinton assumed office, his main policy objective was to keep Haitians from emigrating. The Clinton administration continued Bush's refoulement policy in order to avoid the same anti-immigrant political pressures that plagued President Bush.

It is understandable that, during the 1992 election year, Bush would be sensitive to Florida voters who were against Haitian immigration. South Florida's heavily Republican Cuban American community fit into this category for it was particularly against increased Haitian immigration. However, once Clinton was in office, his immigration policy took the African American community by surprise because it differed so vastly from his campaign promises. Black lobbies that were Clinton's political allies viewed this as a stab in the back. Once again Haitian immigration policy was being driven not by law, but by politics and pressure from immigrant recipient states like Florida. So clear was the policy shift that, during the Sale v. Haitian Council Center, Inc. case, the Clinton administration argued in favor of refoulement on the high seas and for the right to return Haitians to Haiti without prior screening (Ortmayer & Flinn, 1993, 355B, p. 1).

Randall Robinson, executive director for the lobby TransAfrica Forum condemned Clinton's overall Haiti policy as a failure (Robinson, 1994, p. E17). The Congressional Black Caucus did the same. Even President Aristide condemned Clinton's policy as "racist" (Greenhouse, 1994, pp. A1, A5). Repeated lobbying efforts were eventually successful and, by summer 1994, the Clinton administration modified its immigration policy toward Haiti. It ceased forcible repatriation without screening and instead chose to "process" Haitian boat people at unspecified Caribbean locations and onboard Coast Guard vessels. Haitian emigration was reduced to normal rates by fall 1994 after Aristide was restored to the presidency. This marked the end of a major crisis in U.S. immigration policy. The Haitian boat people issue revealed many flaws in U.S. attitudes toward treaty obligations and in U.S. respect for international law and customs. What prevailed was loose judicial interpretation based on shallow arguments regarding the due process requirements for potential refugees. Domestic fears about hordes of Haitian boat people clearly prevailed, helped set policy in both the Bush and Clinton administrations, and ultimately received legal blessing from the U.S. Supreme Court.
Could we see a repeat of this behavior in the future? The answer is yes. While executive orders can be easily modified, the Supreme Court gave the president great discretion to exercise his authority to screen, or not screen, potential refugees on the high seas. According to the Supreme Court in the Sale case, the choice remains in the hands of the president. It noted that "statutory provisions ... confer authority on the President to suspend the entry of 'any class of aliens' or to impose on the entry of aliens any restrictions he may deem to be appropriate" (Sale v. Haitian Centers Council, Inc., 1993). It just so happens that President Clinton chose not to invoke it again. However, who is to say that a future president would not change this policy?

Contemporary Immigration Issues

While the Haitian immigration crisis over forced repatriation without refugee screening on the high seas is behind us, it should be noted that the U.S.–Haitian Interdiction Agreement is still in effect. However, additional laws have been promulgated which spark new legal controversies that once again raise questions about due process and fair treatment of Haitians in the United States.

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is a product of renewed sentiments against undocumented aliens and legal aliens who are perceived to unjustly burden both public and private sectors. IIRIRA is a far cry from the 1986 Immigration Reform and Control Act (IRCA) that granted amnesty to thousands of undocumented aliens able to demonstrate long-time residence in the United States. In particular, IRCA enabled Cubans and Haitians who had resided continuously in the United States since January 1, 1982, to adjust their immigration status to that of permanent resident (8 CFR 1255(a)(1994)).

IIRIRA is designed specifically to decrease the attractiveness of pull factors. It increases border control efforts, dramatically reduces judicial review of decisions pertinent to deportation proceedings, and removes most immigration benefits derived from illegal residence in the United States. IIRIRA increased the difficulty of legalizing one's immigration status. A lot happened between 1986 and 1996 that sparked immigration law revisions. Wars in El Salvador, Nicaragua, and Guatemala, and economic hardship in Cuba as well as the exodus of Haitian boat people from 1991 to 1994 all contributed to an influx of aliens to the United States and added restrictions in the law.

