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Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy

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WET FOOT, DRY FOOT, NO FOOT: THE RECURRING CONTROVERSY BETWEEN CUBANS, HAITIANS, AND THE UNITED STATES IMMIGRATION POLICY

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I. INTRODUCTION

The Caribbean islands of Cuba and Haiti are well-known for their politically-tumultuous history and their abject poverty.¹ The citizenship of both countries has suffered an inordinate amount of deprivation of the most elementary rights that humans possess.² Their only outlet to reach the freedom they both desire has been the high seas—the dangerous and treacherous wa-

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1. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2003, *available at* <http://www.cia.gov/cia/publications/factbook/geos/cu.html> [hereinafter CIA I]; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2003, *available at* <http://www.cia.gov/cia/publications/factbook/geos/ha.html> [hereinafter CIA II].

2. *Id.*

ters of the Atlantic that separate them from the beacon of freedom: America.³ Yet, Cuba is the only one that has an agreement with the United States regarding the rights of its citizens to ask for political asylum.⁴ The Haitians have no such agreement and have become disillusioned with what they perceive is a double standard on the part of the United States.⁵ Why is this, and do the Haitians have a legal basis to achieve parity with the Cubans? This paper will discuss this very complex issue.

Part II of this article will discuss the history and reasons for Cuba's many waves of immigration, as well as the policies instituted in the United States with regard to such emigration. Part III of this article will discuss the history and reasons for Haitian emigration and the laws and policies prohibiting the same. Part IV will briefly explain the current controversy between Cuban and Haitian emigration. Part V will analyze the scrutiny that is applied to laws relating to immigration policies, as well as the power of Congress to regulate immigration. Part VI will analyze whether the policy is unconstitutional on the basis that it discriminates against Haitians by specifically granting Cubans certain rights. Part VII will conclude with what can be done to provide Haitians with similar rights.

II. CUBA AND EMIGRATION

Cuba's relationship with the United States was established well before Fidel Castro's brutal reign over the now communist island.⁶ On May 20, 1902, the United States recognized Cuba's independence after Spain's sovereignty was renounced.⁷ A year later, the infamous Guantanamo Bay naval base was acquired by the United States.⁸ Not surprisingly, the relationship between the United States and Cuba in the preceding fifty-seven years was stable and inconspicuous.⁹ However, such relations would not last long. On December 2, 1956, Fidel Castro and his close friend, "Che" Guevara infil-

3. *Id.*

4. Read Sawczyn, Note, *The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, it Does not Curtail Illegal Immigration, and thus Should be Changed so that Cuban Immigrants Are Treated Similarly to Other Immigrants*, 13 FLA. J. INT'L L. 343, 348 (2001).

5. See generally *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F. Supp. 1396 (D.C. 1985) [hereinafter *Gracey I*].

6. Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens*, 15 GEO. IMMIGR. L.J. 319, 326 (2001).

7. *Id.*

8. *Id.* at 326-27.

9. *Id.* at 327.

trated the island of Cuba.¹⁰ A little over two years later, Fidel Castro victoriously ousted then Cuban dictator, Fulgencio Batista.¹¹

In a speech dated January 3, 1959 to the people of Santiago de Cuba, Castro proclaimed:

I should add that, personally, I am not interested in power nor do I envisage assuming it at any time. All that I will do is to make sure that the sacrifices of so many compatriots should not be in vain, whatever the future may hold in store for me.

In all my dealings, I have always acted loyally and frankly. One should never consider what has been obtained underhandedly and with duplicity as a triumph and the language of honor which you have heard from my lips is the only language I know.

....

All I can do is ask you to give us time and to allow time to the civil powers of the Republic, so that we can do things the way the people want them; but they must be done gradually, little by little The Revolution cannot be completed in a single day but you may be sure that we will carry the Revolution through to the full. You may be sure that for the first time the Republic will be truly and entirely free and the people will have their just recompense. Power was not achieved through politics, but through the sacrifices of hundreds and thousands of our fellows. It is not a promise we make to ourselves but to the people, the whole Cuban nation; the man who has taken over power has no commitments with anyone other than with the people.

....

True order is that based on freedom, on respect and on justice, but at the same time that which precludes the use of force. Henceforward, the people shall be entirely free and the people know how to conduct themselves, as they have proven today. We have achieved the peace that our country needs.

....

In the future, the armed forces of the Republic will be regarded as exemplary, given their ability, their training and the manner in which they identified with the cause of the people and because, henceforward, their rifles will be solely and always at the service of the people The officers will have authority; there will be discipline in the Army; there will be a

10. Roland Estevez, Note, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1273 (2002).

11. *Id.* at 1274.

military penal code, in which any violation of human rights, any dishonorable or immoral acts by any military personnel, will be severely punished. There will be no privileges; there will be no privileges for anyone; and the members of the Armed Forces who are capable and deserving will be promoted. It will not be as it has been in the past--that is, that relations and friends are promoted, regardless of grades. This sort of thing will finish for the military as it will finish for laborers.

....

