

ARTICLES

THE POLITICS OF U.S. ASYLUM POLICY: THE CASE OF RECENT UNDOCUMENTED HAITIAN IMMIGRANTS*

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INTRODUCTION AND BACKGROUND

The tradition of "asylum" in the U.S. may be said to date as far back as the arrival of the first pilgrims at Plymouth, Massachusetts. Early settlers of America were refugees from Europe seeking to escape various forms of religious, social, and political persecution.¹ The tradition of welcoming those escaping persecution also includes the thousands of exiles who left Europe in the first half of the 19th Century because of recurrent political turmoil and upheavals.² Religious and political persecution were, of course, not the only reasons for which refugees or exiles have sought to come to America. Historically, a disproportionate percentage of immigrants coming to this country were motivated by the prospects of economic betterment.³

The official policy of admitting refugees and granting political asylum as a means of promoting the protection of individuals from political persecution

* This paper focuses on a narrow aspect of U.S. policy towards undocumented Haitians during the period 1978-1980. Specifically, the paper examines certain extraordinary policies and decisions that were devised and implemented against a group of undocumented Haitians who sought political asylum in the U.S. The paper further examines the premises and assumptions guiding U.S. policy-makers in their official treatment of undocumented Haitians and the impact of the extraordinary policies on Haitian asylum applicants. Finally, the paper offers alternative explanations for the type of decision-making behavior observed in the Haitian cases.

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1. The commonplace observation that America was founded by individuals escaping religious and political persecution in 17th century Europe requires little historical demonstration. The 102 pilgrims who stepped off the Mayflower in 1620 at Plymouth on the Massachusetts Bay were harbingers to a much larger influx of Puritans who fled England to avoid religious harassment and various forms of political persecution. Following the Puritans, there came the Quakers from Ireland and Wales, and before long, the Monnonites, Inspirationalists, Schwenckfelders and Moravians were flocking to colonial America seeking to escape harassment and persecution. For an overview of religious persecution in Europe in the 17th century and immigration to colonial America, see generally B. GREENLEAF, *AMERICAN FEVER: THE STORY OF AMERICAN IMMIGRATION* (1970).

2. During the first half of the 19th century, Europe underwent a succession of political upheavals followed by a wave of exiles coming to America. By far, the larger exodus of political exiles came to this country after the Revolution of 1848 in Germany, Italy, Austria-Hungary, and the collapse of the Young Ireland Movement and the Revolution from France and Poland. However, even in this early period, political refugees coming to America represented a small fraction of the overall immigration. For a related discussion see M. JONES, *AMERICAN IMMIGRATION* (1960).

3. The first major wave of "economic refugees" to this country occurred during the so-called potato famine in Ireland in 1846 and in the aftermath of the repeal of the corn laws and introduction of poor laws. In the following three decades, an estimated two and one-half million Irish immigrated to the U.S. seeking improved economic opportunities. B. GREENLEAF, *supra* note 1.

is of relatively recent origin, although the antecedents of present refugee and asylum policy may be traced to the earliest immigration control laws enacted by Congress.⁴ In fact, the effort to provide refuge to individuals fleeing political persecution did not gain momentum until after World War II. Immediately after that war there were large numbers of displaced refugees, stateless persons and others fleeing the drastic political changes that had swept Eastern Europe; and a significant proportion of these persons sought refuge and resettlement in the U.S. In 1948, Congress enacted the Displaced Persons Act which made it possible for over two-hundred thousand refugees from war-ravaged Europe to resettle in the U.S.⁵

The spread and entrenchment of communism in Eastern Europe in the post-War period and the specter of communism in the Third World further triggered a particularly acute problem of refugees seeking to avoid life under communist regimes.⁶ Since 1952, the U.S. has explicitly recognized the need to provide protection to those fleeing persecution in their homeland.⁷ Over the past three decades, the policy of admitting eligible refugees fleeing various forms of persecution has been an important feature of U.S. foreign and immigration policy. In 1965, Congress amended the Immigration and Nationality Act and expanded coverage of the provisions by specifying asylum conditions to include "persecution on account of race, religion and political opinion."⁸ Three years later, the U.S. ratified the U.N. Protocol, and the U.S. adopted a more comprehensive definition of refugees and conventions for the treatment of such refugees "without discrimination as to race, religion or country of origin."⁹

Over the past three decades hundreds of Hungarians, Czechoslovaks, Poles, Soviet Jews, Cubans, Indochinese and others have fled totalitarian regimes in their homelands and have sought and obtained refuge in the U.S.¹⁰

4. For instance, in several immigration control laws introduced in the late 1800s, individuals who were likely to face political persecution if deported were given protection from deportation. *See e.g.*, Act of Mar. 3, 1875, ch. 141, § 55, 18 Stat. 477; Act of Aug. 3, 1882, ch. 376 § 4, 22 Stat. 214; Act of Mar. 3, 1891, ch. 551 § 51, 26 Stat. 1804; Act of Feb. 20, 1907, ch. 1174 § 52, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29, § 53, 39 Stat. 874, 877.

5. Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948).

6. For an analysis of U.S. post-War asylum and refugee policy, *see*, Evans, *The Political Refugee in the United States Immigration Law and Practice*, 3 INT'L. LAW., 205 (1969) and Anker and Posner, *The Forty-Year Crises: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

7. For instance, the Immigration and Nationality Act of 1952, provides for the Attorney General to suspend deportation proceedings against aliens who may face "physical persecution" if they were returned to their country of nationality. The Act also conferred upon the Attorney General discretionary parole authority to admit an alien into the U.S. "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest. . . ." *See* Pub. L. No. 82-414, ch. 477, § 243(h), 66 Stat. 163, 214 (1952), (current version at 8 U.S.C. § 1253 (h) (1982)).

8. Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965), (current version at 8 U.S.C. § 1253 (h) (1982)).

9. United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 622, T.I.A.S. No. 6577, 606 U.N.T. § 267.

10. For instance, in 1956 over thirty-thousand Hungarians were admitted to the U.S. pursuant to the discretionary authority granted by the Attorney General under the Immigration and Nationality Act, 213(d) (5). *See also*, Schmidt, *Development of United States Refugee Policy*, 28 INS Reporter 11, (1979). Over the past two decades, thousands of Cubans and Indochinese have been "temporarily" paroled for admission into the U.S. and their status adjusted to permanent residents by special Congressional action. *See* Pub. L. No. 89-732, 80 Stat. 1161 (1956) (providing for residence of the first

The vast majority of these refugees have claimed persecution and/or fear of persecution by communist regimes in their homelands; and the U.S. has generously granted admission, often on a mass basis. Recently, Congress passed the Refugee Act of 1980 which provides for the admission and uniformity in treatment of refugees in a comprehensive manner.¹¹

Traditionally, refugees fleeing communist regimes, particularly from Eastern Europe, Indochina and Cuba, have received favorable treatment by the U.S. Government. However, other refugees and asylum applicants, particularly from authoritarian Third World regimes friendly to the U.S., have faced considerable obstacles. The U.S. has been far more willing to accept refugees from countries which are its ideological adversaries than from friendly countries that may have notorious records for human rights violations and systematic programs of political repression. Generally, accepting refugees or granting asylum to individuals from friendly authoritarian Third World regimes has been thought to be an antagonistic act potentially embarrassing to the regime concerned and engendering a strain on U.S. relations with the particular regime. In this context, one distinct group of individuals seeking asylum in the U.S. from an authoritarian Third World regime friendly to the U.S. has been the so-called undocumented Haitians who came to this country in large concentrations in the late 1970's.

UNDOCUMENTED HAITIAN IMMIGRATION

Haitian immigration to the U.S. predates the large influx of undocumented Haitians in the late 1970's.¹² Haitians have been coming to the U.S. on a much smaller scale since the late 1950's. Unlike the recent Haitian arrivals, earlier Haitian immigrants were generally distributed in South Florida and some of the major urban areas in the Northeast and, to a lesser extent, those of the Midwest.

The first large wave of Haitian immigrants coming to the U.S. was detected in the late 1950's and early 1960's.¹³ It is widely asserted that the first exodus of Haitians to the U.S. was triggered by the rise to power and subsequent entrenchment of the government of Francois ("Papa Doc") Duvalier in Haiti.¹⁴ Duvalier's regime has been widely associated with the creation and

wave of exiles from post-Castro Cuba). See Pub. L. No. 95-145, 91 Stat. 1223 (1977) (providing similar accomodation to refugees from Indochina in the post-Vietnam War period). See Pub. L. No. 95-412, 92 Stat. 907 (1978) (extended similar residency accommodations to all refugees paroled before Sept. 30, 1980).

11. The Refugee Act of 1980 sought to harmonize U.S. refugee policy with its international commitments relating to the status refugees. The Act also removed the statutory preference given to persons seeking asylum from "any communist country or communist dominated country or area." See Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965), *repealed by* Pub. L. No. 96-212, § 203(b)(5), 94 Stat.102, 107 (1980).

12. Scholarly analyses of Haitian immigration to the U.S. after 'Papa Doc' Duvalier's rise to power are scanty. Much of the journalistic reporting on Haitians during the early period may be characterized as anecdotal. For a general analysis of Haitians in the U.S., see generally, M. LAGUERRE, *HAITIANS IN THE UNITED STATES*, (1979).

13. See, *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 699-753, (1981) (statement of Alex Stepick on Root Causes of Haitian Migration) [Hereinafter *Roots of Haitian Migration*]. See also, Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 *LAW & CONTEMP. PROBS.* 163 (1982).

14. For an analysis of the factors leading up to the mass departure of Haitian businessmen,

proliferation of repressive apparatuses in Haiti and increased levels of political repression. The heightened level of repression which characterized the early years of the Duvalier regime and which continued during his tenure is believed to be largely responsible for the departure of thousands of Haitians from Haiti to various Caribbean countries and the U.S. Francois Duvalier's regime dealt with political opposition and dissension harshly; his dictatorial regime fashioned a ubiquitous para-military security apparatus which eliminated opposition and maximized Duvalier's political control.¹⁵ Widespread violence and brutality by Duvalier's security forces were common;¹⁶ and rampant political repression characterized by the imprisonment, torture and persecution of Duvalier's political opponents come to be the hallmark of the Duvalier regime.¹⁷

Haitians who came to the U.S. in the aftermath of Duvalier's rise to power, especially in the early 1960's, are generally said to have middle class backgrounds.¹⁸ Thus, among those fleeing the Duvalier regime during this period were a substantial number of professionals, intellectuals, journalists, merchants, businessmen and former government officials, as well as thousands of other less prominent Haitian citizens. The trend in Haitian immigration continued throughout the 1960's, albeit in small numbers. The vast majority of these early immigrants came to the U.S. by fulfilling the established official visa, passport and other documentary requirements.¹⁹ Their immigration to the U.S. was largely orderly and did not appear to pose serious problems for U.S. immigration authorities.

In the early 1970's, however, the character of Haitian immigration began to change. Three major changes were evident in the pattern of Haitian immi-

journalists, politicians and others and the widespread use of repression during the early years of the Duvalier regime. *See generally*, R. HEINL AND G. HEINL, WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE 585-665 (1971). For an economic analysis of Haitian immigration to the U.S. *see* STEPICK, ROOTS OF HAITIAN MIGRATION, *supra* note 13.

15. *Id.*

16. M. LUNDAHL, PEASANTS AND POVERTY: A STUDY OF HAITI 348 (1979).

17. Human rights violations by the Haitian government have been documented by various international human rights groups. In 1982, a report by the Lawyer's Committee for International Human Rights observed:

Haitian security forces continue to act without fear of trial or punishment for their actions. The Haitian judicial system offers little or no protection to the victims of abuses by these security forces: government opponents, political prisoners, labor leaders, journalists, human rights monitors and those who have been forced to return to Haiti.

LAWYER'S COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, VIOLATIONS OF HUMAN RIGHTS IN HAITI, JUNE 1981-SEPTEMBER 1982, A REPORT TO THE ORGANIZATION OF AMERICAN STATES (November 1982). For similar reports of massive violations of Human Rights by the Haitian government, *see*, AMNESTY INTERNATIONAL REPORT, AMNESTY INTERNATIONAL PUBLICATIONS (1976). *See also*, Report on the Situation of Human Rights in Haiti, Inter-American Commission on Human Rights, Organization of American States, Washington, December 13, 1979; International Commission of Jurists, *The Review*, No. 19 December 1977.

The U.S. State Department in its 1978 Annual Country report on human rights practices takes a slightly different perspective stating that "human rights violations were widespread during the regime of the late Francois Duvalier in the 1960's." The report further observes "Arrest for security or political reasons have declined substantially. Following the release of 290 prisoners, . . . the Government declared there were no longer any political prisoners." *Country Reports on Human Rights Practices*, Report Submitted to the committee on International Relations, U.S. House of Representatives and Committee on Foreign Relations, U.S. Senate, Department of State, Washington, 1978. pp 172-175.

18. *See* STEPICK, ROOTS OF HAITIAN MIGRATION, *supra* note 13.