No amnesty provision following long-term residence is contained in IIRIRA; thus, continued unlawful presence offers little hope of regularizing one's
immigration status. In addition, penalties for unlawful residence were augmented. The law now calls for mandatory detention of unlawful aliens who have resided in the United States for less than two years (Abriel, 1998, pp. 2-25).

What is more, the law calls for deportation of convicted alien felons. In a lesser-publicized section it also requires aliens, including permanent residents, with criminal convictions to be treated as “arriving aliens” upon reentering the United States and to remain incarcerated prior to deportation. Neither the INS decision to incarcerate nor the deportation decision is interpreted as automatically warranting judicial review. Consequently IIRIRA’s provisions have caught many longtime permanent Haitian residents in legal limbo as they remain incarcerated.

The Case of Ralph Richardson

Ralph Richardson was a Haitian-born and legal permanent resident who came to the United States at the age of two. His case illustrates the intent of IIRIRA to implement an immigration policy that reflects a get tough immigration sentiment, especially for those immigrants convicted of crimes. This sentiment is perceived to be widely held by many Americans and IIRIRA is the policy embodiment of getting tough. While the law does not single out Haitians as a class of people, one cannot help but wonder whether the law violates rights afforded legal permanent residents.

Richardson was a married father and owner of a janitorial company in Norcross, Georgia, who departed in October 1997 on a short trip to Haiti to check on his mother’s rental property (Douthat, 1999, p. B1). Unbeknownst to him, Richardson’s immigration status would be reclassified as an “arriving alien” upon reentry because of a 1991 drug conviction. Under IIRIRA permanent residents who have been convicted of aggravated felonies are considered to be arriving aliens and can be arrested and deported. Richardson was incarcerated at Krome Detention Center in Miami starting in 1997 (Reynaud, 1999, June 17, p. A2).

In July 1999, at the Eleventh U.S. Circuit Court of Appeals, Richardson was denied a habeas corpus petition requesting a bond hearing. The court ruled that, under IIRIRA, the administrative Board of Immigration Appeals must first issue its final deportation order. Reynaud notes, “immigration law had divested the federal courts of jurisdiction” to hear Richardson’s petition (Reynaud, 1999, July 23, p. 4). Writing for the appeals panel, Judge Frank M. Hull clarified the political nature of the law when he stated that “Richardson correctly points out many harsh consequences created by these new immigrant laws, but those consequences are not the result of constitutional violations, but are the result of political decisions” (as quoted in Reynaud, 1999, July 23, p. 4).

Arguing for the Office of Immigration Litigation, Ernesto Molina concluded that IIRIRA limits court review of immigration cases and this was seen to include
habeas petitions as well. Richardson’s attorney, Haitian specialist Ira Kurzban, formerly served as counsel to Jean-Bertrand Aristide. Kurzban argued that the right of habeas corpus contained in previous immigration laws could not be denied because it was never specifically repealed (as quoted in Reynaud, 1999, July 23, p. 4). Indeed, the Third Circuit Court of Appeals in the DeSousa case also agreed that IIRIRA does not deny federal courts from issuing writs of habeas corpus (“News from the Court,” 1999, p. 1).

On September 3, 1999, Richardson was still detained and faced a deportation hearing. This time his administrative hearing did not go unnoticed. Instead it attracted hundreds of demonstrators who protested the treatment of 165 detainees like Richardson.

The Supreme Court: Window of Opportunity for Reform

According to attorneys working on his case, Richardson remained incarcerated at Krome Detention Center following a brief transfer to another detention center. He was not granted a bond hearing and his case was pending certiorari review at the Supreme Court in 2000 (R. Huber, personal interview, March 13, 2000). However, the Supreme Court (2000) rejected Richardson’s request for certiorari review and, in that same year, Richardson was quietly deported in a manner devoid of any press coverage (Spokesperson for Ira Kurzban, personal interview, October 27, 2006). Had the Richardson case been heard at the Supreme Court, it would have offered the opportunity to decide on the constitutionality of select parts of IIRIRA that deny due process that is normally afforded to legal permanent residents.