19. *Id.*

gration to the U.S. First, Haitians began coming to the U.S. in large groups often without any documentation. Second, Haitians began utilizing small boats and crafts to undertake the long and hazardous transoceanic journey. Third, the Haitians coming to the U.S. began appearing in sizeable groups and arrived with increasing regularity. Thus, the early 1970's marked the beginning of the arrival of the so-called Haitian "boat people".

Haitians coming to the U.S. by boat and without proper documentation continued in small numbers, usually under 100 entrants, until 1975. This trend increased in 1976 with the entry of hundreds of Haitians in the South Florida area. Until 1976, many of the Haitians entering the U.S. had been generally successful in avoiding INS inspection and apprehension; and immigration officials relied upon routine means of detection to apprehend undocumented Haitians. In 1977, the Bahamian government undertook a program of mass expulsion of Haitians from its territory. At that time, there were an estimated 30,000 Haitians holding long or short-term residence in the Bahamas with increasing numbers of new entrants. On the pretext that the Haitians were posing economic problems, the Bahamian government undertook a program of mass expulsion of Haitians residing in the country.²⁰

The pressure for Haitians to leave the Bahamas increased throughout 1977, and with the increased pressure, many Haitians found it relatively more attractive to come to the U.S. than to be forced to return to Haiti. Since the Bahamian government was pursuing the expulsion program with the tacit approval of the Haitian government, the pressure for Haitians to leave the Bahamas was intense; those Haitians able to leave did so by arranging a trip to the U.S.²¹

In the spring of 1978, large groups of undocumented Haitians began to arrive in South Florida. These groups consisted of Haitians who were under the general order of expulsion in the Bahamas as well as other Haitians coming directly from Haiti. By the middle of 1978, nearly 3,000 undocumented Haitian entrants had been registered by the U.S. Immigration and Naturalization Service (INS). By the late 1970s, partly due to the relatively small percentage of actual apprehension and delays in INS processing, the size of the undocumented Haitian population in Miami and southern Florida continued to grow with several hundred arrivals per month in late 1978 and throughout 1979. This trend culminated in 1980 with the arrival of nearly 25,000 Haitian entrants.²²

20. In late 1977, an agreement was reached with the Haitian government in which the Bahamian government was to repatriate a set number of Haitians to Haiti on a regular basis. Because of the stringent residency requirements in the Bahamas, even those Haitians who had lived in the Bahamas for a long time were subject to expulsion. Although in the initial period, several hundred Haitians were repatriated, the Haitian Government soon reneged on the agreement and it was gradually discontinued. Nonetheless, harassment and mistreatment of Haitians in the Bahamas continued until late 1978. See *N.Y. Times*, July 18, 1978 at 1, col. 2.

21. The exodus in Haitian immigration from the Bahamas may be seen in the number of recorded Haitian boats arriving in Miami. In 1977, 7 boats carrying 274 Haitians were registered by the INS. In 1978, during the Bahamian expulsion, 87 boats and 1860 Haitians were registered. Sixty of these boats were registered as having originated in the Bahamas. In 1979, there was a precipitous drop in Haitian boat arrivals from the Bahamas. Out of the 95 boats carrying 2606 Haitians, only 15 had originated from the Bahamas. List of Haitian Boat Cases, Monthly Statistics compiled by the INS for 1977-1980.

22. According to the Cuban-Haitian Task Force, by the end of April, 1981, a total of 38,536 Haitians had been registered by the INS, including those classified as EPI (Entered and Processed

The U.S. government recognized the undocumented Haitian immigration issue as a major problem in the summer of 1978. The INS, Justice and State Department officials devised specific policies to expedite the exclusion and deportation of undocumented Haitians who were involved in deportation proceedings. Prior to 1978, the issue of undocumented Haitian immigration had been treated as a local problem of immigration law enforcement. However, the influx of large numbers of undocumented Haitians during the spring of 1978, and administrative backlogs in processing earlier Haitian arrivals changed the policy significance of undocumented Haitian immigration to the U.S.

The total distribution of Haitian cases in various proceedings and different stages of processing as of July 30, 1979 is displayed in Table 1. It may be observed from Table 1 that there were a total of 9,871 Haitians in exclusion and deportation proceedings. There were 2,713 Haitians in exclusion proceedings, of which there were 525 withdrawals. Table 1 further shows that there were 84 exclusions hearings with immigration judges with one-half of the cases completed and the other one-half pending. There were 7,093 Haitians in deportation proceedings of which 798 cases had been completed by means of voluntary departure. In terms of applications for political asylum, 1,048 Haitians who were in exclusion proceedings had applied; and 635 of these applications were denied while 381 were pending. Only 32 applications were approved. Among those Haitians in deportation proceedings, 4,147 had applied for asylum and 3,737 were denied while 384 were pending. Only 26 applications were approved.

Scope of Investigation

Over the past decade a growing corpus of scholarly literature has sought to address various aspects of U.S. asylum law and policy.²³ This paper seeks to make a contribution to this literature by focusing upon U.S. policy towards undocumented Haitian immigrants and the extraordinary hardship these Haitians underwent in their efforts to obtain political asylum and refugee status in the U.S.

Since the early 1970s, the U.S. Government has officially determined that

Immediately) arrivals and EWI (Entered Without Inspection) entrants. This figure also includes 2,184 pre-1976 entrants. The Task Force data showed that in 1980 alone, the INS had documented 24,259 Haitian entrants. Moreover, Task Force destination and resettlement data show that over 92 percent of the Haitian entrants had resettled in Florida, with the largest group of entrants (80%) located in Miami and the Lake Okeechobee areas. Fewer than 8 percent of the entrants had relocated in other states, mainly northeastern states. See, Department of Health and Human Service, CUBAN-HAITIAN TASK FORCE MONTHLY ENTRANT DATA, (1981) (hereafter Task Force).

23. See, e.g., Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?* 45 MD. L. REV. 91 (1986); Sexton, *Political Refugees, Nonrefoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSNAT'L L. 731 (1985); Andrioff, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHI-KENT L. REV. 107 (1985); Blum and Lobaco, *The Rights of the Undocumented*, 6 CAL. LAW. 42 (1984); Isamenyi, *The Boat People: Are They Refugees?*, 5 HUM. RTS. Q. 348 (1983); Schey, *The 'Right' to Apply for Political Asylum in the United States*, 5 HOUSTON J. INT'L L. 223 (1983); Ryan, *Political Asylum for the Haitians?*, 14 Case W. Res. J. INT'L L. 155 (1982); —, *Persecution vs. Poverty: Are the Haitians Refugees*, 2 *Philosophy and Public Policy*, 1-5 (1982); Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91 (1981); Gross, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1980); Dernis, *Haitian Immigration: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27 (1976-77).

Table 1^a
 Distribution of Total INS Workload as of July 30, 1979

	Exclusion Proceedings	Deportation Proceedings	Cases Received Previous Week	Total
TOTAL	2,713	7,093	65	9,871
EXAMINATIONS				
1. No. of Arrivals	2,672		62	2,734
(a) Withdrawals	525		47	572
(b) Excl. Proc.	2,147		15	216
ENFORCEMENT				
1. No. of Apprehensions		7,093	3	7,096
(a) OSC Issued		5,064	3	5,067
(b) V/D Prior to Hear		798	—	798
(c) Other — OSC Not Issued		1,241	—	1,241

STATUS OF WORKLOAD = SUMMARY

TOTAL WORKLOAD DISTRIBUTION

1. IJ Hearings	84	4,398	—	4,482
(a) Pending	42	3,920	-7	3,955
(b) Completed	42	478	+7	527
(1) Terminated	—	20	+1	21
(2) V/D. Dep/Exc.	42	458	+6	506
(3) Adm. Relief grated	—	—	—	—
2. Political Asylum	1,048	4,147	—	5,195
(a) Granted	32	26	—	58
(b) Denied	635	3,737	—	4,372
(c) Pending	381	384	—	765
3. Current Status of Special Interest Items				
(a) Apscondees	35	1,918	-2	1,951
(b) Apscondees Apprehended	—	993	2	995
(c) Total Detained	114	1	(+63-67)	111
(d) Litigation	1,785	2,504	—	4,289
(e) Administrative Relief Prior to OSC/Hearing	19	147	1	167
(f) Total Cases Pending This Period	2,016	6,193	(+64-49)	8,225

Source: Immigration and Naturalization Service, Miami, Florida

^a Table is reproduction of actual INS workload statistics as prepared by the Miami INS office. Table includes all files since 1970.

Haitians coming to the U.S. without proper documentation are "economic refugees" and thus concerted governmental efforts have been made to return Haitians back to Haiti or prevent them from entering the U.S. Consequently, since the mid-1970s, undocumented Haitian groups and individuals have been subjected to a variety of official measures by the INS, including deportation, exclusion, detention and interdiction. On the other hand, Haitians who have been subjected to these measures have sought judicial remedies challenging what they believed to be arbitrary and discriminatory practices by the INS.²⁴

24. Since 1964, Haitians fleeing the 'dynastic' regimes of the Duvaliers have litigated in U.S. Courts to vindicate various rights and protections under U.S. law. The legal actions in which Haitians have been involved may be conveniently classified in terms of substantive issues. Thus, legal actions involving Haitian asylum issues include: *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984) (absence of adequate translation of political asylum proceedings denied plaintiff procedural rights); *Haitian Refugee Center v. Smith*, 676 F. 2d 1023 (5th Cir. 1982) (right of alien to seek political asylum is sufficient to invoke guarantee of due process); *Sannon v. U.S.*, 631 F. 2d 1247 (5th Cir. 1980) (that named petitioners received the relief they sought and that class-wide relief was constitutionally impermissible under the facts); *Fleurinor v. Immigration and Naturalization Service*, 585 F. 2d 129 (5th Cir. 1978) (Applicant for 243(h) must establish that he specifically will be subject to persecution in the event of deportation); *Coriolan v. Immigration and Naturalization Service*, 559 F. 2d 993 (5th Cir. 1977) (Amnesty International Reports appropriate in Haitian Asylum Cases); *Gena v. Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970) (denial of motion to reopen did not constitute abuse of discretion when asylum applicant did not produce new facts); *Hippolite v. Sweeney*, 382 F.2d 98 (7th Cir. 1968) (immigration judge taking judicial notice of the violation of human rights under the Haitian regime); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (1980) (Haitian plaintiffs proved a wide variety of defects in the INS processing of Haitian asylum claims); *Sannon v. U.S.*, 460 Supp. 458 (S.D. Fla. 1978) (INS regulations determining asylum claims must be promulgated in accordance with Administrative Procedure Act or otherwise void); *U.S. ex. rel. Mercer v. Esperdy*, 234 F. Supp. 611 (S.D.N.Y. 1964) (discussion of relevance of materials on conditions in Haiti); *Matter of Williams*, 16 I & N 697 (BIA 1979) (Amnesty International Report admissible as background material as to Haiti); *Matter of Jean*, 17 I & N 100 (BIA 1979) (Immigration judge correct in concluding deportation proceedings when applicant failed to file 243(h) after 5 months); *Matter of Matelot*, No. 2927 (BIA 1982) (no error in refusal to receive unsubmitted documents on conditions in Haiti); *Matter of Exame*, No. 2920 (BIA 1982) (Background evidence on Haiti admissible in so far as relevant, material and non-cumulative).

The issue of Haitian detention has also produced a modicum of litigation. These include: *Jean v. Nelson*, 711 F. 2d 1455 (11th Cir. 1983) (determination that there was no discrimination against Haitian detainees was erroneous); *Marquez-Colon v. Reagan*, 668 F. 2d 611 (1st Cir. 1981) (vacated injunction on understanding that the federal government would comply with consent agreement with Puerto Rico); *Louis v. Nelson*, 544 F. Supp. 973 (1982) (policy of placing excludable aliens in detention without parole was not discriminatorily applied against Haitians); *Jean v. Meissner*, 90 F.R.D. 658 (1981) (permissive joinder of parties and their claims appropriate with respect to Haitian refugees held without parole).

Haitian legal efforts involving exclusion and deportation proceedings include: *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981) (INS preliminarily enjoined from deporting Haitians who arrived after May 20, 1981 or held in detention pending exclusion proceedings); *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982) (no causal relationship was established between putatively illegal conduct by INS and injury to Haitian plaintiffs); *Desting-Estine v. Immigration and Naturalization Service*, 804 F. 2d 1439 (9th Cir. 1986) (refusal to allow aliens to redesignate country of deportation was not abuse of discretion).

Over the past couple of years, the question of interdicting potential Haitian entrants has been litigated in: *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (1985) (interdiction program was based on constitutional and statutory authority and did not violate Haitians' rights); *Haitian Refugee Center v. Gracey*, 809 F. 2d 794 (D.C. Cir. 1987) (plaintiffs lacked standing to challenge interdiction program).

Haitian plaintiffs have also sued to recover attorneys fees from the government. *See, e.g.*, *Louis v. Nelson*, 624 F. Supp. 836 (S.D. Fla. 1985) (Haitian plaintiffs entitled to attorney's fees under the Equal Access to Justice Act but must be adjusted downward for failure to prevail); *Louis v. Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986) (Haitian attorneys entitled to reimbursement for costs and expenses).

This paper focuses on a narrow aspect of U.S. policy towards undocumented Haitians during the period 1978-1980. Specifically, the paper examines certain extraordinary policies and decisions that were devised and implemented against a group of undocumented Haitians who sought political asylum in the U.S. The paper further examines the premises and assumptions guiding U.S. policy-makers in their official treatment of undocumented Haitians and the impact of these extraordinary policies on Haitian asylum applicants. Finally, the paper aims to offer alternative explanations for the type of decision-making behavior observed in the Haitian cases.

OVERVIEW OF U.S. POLICY TOWARDS HAITIAN ENTRANTS, 1978-80

During the years 1978-1980, the U.S. Government established a peculiar structure of decision-making to deal with undocumented Haitians. This decision-making structure subsequently generated certain policies singularly applicable to Haitians seeking political asylum and status adjustments in the U.S. While the vast majority of undocumented aliens underwent routine INS processing, an official program was devised to exclude, deport, and deny asylum to Haitians on a mass basis. This separate and disparate treatment of undocumented Haitians represented a highly anomalous case of immigration policy-making and law enforcement. It also marked, in several ways, an important departure from constitutional, statutory and regulatory requirements governing immigration policy-making and law enforcement.

First, even though the processing of undocumented aliens was a generally routine and commonplace INS activity, the U.S. government established an extraordinary decision-making process in 1978 to deal with undocumented Haitian issues separately from all other undocumented aliens. The decision-making group involved officials at the highest levels of the U.S. government. Such high level involvement in policy-making towards particular groups of undocumented aliens was highly unusual and anomalous since the procedures, rules and regulations pertaining to the processing of undocumented aliens were clear, well-established and routine.

Second, undocumented Haitians, unlike other undocumented aliens, were preempted or prevented from undergoing the normal and routine processes of INS exclusion, deportation and asylum by policy decision. While other undocumented aliens were receiving routine procedural protections in deportation and asylum hearings, undocumented Haitians were denied such protections and individual consideration of their cases as a matter of official policy. Rather, special policies and regulations were drawn up which afforded Haitians only pro forma due process considerations.

Third, the special policies and regulations formulated and implemented against the Haitians were either illegal, legally questionable or unprecedented. On the one hand, the policies devised against the Haitians contravened existing laws and constitutional protections, and were adopted merely to facilitate the mass expulsion of undocumented Haitians. On the other hand, these policies were unprecedented in U.S. immigration law, and were devised prospectively as punitive measures to achieve a broader goal of deterrence against new Haitian immigration.

Fourth, the policies pursued against the undocumented Haitians were particularly arbitrary and discriminatory in two respects. First, these policies

affected only Haitians and did not have wider applicability to other undocumented aliens. Second, these policies did not seek to address individual Haitian cases, but rather took Haitians as a monolithic group of undocumented aliens. Since U.S. policy-makers had predetermined Haitians to be "economic migrants," the merits of individual cases mattered very little. Thus policies were geared to deny all undocumented Haitians basic legal protections under U.S. law.

U.S. policy towards undocumented Haitians involved the inflexible position on the part of the U.S. Government that virtually all undocumented Haitians were "economic refugees" with identical motivations, reasons and interests in coming to the U.S. In practice, such a broad and unbounded classification of Haitians as economic refugees automatically precluded serious and earnest consideration of individual asylum applications. Officials from the lowest INS officer to the Attorney General acted on the basis of this general assumption. Consequently, even meritorious Haitian asylum applications were ignored or rejected. Hundreds of Haitians were placed in an accelerated program of exclusion and deportation. Moreover, by classifying Haitians as economic refugees, policy-makers erected an insurmountable evidentiary obstacle which none of the Haitians could overcome. This was true even in those instances where overwhelming evidentiary support was provided in the asylum applications. The Haitians were placed in the untenable position of specifically proving that they were not economic migrants and equally showing that they were political refugees. The Haitians were expected to accomplish this task within the framework of an extemporaneous and accelerated exclusion, deportation and asylum review process.

The anomalous nature of U.S. policy towards undocumented Haitian entrants points to major inconsistencies in the goals, objectives and decision-making processes involved in U.S. immigration policy-making and law enforcement. It also raises intriguing and interesting questions about the processes of immigration policy-making in the context of the relative liberalism of the American political system. Serious questions of policy relevance are raised by the U.S. government's action. It established a separate decision-making process to undertake policy-making tasks which are routinely handled through existing bureaucratic mechanisms and procedures. Those officers sworn to uphold them flagrantly violated duly enacted immigration laws of this country. Further, the decisions and policies generated from the extraordinary decision-making process raise important legal and political questions about the scope of governmental action, and the extent to which those making and implementing public policy should be held accountable for their official misconduct.

THE LEGAL FRAMEWORK OF POLITICAL ASYLUM, 1978-1980

An alien may file an application for political asylum with the government of the United States prior to entry into the U.S. or subsequent to entry.²⁵

25. The regulation provides:

An application for asylum by an alien who is seeking admission to the United States at a land border port or preclearance station shall be referred to the nearest American consul. An application for asylum by any other alien who is within the United States or who is applying for any other alien who is within the United States or who is applying for admis-

Asylum applications made in the U.S. remain within the broad jurisdiction of the INS district director,²⁶ while those outside the U.S. remain within the jurisdiction of the appropriate U.S. consulate and the State Department.²⁷

An alien who is already in the U.S. may apply for political asylum by utilizing one of two options. First, the alien may appear in person and file a claim of asylum before the district director at any time prior to exclusion or deportation proceedings.²⁸ The second option, which is not exclusive of the first, is available to aliens who appear before an immigration judge in deportation or exclusion proceedings.²⁹ In such instances, the applicant who has been placed under deportation or exclusion order may file an asylum application claiming that forced return to his or her country of origin will result in persecution. Filing an asylum request temporarily suspends all exclusion and deportation proceedings.³⁰

Once an alien files an asylum request, the district director, may in his discretion, grant a request for authorization of employment.³¹ Asylum requests that have been submitted during exclusion or deportation proceedings, or alternatively submitted to the district director, are to be transmitted to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) at the State Department for advisory opinion.³² While the INS district director may seek an advisory opinion from BHRHA, the district director enjoys substantial discretion in making a determination upon an asylum claim. An applicant has the opportunity to rebut a BHRHA opinion if a decision to deny asylum was

sion to the United States at an airport or seaport of entry shall be submitted on Form I-589 to the district director having jurisdiction over his place of residence in the United States or over the port of entry.

8 C.F.R. § 108.1 (1978).

In 1979, this section was amended to provide:

An applicant who is seeking admission to the United States at a land order port or preclearance station who wishes to apply for asylum shall be referred to the nearest American consul. In all other cases, application for asylum shall be submitted on Form I-589, "Request for Asylum in the United States." Except as otherwise provided in this paragraph, an application for asylum by an alien who is applying for admission to the United States at an airport or seaport of entry shall be submitted to the docket clerk for the immigration judge who shall consider that application in connection with an exclusion hearing as provided in § 236.3 of this chapter. A crewman or stowaway or alien temporarily excluded pursuant to § 235(c) of the Act who is at a seaport or airport shall submit his application for asylum to the district director. An application for asylum by an alien who is within the United States and who is maintaining a lawful status or whose presence in the United States is authorized by the Service may be submitted to the district director having jurisdiction over his place of residence in the United States, except that an alien who has been paroled into the United States, under section 212(d)(5) of the Act may only apply for asylum as provided in § 236.3 of this chapter. After an order to show cause had been issued, the application for asylum and relief under section 243(h) of the Act must be submitted to the immigration court. The application for asylum is filed on Form I-589 will be considered in accordance with § . 108.3(a). The request for relief under § 243(h) of the Act will be considered under § . 242.17(c) of this chapter.

44 Fed. Reg. 21,258 (1979) (to be codified at 8 C.F.R. § 108.1.)

26. 8 C.F.R. § 208.1.

27. 8 C.F.R. § 108.1 (1978).

28. 8 C.F.R. § 208.3(a) (1981).

29. An applicant denied asylum in the first option may submit, *de novo*, another application in exclusion or deportation proceedings. Thus, in principle, denial by the district director should not prejudice the alien's right to seek a new application and suspension of deportation proceedings. 8 C.F.R. § 208.3(b).

30. 8 C.F.R. § 108.3.

31. 8 C.F.R. § 208.4.

32. 8 C.F.R. § 208.7.

based on such opinion.³³

The burden of proof to establish a case for political asylum is placed upon the applicant; and for a successful asylum claim, the applicant must show a "well founded fear of persecution."³⁴ For this purpose, the applicant may introduce documentary and other material evidence to support the claim that a return to their country of origin will result in persecution. The evidence which may be submitted in support of an asylum application may vary; however, such documentary evidence as newspaper accounts on the applicant, letters and other correspondence, official documents, affidavits and depositions by knowledgeable persons, reports by human rights organizations and other impartial sources represent valid sources of direct or background evidence.³⁵

Procedurally, the immigration officer receiving the asylum application may undertake further interview of the applicant and afford the applicant the opportunity to present additional relevant evidence supporting the application.³⁶ In examining the asylum application, the case officer reviews each item with the applicant and verifies the content of the application. The applicant may provide clarifications and explanations to the case officer as necessary. The interview is concluded upon the completion of the application and submission of the relevant evidence.

Once the application is formally submitted, it is classified in one of three categories: (1) cases clearly meriting asylum, (2) doubtful cases, and (3) asy-

33. 8 C.F.R. § 208.8.

In contrast to the statutory and regulatory provisions regarding review of asylum applications and State Department advisory opinion, oddly enough, at least in 1976, it was standard practice to refer Haitian asylum cases to the U.S. Embassy in Haiti to determine the merits of a particular asylum claim. Former Acting Assistant Secretary for Congressional Relations in the Department of State, Kempton Jenkins, observed:

All the Haitian refugee cases referred to the Department for an advisory opinion are carefully reviewed on a case-by-case basis. Many are referred to our Embassy in Port-au-Prince for any information the Embassy might have bearing on the asylum applicant's claims, or for investigation if possible. In formulating our recommendations, we do not attempt to judge whether most of the claimants have come to the United States for economic or political reasons. Each case is reviewed on its own merits to determine whether the individual claimant appears to have established a well-founded fear of persecution within the meaning of the 1967 UN Protocol Relating to the Status of Refugees.

Letter from Acting Assistant Secretary for Congressional Relations, Kempton B. Jenkins to Donald M. Fraser, Chairman, Subcommittee on International Organizations, Committee on International Relations, House of Representatives, Nov. 30, 1976 (This letter was a response to an inquiry made by Congressman Fraser on October 15, 1976).

34. Burden of Proof. The burden is on the asylum applicant to establish that he/she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of the country of such person's nationality or, in the case of a person having no nationality, the country in which such a person habitually resided, 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. 8 C.F.R. § 208.5.

35. The types of documentary proof which may be submitted in support of an asylum claim have often proven to be problematic. However, certain documents have generally been accepted as part of the supporting evidence for an asylum application. *See e.g.*, *Fleurinor v. INS*, 585 F. 2d 129 (5th Cir. 1978) ("Materiality of Amnesty International Report is surely beyond dispute" in Haitian asylum cases). *Zamora v. INS*, 534 F. 2d 1061 (2d Cir. 1976) (State Department opinion relevant as source of information on political conditions in the Philippines.) *Hyppolite v. Sweeny*, 382 F. 2d 98,100 (7th Cir. 1968) (Immigration judge "took judicial notice of suppression of human rights in Haiti."). *Diminich v. Esperdy*, 299 F. 2d 244 (2d Cir. 1961) (Evidence of general conditions in Yugoslavia relevant). *U.S. ex. rel. Mercer v. Esperdy*, 234 F. Supp. 611, 616-617, (S.D.N.Y. 1964) (Detailed discussion of materials on conditions in Haiti.).

36. Immigration and Naturalization Service, Operating Instruction, 108.1 (a).

lum cases that do not appear to have substance or are clearly lacking in substance.³⁷ If the asylum application is found to be lacking and therefore rejected, the State Department is to be notified and the applicant's departure stayed for 30 days or until the State Department responds.³⁸

The district director may exercise his discretion to approve or deny asylum or make other status adjustments after examination of the asylum claim.³⁹ Denial by the district director does not preclude further asylum application in a subsequent deportation hearing before an immigration judge.⁴⁰ The immigration judge may exercise discretionary authority to approve or deny an asylum request, and if a BHRHA opinion has been obtained, the applicant may

37. 8 C.F.R. § 108.2; Operating Instructions 108.1.

38. Decision.

If an application is denied for the reason that it is clearly lacking in substance, notification shall be given to the Department of State, with opportunity to supply a statement containing matter favorable to the application, and departure shall not be enforced until 30 days following the date of notification unless a reply has been received from the Department of State prior to that time. A case shall be certified to the regional commissioner for final decision if the Department of State has made a favorable statement, but notwithstanding, the district director has chosen to deny the application.