The case begged the question, Can permanent legal residents with due process rights be automatically reclassified at a port of entry as “arriving aliens” without such rights if they are not afforded access to judicial recourse? Are such persons not unjustly denied due process during this transitional period from permanent resident to arriving alien? And, should such persons not be permitted to avail themselves of judicial review during the process of reclassifying them as arriving aliens? Affording persons this right does not invalidate the reclassification process. It only implies that an individual like Ralph Richardson could then make use of the judicial system in order to dispute his reclassification as an arriving alien. Currently reclassification of one’s immigration status remains at the discretion of the U.S. Citizenship and Immigration Services (USCIS), the bureau within the Department of Homeland Security that replaced the INS. Since this 1999 case, immigrant reclassification has not rested with officials outside of Homeland Security nor has it rested with the courts.

Regardless of the Richardson deportation case, one lesson is clear: Immigration changes are effected far more rapidly if those involved possess
political clout and can muster the fear of Communist repression. Legal Haitian residents and U.S. citizens cannot muster fear of Communism, which is still part of the Cuban immigration equation. Haitians' hopes must consequently rely upon coordinated and effective lobbying campaigns—something that in reality has not happened due to the impoverished nature of many Haitian immigrants. The greater number of politically active Cuban Americans in Florida, where many Haitian U.S. citizens also live, reduces the likelihood of electing Haitian Americans to Congress.

A Cuban American Comparison

So strong are the bonds between the U.S. government and the Cuban American community that the specter of Castro's Communist regime still elicits a quick governmental response to most Cuban American lobbying efforts. In a memorandum issued in April 1999, INS Commissioner Doris Meissner clarified that Cubans who arrive at "other than designated ports of entry into the United States are eligible for ... eventual adjustment of status to that of permanent resident" (U. S. Department of Justice, 1999a). Prior to that memorandum Cubans were subject to provisions in the 1995 Cuban Adjustment Act, which granted them asylum upon reaching a designated port of entry. The memorandum broadened the ability to seek asylum for Cubans and was a response to astute lobbying of the INS by private groups and congressional members from Florida.

The 1995 Cuban Adjustment Act was largely the result of an agreement with Cuba to return those persons apprehended by the U.S. Coast Guard before reaching land, and it became known as the "wet feet–dry feet" agreement. This policy is vaguely similar to the Haitian Interdiction Agreement with one major exception—the act automatically grants most Cubans reaching a port of entry the ability to become legal residents. The Haitian Interdiction Agreement does not.

The Cuban American lobby has proved highly effective in gaining individual concessions despite a direct conflict with the existing wet feet–dry feet criteria. In a June 1999 televised chase, six Cubans were pursued by the Coast Guard as their raft drifted along the Florida shore. Upon apprehending four of the men, an officer used pepper spray on one of them in an incident that did not go unnoticed by the cameras. Tensions escalated as the four men were taken to Krome Detention Center. This provoked 3,000 demonstrators to fill the streets near Miami Beach to protest the detention.

The four men who had not reached land on their own volition were released from custody following the demonstration and were told they would be eligible to apply for residency in 366 days. The release appeared to be in direct violation of the Cuban Adjustment Act and the wet feet–dry feet policy. To make matters worse,
one of the detainees revealed hearing from federal officials that the group was released as a result of political pressure from the Cuban American community.

Shortly after this incident, Representative Lincoln Diaz-Balart (R-FL) from Miami insisted that President Clinton end all repatriations to Cuba. Other Florida representatives including Ileana Ros-Lehtinen (R-FL) and Carrie Meek (D-FL) sought further clarification of the raft incident from the Coast Guard and the INS (Calvo & Parra Herrera, 1999, p. 1). At issue was not whether Cubans were deserving of asylum or not, but whether such political clout could be mustered by the Haitian American community. In similar circumstances, the answer is likely to be a resounding no.

The Case a/Lionel Jean-Baptist: Misinterpretation—or Done Deal?