8 C.F.R. § 108.2 (1978) 8 C.F.R. § 108.2 (1981).

39. (e) Approval. When an I-589 is approved, asylum status shall be granted for a period of one year from the date of approval. . . .

(f) Denial — (a) General. The district director shall deny a request for asylum or extension of asylum status if it is determined that the alien:

(i) Is not a refugee within the meaning of section 101

(1) (42) of the Act;

(ii) Has been firmly resettled in a foreign country;

(iii) That the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion;

(iv) The alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the United States;

(v) There are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; or

(vi) There are reasonable ground for regarding the alien as a danger to the security of the United States.

8 C.F.R. § 208.8.

40. Renewal of Asylum Request.

Where an application for Asylum is denied by the district director, the applicant may renew his/her request for asylum before an immigration judge in exclusion or deportation proceedings.

Asylum request in exclusion or deportation proceedings.

(a) Application. A request for asylum made in exclusion or deportation proceedings shall be made on Form I-589.

(b) BHRHA advisory opinion. When the asylum request is filed, the hearing shall be adjourned for the purpose of requesting an advisory opinion from BHRHA. The immigration judge shall not request such opinion if an opinion has been received in connection with an application under 208.7 of this part, unless he finds, in his discretion, that circumstances have changed so substantially since the first opinion was provided that a second referral would materially aid in adjudication of the asylum request. The BHRHA opinion, unless classified under Executive Order No. 12,065, shall be made part of the record, and the applicant given an opportunity to inspect, explain, and rebut it.

(c) Record and non-record evidence. Both the applicant and the Service may present evidence for the record in the exclusion or deportation proceedings. Additionally, the Service may present non-record evidence to be considered by the immigration judge, provided such information is classified under Executive Order No. 12065. When the immigration judge received non-record evidence, the applicant shall be informed as to whether the character of the evidence concerns political, social or other conditions in a specified country, or personally relates to the applicant.

8 C.F.R. § 208.9.

rebut that opinion.⁴¹

Denial of an asylum application automatically places the applicant who is in exclusion proceedings into deportation. The alien who is in deportation proceedings at the time of the asylum application may appeal to the Board of Immigration Appeals,⁴² challenge the decision on constitutional grounds in the federal courts, or accept the deportation order (unless voluntary departure is granted by the district director) and leave country.

UNDOCUMENTED HAITIANS AND THE QUEST FOR POLITICAL ASYLUM IN THE U.S.

Policy Framework

The underlying basis for U.S. policy towards undocumented Haitians during 1978-80, and even to the present day, is the official determination and view that Haitians who come illegally to the U.S. are economic migrants seeking better employment opportunities and standards of living. Policy-makers have been insistent in emphasizing the role of economic factors in motivating undocumented Haitian immigration to the U.S. This official view has been firmly anchored in the demographic profile of the undocumented Haitian entrant population, the prevalent socioeconomic conditions in Haiti and a generalized fear that Florida will somehow be overtaken by boatloads of impoverished Haitians. Indeed, the vast majority of the undocumented Haitians came from relatively impoverished socioeconomic backgrounds with limited education, skills, employment or income.⁴³ Similarly, Haiti, as the "poorest country in the Western hemisphere," is a developing country with limited natural resources, a rapidly growing population and diminishing economic opportunities.

However, in the late 1970's, Haiti was ruled by a highly authoritarian regime. Despite the continued high level of political repression in Haiti dating back to the late 1950's, U. S. policy-makers have consistently maintained that undocumented Haitians coming to the U.S. were fleeing poverty and economic hardship rather than political persecution. In this regard, the "analytical framework" of the Agency for International Development (AID) Country Development Strategy Statement for Haiti serves to illustrate the underlying analysis supporting the official view of undocumented Haitians.⁴⁴

41. (d) Disclosure of non-record evidence. The immigration judge may disclose to the asylum application the non-record evidence, or any part thereof, to the extent that he believes he can do so and still safeguard the information and its source. The applicant shall be provided opportunity to rebut any evidence so disclosed. A decision based in whole or in part on non-record evidence shall state that such evidence is material to the decision.

(e) Approval. When the immigration judge grants asylum, it shall be for a period of one year.

(f) Denial. When the immigration judge denies asylum, the exclusion of deportation proceedings shall be reinstated.

8 C.F.R. § 208.10 (1981).

42. 8 C.F.R. § 3.1 (1978).

43. For a comprehensive analysis of the economic and Labor force characteristics of undocumented Haitian entrants in the U.S., see A. G. MARIAM, *THE ECONOMIC CHARACTERISTICS AND LABOR FORCE INTEGRATION OF RECENT UNDOCUMENTED HAITIAN ENTRANTS IN MIAMI, FLORIDA: RESEARCH REPORT*, (U.S. Department of Labor, Employment and Training Administration, Washington, D.C. 1982).

44. See, AGENCY FOR INTERNATIONAL DEVELOPMENT, *HAITI, COUNTRY DEVELOPMENT STRATEGY*, (1982).

The official U.S. position on undocumented Haitian immigration has been articulated by various high level U.S. officials. According to former Assistant Secretary of State Richard Fairbanks:

The average Haitian asylum applicant arriving in the U.S. today is from a rural area (many are fishermen or farmers) and demonstrates very little if any political awareness nor does he or she indicate any past political involvement. In their initial interview most cite: (1) lack of adequate economic opportunity in Haiti and (2) their hopes to be better able to support family members here or those remaining in Haiti through employment in the U.S. as reasons for leaving.⁴⁵

Former Associate Attorney General Rudolph Gulliani makes a similar assertion on the causes of Haitian migration. He observed:

The information we have received leads us to conclude that most of the Haitians who have recently come to the U.S. have done so in search of economic betterment and do not have a well founded fear that they will be personally persecuted if they return to Haiti.⁴⁶

Haitian Policy

The U.S. began taking extraordinary policy actions against undocu-

45. Letter from Assistant Secretary Richard Fairbanks, Department of State, to Congressman Romano Mazzoli (November 10, 1981).

46. Letter from Associate Attorney General Rudolph Gulliani to Richard Posner (May 19, 1982). Statements similar to Gulliani's reflecting U.S. policy have been documented in news reports since the mid 1970s. INS and State Department officials from the highest to the lowest officially espouse the economic definition of Haitian immigration. In 1979, Rich Swartz of the Washington Lawyers Committee summarized for Congressman Walter Fauntroy his discussion with Gene Eidenberg, Deputy Assistant to the President for Intergovernmental affairs and Henry Owen of the National Security Agency. Swartz reported:

At his request, I discussed this plan (federal funds to South Florida) last week with Gene Eidenberg . . . and Henry Owen of the National Security Agency. The positions Eidenberg and Owen articulated were that they have not changed their view that Haitians are fleeing for economic rather than political reasons, that arriving Haitians were subjecting the greater community to communicable disease and the administration has decided to attempt to provide some Federal funding to deal with the health problems during the pending litigation. My response to this plan was that Haitians are ineligible for Federal benefits unless they are granted refugee status, that any solution short of refugee status is politically unacceptable.

Memorandum from Rich Swartz, Lawyers Committee for International Human Rights, to Congressman Walter Fauntroy (1979) (Re: Status of Haitian Refugee Issue Politically, Legally and in Terms of Human Suffering).

The policy implications of the view that the Haitians were economic migrants was that despite the repressive character of the Haitian regime and the rampant violations of human rights in Haiti, the controlling factor was going to be the economic profile and background of the Haitians. The underlying logic in this view is that the Haitians as economic migrants left their homeland voluntarily while political refugees are forced to leave their countries because of some form of persecution. In sum, by determining that the Haitians were economic refugees, policy-makers were concluding that the Haitians were not fleeing the repressive Duvalier regime but rather poverty and economic privations. In this context, former Deputy Assistant Secretary for Refugee and Migration Affairs, James Carlin observed:

. . . Haiti is a very poor country, and almost inevitably, we have found it necessary to reject a substantial number of Haitians as economic refugees seeking to immigrate to the United States through the device of seeking political asylum. The mere fact that a person is from a country that is considered to have human rights problems does not necessarily imply that person would be singled out for persecution. It is the responsibility of the asylum applicant to establish a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion upon return to his country of nationality or habitual residence.

Letter from James L. Carlin, Deputy Assistant Secretary for Refugee and Migration Affairs to the Ad Hoc Committee of Haitian Organizations of Miami (September 11, 1978).

mented Haitians in the summer of 1978. In July of that year, the Intelligence Division of the INS advised INS policy-makers that the undocumented Haitians presently awaiting hearings, and those coming from Haiti, were "economic" and not political refugees based upon information from the State Department. It also warned that favorable treatment of these Haitians would encourage further undocumented Haitian immigration.⁴⁷ About the same time, the Miami INS office had registered over seven thousand excludable Haitians who had intermittently entered the U.S. since the early 1970's.⁴⁸ Several thousand of these Haitians were awaiting deportation hearings while an equally large number remained unprocessed. Consequently, due to the sheer magnitude of the Haitian case load, the local INS office found itself facing serious administration and enforcement problems.⁴⁹

The administrative problems associated with the processing of undocumented Haitians in the Miami INS office suddenly attained crisis proportions in the spring of 1978. On the one hand, the rate at which undocumented Haitians were coming to the U.S. was accelerating rapidly;⁵⁰ and on the other hand, the large numbers of unprocessed Haitian cases were creating adminis-

47. Memorandum from Mario Noto, Deputy INS Commissioner, to Michael Egan, Associate Attorney General, Department of Justice (August 25, 1978) (hereafter Noto Memorandum).

48. Haitians who came to the U.S. before 1978 were technically considered deportable aliens. Those Haitian entrants who arrived in 1979 and those arriving in the wake of the Mariel boatlift in 1980 were classified as excludable aliens. It is important to note these distinctions since the INS initially sought to implement the "Haitian Program" against Haitian entrants who arrived in the pre-1978 period and were in deportation proceedings. A policy of exclusion, parole and detention was devised for post-1978 Haitian arrivals.

The backlog of deportation cases in the Miami INS office by 1978 had also become unmanageable with several thousand unprocessed Haitian cases. The increased influx of Haitians in the Spring of 1978 created pressure on the INS to act and stop the influx. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 511 (S.D. Fla. 1980).

49. By the summer of 1978, and especially after the sudden influx of Haitians in the spring of that year, INS officials began to perceive that the lack of effective deportation activity was encouraging the flow of new entrants from Haiti. The confusion surrounding the promulgation of new regulations and guidelines for asylum as well as administrative delays produced in the deportation process, pending litigations, postponements, etc., were believed to provide a sure signal to Haitian entrants that they could come to the U.S. with impunity. The perceived relationship between INS administrative inaction and the influx of new Haitian entrants was recapitulated by Circuit Judge James Hill in *Haitian Refugee Center v. Smith*:

It is highly likely that INS inaction provided the greatest inducement to the ultimate swollen tide of incoming, undocumented Haitians. Record material suggests that a large percentage of the aliens bought passage to the United States from promoters in Haiti whose best sales pitch was the large number of the prospectant's countrymen who, without visas or other documents, had reached Florida and were residing there undisturbed. Protestations by INS of the illegality of such operations could hardly be expected to prevail against proprietary reasoning that Haitians who reached southern Florida were living, working and earning in the United States. 'The proof of the pudding' was surely seen as being in the eating; those deciding whether or not to make the trip were not dissuaded by witnessing the return of earlier emigres.

Haitian Refugee Center v. Smith, 676 F.2d 1023, 1029 (5th Cir.1982).

The reasons for the delays and the backlog in processing was attributed to several factors by Richard Gullage who became Deputy District Director (later served as acting Director on a number of occasions). The reasons offered by Gullage included anticipated changes in asylum regulations which created uncertain confusion about the effects of new regulations and on reopening of cases, certain actions by Haitians which discouraged INS trial attorneys from actively pursuing deportation cases, and actions by Haitian counsel to enjoin exclusion proceedings against Haitians, which also focused attention from Washington on the Miami INS office. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 512.

50. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 511-513.

trative paralysis, preventing the local INS office from taking action against Haitians already in INS proceedings or against new arrivals.⁵¹

In June 1978, Associate INS Commissioner for Enforcement, Charles Sava, visited Miami to explore ways and means of resolving the administrative problems created in the Miami INS office by the increasing influx of undocumented Haitians and the backlog of Haitian cases. Sava's discussions with Miami INS officials resulted in the generation of a four point recommendation which included: "(1) detention of arriving Haitians likely to abscond; (2) no authorization for employment; (3) expulsion of Haitians from the United States [and] (4) enforcement actions against smugglers."⁵² However, to Sava the best solution to resolving the undocumented Haitian "problem" was mass expulsion. He affirmatively declared:

I believe the most practical deterrent to this problem is expulsion. . . . We will get the cases moved to hearings swiftly and keep things moving.⁵³

After substantial discussions between and among high level INS, Justice and State Department officials, a decision to expel undocumented Haitians on a mass scale (and effectively outside the legal framework of immigration policy-making and law enforcement) was made in July of 1978.⁵⁴ Shortly thereafter a plan for the mass expulsion of undocumented Haitians was formalized in an executive memorandum prepared by Deputy INS commissioner Mario Noto.⁵⁵

The expulsion program forged by the Noto decision-making group was extraordinarily arbitrary, discriminatory and completely outside the legal framework set for the treatment of undocumented aliens. First and foremost, the plan was comprehensive in scope and sought to deal with the Haitians as a distinct national group, and not as individual cases as the law requires. Specifically, the plan sought the deportation and expulsion of the Haitians with superficial consideration for the Haitians' constitutional or statutory rights. The plan also established mechanisms which made it extremely difficult for individual Haitians to pursue their cases in exclusion, deportation or asylum pro-

51. *Id.* at 511-513.