A relatively unique and still ongoing immigration case with international ramifications is that of Haitian immigrant, Lionel Jean-Baptiste, who arrived 26 years ago, obtained permanent residence, and petitioned for U.S. citizenship on November 21, 1994. Jean-Baptiste's application to become a naturalized citizen was approved on February 13, 1996, and on April 23, 1996, he became a U.S. citizen. In 1995, the period in which his naturalization was being processed, Jean-Baptiste allegedly committed conspiracy to distribute crack cocaine although he maintains that he was a victim of a sting operation in which he simply revealed where to buy drugs (Chardy, 2006a, p. 1B). On October 30, 1996, he was arrested. He was convicted on January 8, 1997, and sentenced to 97 months in prison, 5 years supervised release, and a $50,000 fine.

He began serving his prison sentence and, in 2002, immigration officials learned of his case and commenced denaturalization, or revocation of citizenship, proceedings. His quest through the court system ended in the Eleventh Circuit Court of Appeals (2005) where, like Ralph Richardson, he too, lost his case. The appeals court ruled in 2005 that Jean-Baptiste did not exhibit "good moral character" prior to his application for citizenship and hence his citizenship was revoked. This landmark case represents the first time in recent history in which a naturalized citizen had his citizenship revoked following a criminal conviction.

Like Ralph Richardson, Jean-Baptiste found himself incarcerated at Krome Detention Center awaiting deportation to Haiti. Also like Richardson, Jean-Baptiste's petition for certiorari at the Supreme Court was denied on October 3, 2005 (Jean-Baptiste v. United States, 2005). This time, however, there was an international twist because the Haitian government refused to accept him back—the reason given was that he was a U.S. citizen and had denounced his Haitian nationality (Chardy, 2006a, p. 1B). Finding a third country to take Jean-Baptiste is also proving to be problematic as France has also refused to grant entry to this apparently stateless
person (Chardy, 2006b). This case holds significance because denaturalization is extremely rare and because it sheds light on broader immigration issues affecting the U.S. Haitian community that might otherwise go unnoticed.

Conclusions For The 21ST Century

Strides Forward in Immigration Policy?

While immigration policy regarding Haitians has not been as responsive as it is toward other groups, the situation has seen overall improvement. In an effort to correct immigration inequalities between various nationalities, two measures were adopted in recent years. First, President Clinton issued a memorandum on December 23, 1997, that empowered the attorney general to grant what is termed "deferred enforced departure" (DED) to certain Haitians who have resided in the United States since December 31, 1995 (Memorandum for the Attorney General, 1997). DED for Haitians was designed to be an interim measure until passage of the Haitian Refugee Immigration Fairness Act (HRIFA) in 1998 (Schoenhotlz & Muther, 1999, p. 517). The DED status permitted individuals to legally reside and work in the United States pending future changes to their immigration status as a group. Due to its interim intent, by November 2006, no countries were listed under the DED category, including Haiti (U.S. Department of Homeland Security, 2006).

HRIFA enables those Haitians residing in the United States before December 31, 1995, to adjust their status and become legal residents. Based on HRIFA's guidelines, USCIS stipulates that, after the expiration deadline of March 31, 2000, only dependents can petition for permanent residency (U.S. Department of Homeland Security, 2006b). Schoenhotlz and Muther estimate that the act would benefit approximately 50,000. Only 39,050 HRIFA applications had been received from Haitians, however, by February 28, 2005 (U.S. Government Accountability Office, 2005, p. 3).

In a 1998 position paper on Haitian immigration, the Haitian Ministry of Foreign Affairs expressed grave concern over the 1997 passage of the Nicaraguan Adjustment and Central American Relief Act (NACARA), which facilitated Cubans, Nicaraguans, Salvadorans, Guatemalans, and even nationals of former Soviet bloc countries who sought residency status. The Ministry noted the glaring absence of Haitians in that act. While the act refers to Central America, it includes Cubans from the Caribbean as well. The Haitian government was understandably concerned about immigration decisions in the United States because any exodus of Haitians back to Haiti was regarded as a destabilizing force and economic strain. It noted: "The Government of Haiti takes the view that any massive deportation
of thousands of its citizens would upset the delicate balance, and create chronic instability and chaos" (Haiti, Ministry of Foreign Affairs, 1998). Regularization of immigration status for Haitians residing in the United States was thus in the best interest of the Haitian government.