52. The four recommendations were submitted to Sava by Noto. These recommendations anticipated the beginning of a wholesale program of deportation to resolve the Haitian "problem." The underlying policy thrust was clear: the Haitians both collectively and individually were ineligible for asylum, and any means was justifiable in their removal and/or prevention from entry. Therefore, no consideration ought to be given to due process requirements.

The underlying thrust in Sava's recommendation was presumably deterrence. That is to say, if Haitians who are already in the U.S. were systematically harassed, this might serve a lesson to would-be entrants from Haiti. This notion of deterrence appears to be behind Sava's draconian measure to deny work permits wholesale and mass deportation of Haitians despite their pending asylum applications: *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 514.

53. *Id.* at 514.

54. The planning process for mass expulsion of Haitian entrants was directed by Mario Noto, Deputy Commissioner of INS. Armand Salturelli, INS Regional Commissioner prepared and submitted the recommendations for the expulsion and Michael Egan, Associate Attorney General, was in overall charge. Other direct participants in this decision include: INS Commissioner Lionel Castillo, Noto, Sava, Mack, Rebsanmen, Crossland, Bertness, Redinger, Day, Gibson, Turnage, Salturelli, Powell, Young, Fodolny and Grottenrath—all high level officials of the INS. From the State Department, Doris Meissner (later INS Commissioner) and Green were present. See memorandum of Conference, INS, RE: Haitian Undocumented Aliens, July 17, 1978.

55. The "Haitian program" was detailed in a comprehensive memorandum from Mario Noto, Deputy Commissioner, INS to Michael Egan, Associate Attorney General, Department of Justice. Noto Memorandum, *supra* note, 47.

ceedings. In practical terms, the plan set up a "revolving door" operation in which the Haitians would be uniformly placed in exclusion proceedings, given pro forma asylum hearings and instantly placed in deportation proceedings.⁵⁶ Similarly, those Haitians in deportation proceedings, would be given perfunctory asylum review and then placed back in deportation proceedings.

The policy of mass exclusion deportation, and mass asylum hearings was officially based on the belief that "few of these Haitians are bona fide refugees entitled to sanctuary and asylum from political persecution in Haiti. Instead most are intent to remain in the U.S. solely to better their economic opportunities and way of life."⁵⁷ Officials had decided *a priori* that virtually all of the Haitians in INS proceedings were economically motivated and were not subject to any forms of persecution in Haiti. Moreover, policy-makers had also reached the conclusion that "the claims of persecution advanced by these aliens, in the main, are without merit and intended to serve only as a means to delay a defeat return to Haiti."⁵⁸

These two fundamental beliefs, shared among all levels of the active decision-making body from the outset, undermined the prospects for individual Haitians to pursue their cases within the framework of U.S. immigration law and procedure. The fundamental policy position on the Haitians was that they were economic refugees with frivolous or dilatory asylum claims. This policy position served to foreclose any reasonable opportunity for the Haitians to demonstrate the merits of their individual cases, and made it extremely difficult, if not impossible, to obtain a fair and individualized consideration of asylum applications or deportation and exclusion hearings. Secondly, the basic policy position on the Haitians led officials to view the procedural due process protections as superfluous and an obstacle to expeditious immigration law enforcement. As a result, policy-makers promptly reduced constitutional and statutory rights to mere formalities and meaningless gestures, which only afforded the Haitians an illusion of a legal due process.

In this context, the first directive of the so-called Haitian Program was the placement of "4,340 Haitians (approximately 50% of known Haitians) (parentheses original) under INS deportation proceedings."⁵⁹ This was to be accomplished by directing "Miami INS to issue at least 100 orders to show cause daily to bring the situation current. This move by INS is designed to bring the (Haitian) aliens under administrative jurisdiction and control for eventual expulsion."⁶⁰ Moreover, any new undocumented Haitians apprehended after reaching U.S. shores should "immediately be brought under INS control for exclusion process."⁶¹

The Haitian Program essentially had three components. One component dealt with exclusion, another involved deportation and a third component was

56. Noto's Memorandum also had an extra-territorial component. He suggested that an interception program to prevent Haitians from completing the trip to Florida be set up and subsequently any intercepted boats be taken to Guantanamo Bay. The obvious danger in this strategy was the potential for depriving asylum seekers any meaningful opportunities to obtain appropriate consideration. Noto Memorandum, *supra* note 47.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

concerned with the processing of asylum applications. The exclusion component of the policy was not designed for individual cases, but rather for the processing of a groups of Haitians. Thus, the first major action to be undertaken in the Haitian Program was the issuance of mass Orders to Show Cause to all apprehended and registered Haitians who were not already in deportation proceedings. After the show cause orders had been issued, the Haitians were to be brought in groups before immigration judges and required to show why they should not be excluded.⁶² The exclusion hearings were not expected to be consequential and in fact proved to be superficial. There was little concern for the Haitians' rights to be represented by counsel, or to inform them of the availability of free legal services or right to file for asylum and to present evidence to support their cases. The thrust of the program was to dispense with basic procedural requirements which the Haitians were entitled to receive and to move cases through the system.

Similarly, the deportation component of the Program was also not concerned with individual cases but rather with large-scale expulsion. According to the terms of the Haitian Program, "deportation hearings (were to be scheduled) at the rate of 70 per day."⁶³ On the other hand, 100 daily orders to show cause, placing Haitians under the deportation process were to be issued by the INS.⁶⁴ Additionally, proposals to "consolidate deportation hearings to accelerate multiple hearings on identical issues by immigration judges"⁶⁵ were to be considered. In order to facilitate the program, "two immigration judges were to be detailed to Miami to work exclusively on Haitian cases"⁶⁶ and the "productivity of immigration judges was (to be) tripled from 5 hearings per day for each judge to 15 hearings per day for each judge."⁶⁷ In accordance with the plan, immigration judges were to be made part of the overall expulsion program, and to aid in the attainment of the mass expulsion objective by accelerating the deportation process, while denying the Haitians their rights to asylum and due process wholesale.⁶⁸ The role to be played by the immigration judges was particularly significant. The expectation was that they could manipulate the process by reaching findings of deportability, provide for an abbreviated asylum review, and then, when the Haitians failed to meet the abbreviated deadlines, issue deportation would be automatically entered.

The asylum policy to be pursued against the Haitian asylum applicants equally sought to deny the Haitians any meaningful legal protection. The asylum policy was most notable both for the extent to which it undermined the Haitians' rights under the law as well as for its disregard of the law altogether. The first step to be taken in the asylum component of the Haitian program was for "INS to establish guidelines and standards for District Directors' decision on asylum claims, since none are now available (sic) . . ." Establishing such standards "will refute charges of arbitrariness and lack of uniform standards and proper basis for District Director determinations."⁶⁹

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

The proposed policy actions against Haitian asylum applicants represented an extraordinary instance of unlawful official conduct and disregard for the law. According to the Haitian Program, the INS was to actively "consider revision that would eliminate the current requirement that a claim for asylum made during deportation hearings be first processed by the district director, and when denied, to be reviewed by an immigration judge."⁷⁰ Such a procedure would eliminate any appeals efforts by the Haitians and make their deportation certain and instantaneous. Further, to expedite the asylum process even more, the "applicable procedures for adjudicating Haitian claims for political asylum were to be imposed to elicit comprehensive and detailed pedigree (sic) and other data necessary to facilitate decision by INS and State Department and [eliminate chances of] return for insufficient data."⁷¹

The effort to curtail and limit meaningful asylum consideration went even further. Accordingly, the "Department of State shall consider revision of its policies and elimination of its current procedure of forwarding to UNCHR each asylum case referred to it."⁷² Regardless of the circumstances, however, "State shall process at least 40 asylum cases weekly, and unless it is advised to the contrary within 30 days, INS will conclude that the INS decision is sound and confirmed."⁷³ Finally, to facilitate the summary asylum process, the "Department of State shall assign an officer to INS Miami to review asylum cases which would have been referred to Washington, D.C. State and the Haitian Desk officer will also delegate his authority to permit on site approvals . . . (and) only doubtful cases would be referred by the State officer in Miami to State, D.C."⁷⁴

IMPLEMENTATION OF POLICY

In August, 1978 a general inter-agency meeting involving various agencies was held, including the Departments of State and Justice, U.S. Customs, U.S. Border Patrol, U.S. Public Health Service and the INS. The significance of the Haitian "problem" was impressed upon representatives of these agencies by Noto, as was the need for collaborative effort in addressing the problems presumably posed by the Haitians. Consensus was reached among participants, and the State Department in particular agreed to participate in a deterrence strategy.⁷⁵

Implementation of the Haitian Program was to have a devastating effect upon Haitians. According to plan, processing of Haitian entrants was expedited, and the practice of ceasing deportation proceedings upon an asylum claim as required by law and agency regulations was suspended and ignored.⁷⁶ The aim of meeting numerical goals in deportation and exclusion became an

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. As part of the deterrence strategy, it was agreed that the

. . . State Department would urge INS to revoke the present authorizations of work permission to Haitians arriving in the United States and, in turn, State Department would initiate a propaganda campaign in the Caribbean area relative to the United States Government refusal to grant such work permits to arriving Haitians.

Haitian Refugee Center v. Civiletti, 503 F. Supp. at 516.

76. Salturelli acknowledged in court testimony that not suspending deportation proceedings

all important activity.⁷⁷ This was reinforced by Deputy Commissioner Noto, who visited Miami in mid-August, 1978. Noto instructed INS trial attorneys to cooperate with the U.S. Attorney's office in enforcement actions aimed at those individuals transporting the Haitians. Noto advised:

Please work together with them.—ACTUALLY PAIN [sic] OUT THE DIMENSIONS OF THE HAITIAN THREAT. [Trial Attorneys] should give the U.S. attorneys more data and background as to the importance of Haitian cases. -Volatile- show that these are unusual cases dealing with individuals that are threatening the community's well-being-socially & economically.⁷⁸

Noto also emphasized the importance of speed in processing Haitian cases to district INS officials. Responding to an inquiry on how to handle those individuals who choose to exercise their right to remain silent in deportation hearings, Noto bluntly stated: "When mute, go with punches and give the most publicity to it and discourage them . . . (and) when alien(s) refuse to speak, why can't you deny (the) asylum request(s)?"⁷⁹

In response to pressures exerted from INS central office and to insure "high productivity", District Director Richard Gullage issued a memorandum to all personnel in the Miami office directing that "processing of these (Haitian) cases cannot be delayed in any manner or in any way. All supervisory personnel are hereby ordered to take whatever action they deem necessary to keep these cases moving through the system."⁸⁰ In the fall of 1978, the Haitian Program was fully underway.

Mass scheduling was the primary means by which the INS sought to implement its Haitian Program. The rate at which Haitian deportation cases were scheduled was astonishing. Immigration judges began scheduling 55 show cause hearings daily at first, which shortly graduated to 60, and by Octo-

upon an asylum claim was in direct contradiction of the Service's Operations Instructions, 108.1 (f) O.I. Section 108.1, (f) (2) of the Operating Instructions clearly states:

If any case in which deportation proceedings have been initiated and the alien or his representative introduces a request for asylum, the special inquiry officer shall postpone the hearing to enable the district director to fully consider the bona fides of the request.

but nonetheless, he recommended that the provision should be cancelled or "at least be *suspended in so far as Haitians are concerned.*" *Haitian Refugee v. Civiletti*, 503 F. Supp. at 513.

77. INS District Director Gullage testified:

"the fact was that he (the Deputy Commissioner) dumped, he put the responsibility on the district and he said, move it."

Id. at 517.

78. *Id.* at 517. In a tone of incredulity, Judge King commented on Noto's perception of the "Haitian Threat:"

Where did Noto find a Haitian THREAT? How can a group of poor, black immigrants threaten a community? What, for that matter, is a 'social threat,' if not the words of someone trying to protect his own views of how society should exist? On such views was the Haitian Program founded.

Id. at 517.

79. *Id.* at 518. It is also interesting to note that while Noto was making battle plans, he and Leonard Leopold, INS Acting Supervisory Trial attorney, were pontificating to the local bar association in Dade County urging attorneys to donate legal services to represent Haitians on a pro bono basis. In fact, when the plan was finalized, Leonard Leopold wrote the association of Immigration and Nationality Lawyers of Miami on August 31, 1978 urging it to provide assistance to Haitians. See Letter by Leonel J. Castillo, INS Commissioner to Hon. Charles C. Diggs, House of Representatives, n.d. File No. CO 243.35-C (responding to a letter co-signed by five House members asking a series of questions on the treatment of Haitians.)

80. *Id.* at 518. The pressure for "high productivity" in terms of the processing of Haitians was kept up through a daily reporting system with the central INS office.

ber 1978, "there were 100 or more hearings per day."⁸¹ "Prior to the Haitian Program, only between 1 and 10 deportation hearings were held per day."⁸² At the same time, asylum interviews were scheduled at the rate of 40 per day. Moreover, hearings on applications to withhold deportation and other process hearings were also being held simultaneously at various INS locations throughout Miami.⁸³ The policy of mass rejection of Haitian asylum claims was characteristically arbitrary.

Haitian asylum applicants were given little opportunity to benefit from their counsel and little time to assemble supporting evidence to meet stringent INS requirements. As a result, most of the Haitian applicants completed the various INS asylum forms without attaching supporting documentation for their claims. The Haitian Program was being implemented with such ferocity at the inception that one INS trial Attorney made the observation that such massive asylum processing had never been undertaken in U.S. history.⁸⁴

There were only 13 attorneys available to represent the thousands of Haitians, most on pro bono basis. This was well known among policy-makers, including District Director Gullage, who admitted that the INS had "anticipated the possibility of attorneys being scheduled for as many as 5 hearings or interviews simultaneously."⁸⁵ However, the INS decided that scheduling difficulties were too cumbersome for it to handle, and did not appear to care about the excessive work load on the few attorneys representing the Haitians. Continuances were given usually for a seven day period, but due to the overload, any rescheduling merely shifted or delayed the conflict in scheduling to another time.⁸⁶

The treatment of Haitian asylum applicants in the Haitian Program was quite revealing. Unlike any other group of refugees, the Haitians were consistently and uniformly denied basic due process review and ultimate asylum.⁸⁷

81. *Id.* at 523.

82. *Id.* at 523.

83. Hearings, interviews, and other official proceedings were going on at four different sites. In one section, "courtrooms were set for show cause hearings" and additional court rooms were set up within a couple of blocks for more show cause hearings, political asylum interviews and work permit authorizations. There were also other facilities within close proximity for show cause hearings. *Id.* at 524.

84. *Id.* at 523.

85. *Id.* at 524.

86. The problems of overscheduling and heavy case load by attorneys representing Haitians was aptly summed up by Attorney Ronald Haber:

Most of them came in a desperate state. They came after an order to show cause was issued. Many of them had two or three days before the hearing when they first appeared in my office. They heard about my office from friends, usually, and they seemed to have their minds made up that I would be the one representing them.

If I told them that I might have too many cases and I asked them to go to the Haitian Refugee Center, they would usually not leave my office until I made assurances that I would represent them . . . I remember coming into the office at 8 o'clock in the morning and there would be 20 to 30 people in the waiting room, all of Haitian decent.

A typical day in the work of a lawyer representing Haitian entrants during the "Haitian Program" was chaotic. According to Haber:

A typical day in September or October of 1978 would include maybe two or three political asylum interviews scheduled at the Federal Building at 8 o'clock, maybe two, three, or four deportation hearings scheduling at 9 o'clock at 111 Southeast Third, and then at 10 o'clock maybe two or three political asylum interviews scheduled at the Federal Building.

Id. at 524, 525.

87. *Id.* at 519.

While other refugees, for example, Nicaraguans, Afghans, etc., were given temporary status adjustments, including work permits, the Haitians were uniformly denied even temporary relief and were refused work permit authorizations.⁸⁸ The INS was clearly determined to deny asylum to all Haitian entrants regardless of the merits of their cases. District Judge Lawrence King observed:

(T)here was a program at work within INS to expel Haitians. Their asylum claims were prejudged, their rights to a hearing given second priority to the need for accelerated processing Virtually every one of the violations occurred exclusively to Haitians. The violations were discriminatory acts intentional (and) class-wide denial.⁸⁹

The impact of the Program upon the Haitians was also evident in terms of the arbitrary process which placed the Haitian asylum applicants in a peculiar position of admitting deportability so that they might have a basis to apply for asylum, which would promptly be denied. The applicants then would be placed back in deportation proceedings. In essence, the Haitians were effectively forced to admit their deportability before being eligible to file for asylum. After asylum was denied they would inevitably be deported. The normal procedure, which required the government to produce the facts compelling deportation, was replaced by procedural formalities which sought to accomplish the single objective of expediting deportation and wholesale rejection of asylum applications. Judge King aptly summed, "The procedure to which Haitians were subjected is roughly the equivalent of requiring a criminal defendant to concede his guilt before providing him any constitutional or statutory rights."⁹⁰

The arbitrary treatment of and official indifference to the Haitian asylum applicants may be seen more clearly in the mechanisms the INS employed to disguise the fundamental policy determination that the Haitian entrants were to be uniformly denied asylum. According to the Program, asylum interviews were conducted, but they were highly abbreviated and generalized. This posed extraordinary problems in the preparation of asylum claims for the Haitians in view of the language and cultural problems. According to attorneys for the Haitians, the preparation of Haitian asylum claims was a lengthy and time consuming process.⁹¹ On the other hand, asylum interviews conducted by INS officers were even more problematic. The interviews, which at one time were scheduled at the rate of 40 per day, were performed by inexperienced INS officers reassigned from other locations to assist in the hearings.⁹² Prior to the program, asylum interviews had lasted an hour and thirty minutes, but during the Haitian Program one-half hour was devoted to each applicant. Since the interviews were generally conducted through interpreters, only fifteen minutes of the interview was estimated to have been used in substantive dialogue.⁹³ The INS asylum hearings were superficial and inconsequential. Little time was allowed to present details of asylum claims, and the hearings were generally completed within a few minutes. Given the language problems

88. *Id.* at 519.

89. *Id.* at 519.

90. *Id.* at 520.

91. *Id.* at 524, 525.

92. *Id.* at 526, 527.

93. *Id.* at 527.

and the time spent in translation, the actual exchange of substantive information was extremely limited.⁹⁴

Nonetheless, INS officers were pressured to meet the numerical goals established for the accelerated deportation program. They had to process as many applicants as possible in a given day. The large volume of interviews did not induce a friendly atmosphere; INS officers were anxious to get more cases underway, which produced friction and hostility between the officers and the Haitians.⁹⁵ Clearly, INS hearing officers did not have the time to undertake full interviews of the applicants. It was also questionable whether the hearing officers were even competent to undertake the interviews. INS inspectors were brought from Miami airport to assist in asylum processing without receiving any instructions or information on conditions in Haiti. The supervisor of the Haitian asylum application section, for example, testified that she was not told about conditions in Haiti, was not given State Department material on the country, and had not read any official material on Haiti. However, she was effectively making decisions to grant or deny asylum requests in the name of the district director.⁹⁶

The asylum hearings were obviously mere formal exercises, since the decision to deny all Haitian entrants had been a foregone conclusion. District Director Gullage, for example, testified at trial that he had "personally reviewed 30 or 40 of the thousands of asylum cases processed" in the district office. But from November 1978 to March 1979 he had not reviewed any asylum applications.⁹⁷ According to the INS supervisor who decided upon asylum requests on behalf of the district director, after completing asylum interviews, INS case workers made recommendations on the application. The supervisor would then categorize the applications, and if she believed the applications were "clearly lacking in substance," she would sign the district director's name to denials and mail them to the Haitians. However, if she determined that the cases were "doubtful," she would refer them to the State Department.⁹⁸ This supervisor could perform asylum application review even though the supervisor had no experience or background information concerning conditions in Haiti. During the tenure of this particular INS supervisor, decisions were made on between 1,700 and 2,700 asylum applications. This supervisor never found an instance of a "clearly meritorious" asylum claim.⁹⁹ During the Haitian Program, not one Haitian asylum applicant filed a claim of asylum that was granted.

The Haitian asylum applicants were also prevented from providing adequate evidence by rigid time limitations. The process of collecting supporting documentary materials, which took considerable time, was foreclosed by establishing arbitrary time limits.¹⁰⁰ This time pressure, combined with the general absence of legal counsel, made it impossible for the vast majority of the Haitian applicants to prepare a proper application. Consequently, asylum claims were rarely developed in a complete manner, and were filed pro forma

94. *Id.* at 526, 527.

95. *Id.* at 526.

96. *Id.* at 527, 528.

97. *Id.* at 527.

98. *Id.* at 527, 528.

99. *Id.* at 528.

100. *Id.* at 520.

merely to meet INS deadlines. According to a representative of the U.N. High Commission on Refugees, "Many of the applications were incomplete or contained no information at all on the subject matter related to asylum."¹⁰¹ The INS used the lack of adequate information on the asylum applications to deny the asylum requests.

Haitian asylum adjudications before immigration judges were equally arbitrary. Haitians who sought to remain silent by invoking the Fifth Amendment before immigration judges were subjected to severe treatment. Although the Haitians had the right to remain silent, the immigration judges used the exercise of that right as a basis for further punitive actions. Immigration judges systematically threatened, coerced and sought to sanction those Haitians who claimed the Fifth Amendment. As Judge King observed:

Immigration judges . . . inferred from the Haitians silence an admission of the facts in the Order to Show Cause. Second, they harassed and penalized the Haitians by (1) denying them further aid from their counsel, and (2) revoking work permits. Third, they harassed and intimidated attorneys by threatening them with bar association action and by threatening them that 'counsel needs to be taught a few things.' As a result of such action, attorneys representing Haitians felt forced to plead to deportability. . . .¹⁰²

The effect of the Haitian Program upon the Haitians was completely and excessively harsh. Asylum applications were denied without exception; and deportation proceedings against the Haitians were equally relentless. The Haitians were treated categorically as deportable aliens without valid claims to political asylum. A clear illustration of the wholesale denial of asylum applications is shown in Table 2. Table 2 shows that between September 1978 and May 1979, a total of 2,356 asylum applications were filed. By May 11, 1979, a total of 1,767 or 75 percent were denied, while none were granted.

District Judge King, after reviewing the evidence, observed that the results of the accelerated program adopted by INS are revealing, stating, "None of the over 4,000 Haitians processed during . . . (this period) were granted asylum."¹⁰³

HAITIAN IMMIGRATION AND THE BODY POLITIC

In the preceding discussion, data and analysis were presented showing an extraordinarily harsh treatment of undocumented Haitians through the concerted actions of policy-makers from various U.S. government agencies. The measures employed against the Haitian asylum applicants were shown not to be unprecedented or illegal because of administrative inadvertence, but rather, that the illegal and arbitrary policies were fashioned by high level U.S. government officials who purposefully ignored the rights of the Haitians and disregarded established immigration laws.¹⁰⁴

The pattern of arbitrary and illegal conduct by high level policy-makers observed in the Haitian cases raises fundamental questions with regard to the basic tenets of American democracy and the prominence of the rule of law in American society. Indeed, the critical questions arising out of the illegal offi-

101. *Id.* at 525, 526.

102. *Id.* at 521.

103. *Id.* at 451.

104. *Id.* at 511.

Table 2
Weekly Record of I-589 [Asylum] Claims

Week of	(September 1978 - May 1979)		Denied
	Total	Granted	
09/02/78 - 09/08/78	69	0	62
09/09/78 - 09/15/78	104	0	104
09/16/78 - 09/22/78	147	0	147
09/25/78 - 09/29/78	117	0	117
10/02/78 - 10/06/78	99		
10/07/78 - 10/13/78	109	0	109
10/14/78 - 10/20/78	122		
10/21/78 - 10/27/78	130	0	130
10/30/78 - 11/03/78	149	0	149
11/04/78 - 11/10/78	126		
11/11/78 - 11/17/78	149		139*
11/18/78 - 12/01/78	242		237*
12/01/78 - 12/08/78	119		
12/09/78 - 12/15/78	108		
12/16/78 - 12/22/78	70	0	70
12/23/78 - 12/29/78	55	0	55
12/30/78 - 01/05/79	88	0	88
01/06/79 - 01/12/79	15	0	15
01/13/79 - 01/19/79	57	0	57
01/20/79 - 01/26/79	38	0	38
02/03/79 - 02/09/79	38	0	38
02/10/79 - 02/16/79	19	0	19
02/17/79 - 02/23/79	18	0	18
02/23/79 - 03/02/79	17	0	17
03/03/79 - 03/09/79	46	0	46
03/10/79 - 03/16/79	28	0	28**
03/24/79 - 03/30/79	21	0	21
03/31/79 - 04/06/79			
04/07/79 - 04/14/79	15	0	15
04/28/79 - 05/04/79	25	0	25
05/04/79 - 05/11/79	23	0	23

* Transfers account for the difference between total dispositions and denials on these two lines.

** This entry includes adjustments to show all cases back to 1972.

cial conduct in the Haitian Program are complex and numerous. Yet one central question which requires further exploration is why such high level officials, sworn to uphold the law, deliberately embarked upon an illegal course of conduct to deny the lawful rights of a relatively small group of undocumented aliens.