Another concern expressed by the Ministry of Foreign Affairs pertained to the “matter of justice” for Haitians of the diaspora. The position paper went on to express the belief that Haitians in the United States had experienced discrimination. The Haitian government recognized that Nicaraguans, Salvadorans, and Guatemalans had all experienced hardships yet had been granted many reprieves to adjust their immigration status while Haitians, who had also experienced great political duress, had not been accorded similar treatment. The Ministry thus strongly urged Congress to pass HRIFA.

Such lobbying efforts were worthwhile for HRIFA did become law in October 1998. It is, however, at best a stopgap measure that does not incorporate Haitians into the more comprehensive NACARA. In addition, HRIFA only covers Haitians who have a “credible fear of persecution” or have petitioned for asylum and have resided in the United States since before December 31, 1995 (U.S. Department of Homeland Security, 2006b).

Noting the unequal treatment within NACARA, Congress once again took notice. House Resolution 2722, introduced in August 1999, sought to incorporate Haitians into NACARA. The new act was to be called the Central American and Caribbean Refugee Adjustment Act and would have placed Haitians on par with the above-mentioned Central American nationalities, which also included Cubans. This act never materialized; instead, the Central American and Caribbean Refugee Adjustment bill died in committee.

Despite the ominous restrictions within IIRIRA, things are looking brighter for law-abiding Haitian U.S. residents who seek to adjust their residency status if we consider HRIFA to be a start in the right direction. Nevertheless, one thing remains in sharp contrast to the existing acts and proposed bills—the lack of effective lobbying power by the Haitian community in the United States. To remedy this shortcoming, existing Haitian interest groups should expand their focus on immigration issues. Currently such issues are tracked by groups like the National Coalition for Haitian Rights, Haiti Advocacy, and the Florida Immigrant Advocacy Center. Pro bono legal assistance is also offered in some immigration cases. For example, in the high profile Ralph Richardson case, the law firm of Kurzban, Kurzban, Weinger, and Tetzeli was involved on a pro bono basis, thus providing access to high quality attorneys in Miami. Traditionally, sources of lobbying support have also come from the African American community. Groups like TransAfrica Forum have some proven effectiveness in achieving their objectives. Since Haitian American groups enjoy less visibility than traditional African American or other groups in general, it
appears logical that a coalition of forces between various groups would be the most effective route to success in immigration issues.

**Temporary Protective Status and the TransAfrica Forum**

TransAfrica Forum's (2004) latest attempt to draw attention to Haitian immigration issues came in 2004 when it issued a call to grant Haitians living in the United States temporary protective status (TPS). Temporary protective status is “granted to eligible nationals of designated countries ...who are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions” (U.S. Department of Homeland Security, 2006a). It is not a status which leads to permanent residency or U.S. citizenship (Wasem & Karma 2006, p. 2).

Following the devastation from tropical storm Jeanne in September 2004, which left 1,100 dead and 100,000 homeless according to TransAfrica Forum, the group requested that Haiti be granted TPS status, but to no avail (TransAfrica Forum, 2004). By November 2006, TPS was granted, and extended annually, to select countries, some of which have been removed over the years from the current list. Today countries whose nationals enjoy TPS include Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia, and Sudan (U.S. Department of Homeland Security, 2006b). Haiti is not on the list, nor has it ever been on the TPS list, despite its frequent environmental disasters and obvious political violence. Wasem and Karma (2006) acknowledge that while some have called for the Bush administration to grant TPS to Haitians, little public outcry has been made and no response has been forthcoming from the executive branch.