In the introduction to this paper, it was shown that America represented a haven to refugees from diverse national origins seeking to avoid repression in their homelands. Comparatively, the vast majority of earlier refugee groups seeking admission to ask for asylum in the U.S. were distinct from the Haitians in terms of their demographic characteristics, socioeconomic backgrounds and types of regimes from which they were fleeing. Similarly, the large numbers of individuals who immigrated to the U.S. in the past seeking

better economic opportunities were also distinct from the Haitians in terms of geographic origin, racial composition and economic background. In fact, the case of the recent undocumented Haitians represents the only instance of a concentrated, voluntary and relatively large-scale immigration of black people to the U.S.

Certainly, several million Africans were involuntarily taken into slavery and brought to the New World. However, black Africans or blacks in the Diaspora have not historically sought admission to the U.S. as a class of refugees. In fact, only a few thousand Biafrans sought asylum in the U.S. during the Nigerian Civil War in the late 1960's. Further, Ethiopians fleeing the military socialist government's "Red Terror" violence have sought asylum in the U.S. in the late 1970's. The Haitian case, however, is particularly unique because it represents the first instance in which a relatively sizeable group of black people sought refugee status in the U.S.

The number of Haitian immigrants to the U.S. and their subsequent effort to gain refugee status was not proportional to the kind of harsh policy response revealed in the Haitian Program. Comparatively for instance, in 1980, during the Freedom Flotilla, nearly 125,000 Cubans entered the U.S., but between 1970 and 1980, fewer than 40,000 Haitians entered the U.S. without documentation. In this context, U.S. policy towards the Haitians is drawn into sharp contrast, raising basic questions about the motivating factors leading to the formulation of policies for the mass expulsion of undocumented Haitians from the U.S. Therefore, the issue which must be critically examined is the extent to which policy-makers were influenced by factors of race, national origin, administrative requirements and economic considerations in devising the Haitian Program and the extraordinary harshness with which the Program was implemented against the Haitians.

A complete analysis of this issue cannot be readily provided because of the complexity of motivations, perceptions and intentions guiding the particular policy-makers in their decision-making roles. However, partial answers may be sought by examining certain aspects of individual policy-makers behavior, the legislative, judicial and administrative processes involved in immigration policy-making, and the overall assumptions and perceptions guiding decision-makers in formulating policy.

In *Haitian Refugee Center v. Civiletti*, District Court Judge Lawrence King concluded that the Haitians were intentionally discriminated against, by official policy, resulting in the violation of the Haitian's rights under U.S. law. He observed:

The Haitians allege that the actions of the INS constitute impermissible discrimination on the basis of national origin. They have proven their claim. This court cannot close its eyes, however, to a possible underlying reason, why these plaintiffs have been subjected to intentional national origin discrimination. The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country. All of the plaintiffs are black . . .¹⁰⁵

Certainly, the issue of race and national origin discrimination as well as class discrimination has been the most controversial aspect of U.S. policy against undocumented Haitians. Clearly, in the Haitian cases, there is surfeit

105. *Id.* at 451.

evidence showing arbitrary official actions and discriminatory treatment. The question relevant to our analysis is the extent to which the personal prejudices and biases of policy-makers overcame their rational faculties and compelled them to engage in a patently illegal and morally bereft manner. Obviously, a conclusive answer cannot be provided to this question. But insight into the possible motivations and intentions of policy-makers may, however, be obtained by examining aspects of the official decision-making process used in making policy towards the Haitians within the broader context of U.S. immigration policy.

Historically, in certain instances, immigration policy in the U.S. has been sensitive to the racial and demographic composition of immigrants coming to settle in this country. In the late 1800s, for instance, there was considerable effort to exclude Chinese immigrants from entering the U.S.¹⁰⁶ There have been similar restrictionist impulses in U.S. immigration policy expressed in the quota systems. Since the passage of the Immigration and Nationality Act of 1952, a number of statutory provisions have been made to exclude or deny entry to individual aliens with particular characteristics.¹⁰⁷ Arguably, there are some historical antecedents for preferential admission of immigrants because of racial composition or other characteristics. Equally important, the U.S. immigration policy has encouraged the immigration of individuals with the requisite economic means while outright excluding those individuals with limited economic capabilities.¹⁰⁸

In the context of these historical factors, one may attempt to offer a partial explanation for the apparent racism observed in the Haitian Program. In this regard, it may also be instructive to consider the differential official treatment given to Haitians and Cubans in understanding the particular aspect of racism in policy-making towards the Haitians. First, both Haiti and Cuba are Caribbean islands with repressive regimes. Fewer than forty thousand undocumented Haitians entered the U.S. between 1970 and 1980. In 1980 alone, nearly one-hundred and twenty-five thousand Cubans emigrated to the U.S. during the "Freedom Flotilla". Among the Cuban immigrants, an estimated 98 percent have been admitted as refugees and legally reside in the U.S. The exact opposite has been the case with the Haitians. Less than one percent of the total undocumented population was granted asylum between 1970 and

106. Beginning in 1882, a number of bills were passed to exclude Chinese from entering the U.S. While immigration to the U.S. was free and even encouraged until the mid 1800s, by 1875 there were growing unemployment and economic problems. Racist and xenophobic sentiment had been directed toward the Chinese, leading to the passage of the first Chinese exclusion bill in 1882. See Ch. 126, 22 Stat. 58 (1882); Ch. 220, 33 Stat. 115 (1884). For a discussion of Chinese exclusion, see Hendin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1986).

107. For instance, the Immigration and Nationality Act of 1952 provides for the exclusion of, among others, aliens who believe in Communism or anarchism, or belong to organizations promoting such principles, homosexuals, psychopathic personalities, paupers and beggars. INA 212 (a) (28), 8 U.S.C. 1101 (1982); 212 (a) (4), 8 U.S.C. 1182 (a) (4) (1982). In *Boutilier v. INS*, 387 U.S. 118 (1967), the Supreme Court held that homosexuals could be excluded under 212 (a) (4). See also Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930 (1986).

108. For instance, alien E-1 traders who carry on substantial trade between the treaty country and the U.S., and E-2 Investors who commit \$100,000 to business activity in the U.S., may enter the U.S. to conduct business, and later seek waiver of labor certification and obtain permanent residence. 20 C.F.R. § 656.10 (d).

1979. That is to say, only 58 Haitians were granted asylum from a possible pool of 9,871 asylum seekers; and this number would be infinitesimal if the total undocumented Haitian population were to be considered. Flotillas of private boats were organized to ferry Cubans to Miami with official approval, while the Coast Guard deployed its powerful cutters to intercept the Haitians in their rickety boats.

The official explanation has, of course, been that the Cubans were "refugees" and the Haitians, economic migrants. However, this explanation falls far short of the simple and obvious fact that at the same time of the Cuban Freedom Flotilla, those fleeing Cuba were as likely to be economic migrants as the Haitians were likely political refugees. In fact, anyone who could manage to get on a boat leaving Cuba during the Flotilla was likely to be welcomed as a "refugee". Few, if any, were required to produce "proof" of persecution, nor were any Cubans subjected to the kinds of retributive policy actions directed against the Haitians.

The underlying factors in this comparative illustration suggest an explanation of the attitudes of policy-makers, and the extent to which immigration policy-making in the U.S. remains sensitive to the issues of race, national origin and economic background of potential immigrants.¹⁰⁹ In the Cuban case, policy-makers were likely to believe that the majority of the "refugees" would readily be integrated into American society and pursue productive lives. They were also likely to assume that the Cubans had relatively sophisticated educational backgrounds which would serve to accelerate their integration into the labor market. There is also a tendency among policy-makers to believe that the Cubans have particular entrepreneurial abilities which may be fully developed within the framework of the economic dynamism shown among the Cuban community in Miami. The fact that the majority of the Cuban "refugees" are white is likely to influence policy-makers in a positive manner. Obviously, this analysis is not intended to underrate the ideological implications and constituency pressure from the Cuban community in the U.S. Undoubtedly, the departure of thousands of Cubans was a major embarrassment to Castro, and there was consistent pressure from the Cuban community to promote family unification and to liberalize policies to allow new immigration from Cuba. However, these factors were less likely to be controlling when viewed comparatively with the Haitian situation.

On the other hand, the Haitians were likely to be viewed from a diametrically opposing policy perspective. From an economic standpoint, the vast majority of the Haitians came from impoverished backgrounds with limited education. Policy-makers were likely to believe that the Haitians were not only attracted to the U.S. for economic betterment, but that such betterment would be at the expense of American jobs and tax-supported programs. Pol-

109. Our analysis of the salience of race, national origin and economic background draws upon the concept of operational code, which focuses upon a leader's political belief system and notions of correct strategy and tactics. The concept offers a framework in which we can examine the belief systems of top level immigration policy-makers regarding undocumented immigration, eligibility for refugee status and solutions for the problem of illegal immigration. For a discussion of the concept of operational codes see A. George, *The Operational Code: A Neglected Approach to the Study of Political Leaders and Decision-Making*, 13 *International Studies Quarterly*, (1969); O.R. Holsti, *The Operational Code Approach to the Study of Political Leaders: John Foster Dulles' Philosophical and Instrumental Belief*, 3 *Canadian Journal of Political Science* (1970).

icy-makers were less likely to believe that the Haitians could make a net contribution to American society through entrepreneurial ability, at least in the reasonable foreseeable future. They expected the majority of the Haitians to need taxpayer support in the form of social services and income support. The basic assumptions shared among policy-makers does not faintly suggest that the Haitians were viewed as being capable of leading productive lives and making positive contributions to American society. The fact that the Haitians were all Black is likely to have amplified existing stereotypical views held by the policy-makers.

Policy-makers also appeared to have been equally disturbed over the fact that poor black people were coming to the U.S. without apparent abatement. The perceived "Haitian threat" was to a certain extent the perception among policy-makers of an invasion by poor Black Haitians. It is likely that policy-makers may have reasoned that a fair treatment of the Haitians already in the U.S. might be a signalling invitation to other poor Haitians. This was particularly disturbing to policy-makers, who envisioned an endless influx of poor Black people invading the shores of Florida. They were, of course, less prone to articulate any possible bias they may have had relative to the demographic characteristics of the undocumented Haitian population. But their concern about the impact of the Haitians on social services, criminal activity and other adverse consequences on the local scene was frequently declared and openly expressed. In a certain sense, the policy argument concerning the "economic" nature of Haitian migration served to conceal and justify an essentially biased perspective with respect to the Haitians.

Suggesting this analysis as partial explanation to policy-maker behavior in the Haitian situation, is not to ignore the untenability of the U.S. position if it should grant asylum to Haitians on a large scale. Doing so would certainly have caused considerable embarrassment to the Duvalier regime, and have brought into sharp focus U.S. relations with Haiti and the U.S. role in maintaining the Haitian regime. Nonetheless, in U.S. policy towards the Haitians, the salient factors in decision-making had a great deal to do with the Haitians' economic backgrounds and demographic characteristics.

While the obvious and stark factor of prejudice permeated U.S. policy towards the Haitians, it may be somewhat simplistic to limit our analysis only to the factor of policy-maker bias and prejudice. Thus, we must turn our attention to an examination of the systemic and structural factors which render the kind of illegal official conduct we observed in the Haitian case not only possible but also probable.

One significant factor which may serve to explain aspects of the illegal official conduct documented in the Haitian cases may be related to the structure and process of immigration policy-making and law enforcement. Historically, Congress has enjoyed an unchallenged authority in making immigration laws. On the other hand, Congress has also deferred to the executive branch substantial administrative and regulatory power in terms of broad discretionary authority to enforce U.S. immigration laws. Perhaps unlike any other area of legislative activity, congressional action in immigration and naturalization matters has been subject to few restrictions and Congress' authority has with-

stood legal challenge.¹¹⁰

In the past, the wide latitude enjoyed by Congress in making immigration policy has produced some discriminatory legislation and treatment against certain races and nationalities. The executive branch has acted in the same fashion in implementing the laws.¹¹¹ Both Congress and the executive branch have also been partially responsible in fostering a public perception that the country is no longer in control of its borders, and that certain immigrant groups continue to enter the country with impunity. The corollary of this public impression has of course been that these aliens are poisoning themselves to take American jobs and be supported by American taxpayers. This in turn creates public pressure to act, resulting in policies which appear to be a response to a public demand.

Certainly, both Congress and the executive branch have sought to project a public image that something is being done about the problem of illegal immigration. By attributing crisis proportions to the problem, the executive branch expects to cultivate a certain amount of tacit public approval and tolerance of its actions with respect to undocumented aliens, even when these actions may be illegal. After all, a tough and unequivocal law enforcement posture is necessary to regain control of our borders! In this context of contrived or actual emergency, depending upon one's perspective, it is quite likely and even predictable that the framework for illegal official conduct may be nurtured.

While the range of activities and actions that the INS may take relative to aliens is defined by statute and its own regulations and procedures, there is a general tendency in INS law enforcement activities to depart from established practices in situations involving undocumented aliens. This departure is generally characterized by arbitrary and illegal official conduct, usually involving denial of procedural due process rights to the undocumented alien. This often occurs at the district level, and results from the discretionary authority of immigration officers who apprehend and process the aliens. For instance, it would not be an overstatement to observe that the average undocumented alien dreads the prospect of apprehension by INS officers as much as he might the prospect of death. The chance of being caught by "Immigration" is a terrifying and intimidating experience in the mind of the average undocumented alien. Many of these aliens, when apprehended by the INS, are more willing to accept options offered them by the INS at the initial levels of review, than to take a chance by exhausting the legal process, which in fact may not necessarily alter the outcome of deportation. Thus, the position of complete powerlessness which the undocumented alien finds himself in when apprehended by the INS fosters the unchecked exercise of arbitrary and discretionary authority by immigration officials. These officials know from experience that the average undocumented alien is less likely to complain about mistreat-

110. While the Supreme Court has not clearly established the Constitutional basis for Congressional supremacy in the area of immigration, the presumed basis has been attributed to the power "inherent in sovereignty", and the protection of the country from someone deemed injurious to the U.S. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651 (1982); *Chae Chan Ping v. United States* 130 U.S. 581 (1889); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

111. For instance, a regulation promulgated in 1979 by the Attorney General to require Iranian students to report to the INS was upheld on the ground of national emergency. See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir 1979).

ment, and even if he should complain, he may still not achieve a different result. It is quite likely that a process akin to this may have taken place in the Haitian situation, except at a higher level of policy-making. Haitians eager to adjust their status and obtain employment authorization flocked to the INS for registration. This ultimately led not only to revocation of the authorizations but also to exclusion and deportation proceedings.

A third factor which may help explain the types of actions observed in Haitian cases may have to do with policy-makers' perceptions of crisis, ideological orientations with respect to the causes of undocumented immigration, and strong personal views on the need to halt the flow of undocumented entrants coming to the U.S.¹¹² The Haitian asylum cases show that policy-makers perceived a "threat" of invasion by large numbers of Haitians, and that they had to do something to resolve the "threat." While the policy-makers did not fully articulate the nature of the perceived "Haitian threat," it was clear from the policy discussions that they were preoccupied and obsessed with it.

This perceived threat of boatloads of new Haitian arrivals combined with administrative paralysis, i.e. the several thousand unprocessed deportation cases, may have triggered a form of crisis decision-making. That is to say, when policy-makers perceive the existence of a situation of "high threat," they tend to promptly seek out means and approaches that are operationally expedient and responsive, even though outside the normal process of decision-making. In the Haitian situation, the policy discussions suggest that the need to establish the particular decision-making machinery was generally justified in terms of a perceived crisis. The need for quick responses to reduce or eliminate the "threat" may have overwhelmed the decision-makers.

The perceived "threat" may have also shaped various aspects of the Haitian decision-making structure. Decision-makers sought to foster collective action and cohesion in formulating policy and in processing new information for decision-making. They also sought to promote consensus, reduce conflict among decision participants, and limit policy discussions and consideration of policy alternatives to as few as possible so that quick action could be generated. There appeared to be little evidence suggesting basic disagreements, conflicts or analysis of alternative policies; and leading policy-makers did not have any obvious difficulties in generating and maintaining a consensus on the actions taken against the Haitians. In fact, the formal process of decision-making took only a few weeks and implementation started immediately thereafter.

The crisis decision-making model used in this analysis may provide a partial explanation for the Haitian asylum cases. It also reveals the fundamental problems of supplanting the normal policy-making process by an ad hoc decision-making process which thrives on the perception of imminent threat and short decision-time. Thus, the premium placed on consensus and agreement

112. The concept of crisis decision-making has a well established use in the study of international conflict. The concept applies to decision-making situations where decision-makers perceive unanticipated threat, short decision time and the need for quick response. The dynamics of the crisis situation requires that established procedures and organizational process be superseded to generate quick response. For a conceptual analysis see Herman, "International Crises as a Situational Variable," in *International Politics and Foreign Policy: A Reader in Theory and Research*, (J. Rosenam ed. 1969), On the relationship between policy-makers' perceptions, beliefs, and attitudes and policy Actions, see, R. Jervis, *Perception and Misperception in International Politics* (1976).

on a particular policy option among decision participants eliminated the expression of counterbalancing views from being seriously considered. It also prevented other influences from moderating the position of the decision group. To achieve unanimity and quick action, decision-makers, who may have legitimately participated in immigration policy-making, were either not given appropriate decision-making roles or excluded from the process altogether. Ultimately, in the rush to expedite the decision-making process, decision-makers based their actions on faulty assumptions, and reduced the objective situation to their own subjective perceptions of the threat and the need for immediate response.

A fourth factor which may provide partial explanation for the type of illegal official conduct observed in the Haitian asylum cases relates to the absence of a domestic constituency which aggressively pursues and defends the interests of the undocumented Haitians and undocumented aliens in general. Certainly, the agricultural lobby, which aims to insure a ready supply of low cost labor does maintain a vigorous lobbying effort to make sure that the pool of undocumented alien labor persists in some form. Yet there are relatively few organizations which seek to protect the rights of undocumented aliens either in the work place or in the legal, legislative and administrative processes. Thus, in the absence of external pressure and internal checks, it may not be surprising to find arbitrary and illegal actions taken against undocumented aliens.

The absence of an organized and aggressive domestic support group for the Haitians may have contributed to the arrogance and heavy-handedness with which officials dealt with the Haitians. Policy-makers may not have felt accountable for their unlawful actions, at least in so far as public opinion is concerned, because there were few individuals or organizations with the requisite political influence to restrain or inhibit their arbitrary conduct. Clearly, the broader Afro-American community in the U.S. did not rally to the support of the Haitians, although a few Afro-American leaders and civil libertarians from the majority community were successful in publicizing and providing legal defense for the Haitians. Comparatively, it is unlikely that the Cubans who came during the "Freedom Flotilla" would have been subjected to the same kinds of official mistreatment as were the Haitians. The Cuban community would have mobilized its resources, not only to secure a permanent resolution of the immigration status of any bona fide Cuban entrants, but also to frustrate and stop any large-scale expulsion programs.

POLITICAL ASYLUM IN THE U.S.: POLITICS OR LAW?

The manifestations and magnitude of persecution particularly in authoritarian and totalitarian Third World countries are taking new forms that may not have been consciously anticipated in U.S. asylum and refugee policy. As the communist regimes in the East become more subtle in their repressive techniques and attempt to project a facade of political liberalism for Western consumption, their oppressive counterparts in the Third World are adopting brazenly brutal and indiscriminate methods of persecuting large segments of their populations. One case in point is the program of mass 'resettlement' of drought victims by the socialist military government in Ethiopia. The so-called resettlement program has led to the dislocation of hundreds of

thousands of people from regions where opposition to the military regime is high, to other barren parts of the country which remain under the military's control. Similarly, persecution has also taken the form of indiscriminate violence sponsored or organized by semi-official and private 'death squads' and vigilante groups, who seek to eliminate any opposition and popular democratic impulses in the name of resisting communism. Persecution is also taking the form of massive warfare upon large civilian populations as witnessed in the Soviet bombings in Afghanistan. Over three million Afghans have become refugees because they are unwilling to survive under Soviet domination and a communist political order.

The dilemma of U.S. asylum policy arises from its inability to reconcile and accommodate these evolving manifestations of persecution. U.S. policy insists upon proof of individual and personal persecution. The refugee or individual applicant must produce evidence which shows not only that the refugee applicant was persecuted in the past in a readily recognizable form, such as, imprisonment or torture, but also, until recently, establish a clear probability of persecution if the refugee applicant returned to his homeland.¹¹³ Unfortunately, it is often not possible for the individual who has been terrorized and menaced by the 'death squads' or a repressive security apparatus, such as the *Ton Ton Macutes* in Haiti, or whose village has been strafed by Soviet bombers, to produce documentary or other evidence of individual persecution. However it cannot be said that this individual is any less persecuted than the ambassador who defects upon recall by any one of these authoritarian or totalitarian regimes. Given the mass nature of persecution in the present day, U.S. asylum policy has not evolved to accommodate the changing circumstances of the factors creating refugees in the totalitarian and authoritarian societies. It may be unrealistic and even contradictory to insist upon proof of individual persecution, when persecution often occurs indiscriminately and on a mass scale through state organs and well organized private vigilante groups.

A second major issue in U.S. refugee and asylum policy involves the dichotomy between the so-called economic migrants and those fleeing political persecution. Many of the authoritarian regimes that have friendly relations with the U.S. have spawned extreme conditions of poverty in their societies, through mismanagement of their national economies, political corruption and the residual effects of underdevelopment. The absence of meaningful land reform, the lack of a redistribution of wealth, excessive military expenditures, heavy external debts and a host of other factors have produced large dispossessed populations which exist on the edge of subsistence. U.S. refugee and asylum policy blindly refuses to recognize anyone who may flee conditions of extreme poverty and destitution, even though such conditions of poverty are rigidly maintained by the security organs of these authoritarian regimes.

U.S. policy ought to be sensitive to the type of brutal persecution visited upon the poor in these authoritarian societies through an economic, political and legal system which serve to enforce and maintain structural inequality by means of repressive police forces. Presently, an asylum applicant or a refugee who may argue that he is a victim of institutional violence, and a legal, economic and political system which keeps him in a state of perpetual destitution is not likely to gain favorable asylum consideration. Even if this individual

113. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

could document every aspect of this claim as it affects him, he is still not likely to prevail. To be eligible under U.S. asylum and refugee policy, he must not only risk his life by doing some act which brings him in direct confrontation with the regime in power, but he must also be subject to some drastic action by the regime.

The insensitivity of U.S. asylum policy to the conditions of the so-called economic migrants also begs the ethical question: Why is political persecution intrinsically more worthy than economic persecution maintained by a repressive political system which is responsible for extreme poverty and despair? Alternatively, should the means used to accomplish the persecution be determinative of the significance accorded the end result of persecution? Taking an inflexible policy approach, of course, does not answer the question; and U.S. policy-makers must ponder the underlying assumptions in their policy approach and the reality of extreme poverty maintained by the authoritarian regimes which the U.S. often supports.

Ironically, U.S. refugee and asylum policy has, to a certain extent, reflected a bias in favor of asylum applicants and refugees who come from relatively privileged socioeconomic backgrounds. While it may be true that refugees with elite backgrounds are likely to be subject to persecution under certain circumstances, due to their relative positions in the totalitarian or authoritarian societies, similar forms of persecution that are less likely to be reported occur daily in the lives of the common people. Yet, an impoverished Haitian, who may argue that he left his homeland because a local Macute official expropriated his cattle or production implements, or that he was a victim of Macute extortion, is likely to be dismissed as a "farmer or fisherman without political awareness." There is the incorrect and unfortunate assumption in the application of U.S. refugee and asylum policy which postulates that an individual with limited education and modest economic background seeking asylum is either unable to discern persecution, or even if he did, that persecution could not be separated from the general conditions of economic hardship he was facing. Therefore, the persecution should not make a difference. Nonetheless, the persecution of the individual from an elite background is, however, more conspicuous to the administrators of U.S. asylum and refugee policy.

CONCLUSION

America has an unrivaled tradition of welcoming refugees seeking a haven from persecution and immigrants seeking economic opportunity. It has been said that in recent years, the U.S. has begun experiencing 'refugee fatigue' syndrome. The world sees the U.S. as a place of political stability and economic opportunity, and so it is said that anyone with the means to come to the U.S. will attempt to do so. Undoubtedly, America has been generous among the community of nations welcoming refugees. However, with increasing domestic economic problems, admission of large number of even bona fide refugees will pose some problems.

Whether or not the U.S. will continue to admit refugees in sizeable groups in the future is likely to provoke substantial public debate and discussion. However, it would be tragic to allow officially discriminatory practices to occur within the context of existing asylum and refugee policy and deny

individuals or groups the opportunity to a fair hearing under U.S. law. Such discriminatory practices would not only be inconsistent with the long tradition of welcoming those fleeing persecution, but is also undemocratic and morally wrong.

The obvious argument needs to be made that U.S. refugee and asylum policy must be facially and substantively neutral in the treatment of individuals or groups seeking refugee status or asylum. U.S. policy ought not make distinctions between the repression and persecution of totalitarian regimes and the equally reprehensible conduct of their authoritarian counterparts. In the same vein, U.S. refugee and asylum policy must be 'de-ideologized' and made less of an instrument of foreign policy to undermine and embarrass ideological adversaries. Rather, it should be a human policy aimed at reducing human misery. The treatment of asylum applicants should also be depoliticized and conducted within the established administrative and judicial framework. Finally, implementation of U.S. refugee and asylum policy should not be explicitly predicated on the view that one is more likely to be subject to persecution because one came from a society dominated by a totalitarian regime. Alternatively, policy should not demand a higher standard of proof of persecution from the individual who may come from a friendly authoritarian regime. Failure to abandon this duality in U.S. policy will continue to reveal a double standard which is disparately applied to different groups of refugees with inconsistent and discriminatory results.