**Lesson Learned**

The lesson learned from Haitian immigration status in the United States is clear—that a dose of fear of the poorest population in both Northern and Southern Hemispheres drives U.S. immigration policy and it did so prior to 9/11. The post-9/11 immigration environment is made more complex by fears of terrorism and, as Waibsnader notes, also lacks “humanitarian goodwill”—especially in Congress—as well as manifesting a “deep skepticism toward asylees” (Waibsnader, 2006). Lack of a strong and nationally recognized advocacy network also works against Haitians within the United States when they encounter immigration difficulties. This means government officials have greater discretion to interpret immigration regulations and laws in ways that may disfavor the Haitian immigrant. Cubans, on the contrary, often find interpretations that swing in their favor.
In one illustrative example, 207 Haitians and a handful of Dominicans landed at Key Biscayne on October 29, 2002, and became the basis for the Department of State to conclude that U.S. policy must not appear soft on immigration or it could spark ever more attempts to illegally enter the United States (U.S. Department of Justice, 2003, p. 579). Then attorney general John Ashcroft took the State Department’s view one step further by siding with the Coast Guard and INS in a bond hearing for some of the detained Haitians. The Coast Guard regarded numerous unauthorized Haitian attempts to enter the United States by sea as a drain on its resources, which could be better channeled elsewhere. The Attorney General’s Office went one step further by restricting Haitians seeking entry out of national security concerns since Pakistanis and Palestinians had used Haiti in attempts to gain entry into the United States (U.S. Department of Justice, 2003, pp. 578-579; Waibsnaider, 2006). Thus, stepping up interdiction of Haitians who illegally attempt to enter the United States has now become a national security issue because the route they take might also be used by terrorists. This logic makes no mention of the Canadian-U.S. border nor of the fact that an al-Qaeda trained terrorist, Ahmed Ressam, attempted to cross from Canada at Port Angeles, Washington, in December 1999 with 130 pounds of explosives to be detonated at the Los Angeles International Airport (Clayton & Chaddock, 2001, p. 3).

This preoccupation with terrorism can also be interpreted as a convenient pretext to stem further Haitian immigration into the United States. Subtitle B, “Enhanced Immigration Provisions,” of the Patriot Act focuses on stemming terrorism with immigration as a means to that end (USA Patriot Act, 2001). This may change somewhat after January 2007, as the face of a Democratically controlled Congress will likely incorporate a softer approach to immigration policy than existed under the hard-line Republican Congress. That said, the reader should not come to expect too much change in immigration laws and regulations toward Haitians since many of the actions outlined in this article span both Democratic and Republican administrations.

Without a historically relevant Communist leader such as Fidel Castro, in the Cuban case, or the civil wars that ravaged Central American countries to rid them of pro-Communist forces, Haiti attracts little public affinity or sympathetic memory. Instead, American apprehension turns to Haiti’s high AIDS rate, its unending political turmoil, and, to make matters worse, its voodoo connection, which only fuels misunderstanding and a desire to keep its people from reaching U.S. shores.

After conducting years of Caribbean immigration research, Stepick bluntly observed the obvious—that “we have this perception of Haitians being basically pathetic. It’s a misperception … Nevertheless it’s a perception that does lie behind many of the actions of the U.S. government and general public opinion” (Stepick quoted in Arrillaga, 2006). Haiti is indeed a country that gets no respect. Its
people fleeing the island in hopes of a better life in the United States, free from political repression and economic dysfunction, will continue to bear the brunt of an unbending U.S. policy. Is it because they are Haitians, and not Cubans, Nicaraguans, or Salvadorians?

Notes

1. According to Waibsnaider, 9/11 resulted in a significant decrease of refugees admitted into the United States with those from Afghanistan and Iraq being especially susceptible and often denied entry. See Waibsnaider, 2006.

References


References


Haitian Refugee Center, Inc. v. McNary. 969 F.2d 1350 (2nd Cir. 1992).


Haitian Refugee Center, Inc. v. Baker II. 950 F.2d 685 (11th Cir. 1991).


Immigration Reform and Control Act. 100 Stats. 3359 (1986).

*Jean-Baptiste v. United States*, 395 F.3d 1190 (11th Cir. 2005).