At last the people have been able to free themselves from this rabble. Now anyone may speak out, whether they are for or against That was not the case here previously because until the present time, they were the only ones [allowed] to speak out; only they spoke out. And they spoke against us. There will be freedom for those who speak in our favor and for those who speak against us and criticize us. There will be freedom for all men because we have achieved freedom for all men. We shall never feel offended; we shall always defend ourselves and we shall follow a single precept, that of respect for the rights and feelings of others.

....

On this date, today, when Dr. Urrutia took over the Presidency of the Republic Dr. Urrutia, the leader who declared that this was a just revolution--on territory that has been liberated, which by now is the whole of our country, I declare that I will assume only those duties assigned to me, by him. The full authority of the Republic is vested in him. And our arms bow respectfully to the civil powers of the Civilian Republic of Cuba I surrender my authority to the Provisional President of the Republic of Cuba and with it I surrender to him the right to address the people of Cuba.¹²

The term "provisional" referring to Dr. Urrutia's presidency was correct.¹³ Just seven months later, Dr. Urrutia resigned as President of the Republic of Cuba because of irreconcilable differences between him and then prime minister, Fidel Castro.¹⁴ Dr. Urrutia's resignation came right after a televised speech given by Fidel Castro, accusing Dr. Urrutia of treason and other high crimes.¹⁵ Not surprisingly, Dr. Urrutia found it necessary to resign from his post after Fidel Castro's own resignation as Prime Minister during a televised speech.¹⁶

12. Fidel Castro, Speaks to Citizens of Santiago (Jan. 3, 1959), available at <http://lanic.utexas.edu/la/cb/cuba/castro/1959/19590103>.

13. Robert E. Quirk, *The Political End of "President" Urrutia*, Free Cuba Foundation (1993), at http://www.fiu.edu/~fcf/castro_year1/urrutia.dorticos.html.

14. *Id.*

15. *Id.*

16. *Id.*

After Dr. Urrutia's resignation, Fidel Castro appointed Osvaldo Dorticos Torrado as the nineteenth president of the Republic of Cuba and, on July 26, 1959, the newly appointed president announced to the citizens of Cuba that Fidel Castro was to return as premiership of the republic.¹⁷ Shortly thereafter, Fidel Castro's true vision of Cuba began to take form; instantaneously, he began to implement new changes within the political structure of Cuba.¹⁸ Cuba's wealthy were the first to feel Fidel Castro's wrath, thus marking the beginning of a new sense of urgency to emigrate out of the emerging communistic state.¹⁹ This growing concern continued and an estimated 215,000 refugees fled the island of Cuba from 1959 to 1962.²⁰

Rumors that the Cuban government intended to "nationalize" children over the age of five began to circulate over the island.²¹ Frantic parents began to take desperate measures to ensure that their children would not be sent to the Soviet Union for communistic indoctrination.²² Word of an underground movement organized by the Catholic Church and the CIA operation, code-named "Operation Pedro Pan," spread through the island.²³ History reveals that "Operation Pedro Pan" successfully extracted 14,048 Cuban children, escalating the already growing immigration influx crisis of that period.²⁴ Thousands of these children left Cuba, not knowing whether they would ever see their parents again.²⁵ Unfortunately, for many that was the

17. Fidel Castro, Castro Agress [sic] to Return to Premiership (July 26, 1959), available at <http://lanic.utexas.edu/la/cb/cuba/castro/1959/19590727>.

18. Estevez, *supra* note 10, at 1274.

19. *Id.*

20. *Id.*

21. Yvonne A. Tamayo, *Cubans Without Borders: Finding Home*, 55 FLA. L. REV. 215, 221 (2003); Karen Fletcher, *Cuba: U.S. Employs Weapons of Mass Migration*, CISLAC, (May 2003), at <http://www.cislac.org.au/n3.htm>.

22. Tamayo, *supra* note 21.

23. Fletcher, *supra* note 21.

24. Tamayo, *supra* note 21.

25. Interview with Lomberto L. Pérez, Operation Pedro Pan Participant, in Miami, Fla. (July 2, 2003). Interviewee explained:

A year before I left Cuba I was in hiding. My mother and father feared the rumors that were circulating over the Island. I thought to myself: "This could not be happening, the Government was going to take all the children of Cuba to the Soviet Union! Why?" The time came when the fear was too great, and my parents decided to send me to the United States by "Operation Pedro Pan." This was an operation orchestrated by the Catholic Church and the CIA. They were able to falsify our visas so that the Cuban government would think they were real. I believe an estimated 14,000 children in 1962 reached United States soil because of Operation Pedro Pan.

I still remember that day, May 1, 1962, when the authorities in Cuba stuck my brother and I in a bathroom. There, a government agent began to touch us with his rough and cold hands. "Bajense los Pantalones! (Lower your pants)," he said in a heartless and shaky voice. They found nothing on either of us, except a sparkling silver, well taken care of Parker pen that my father had recently given me. He found my stunning pen to his liking, so he decided he would make

case.²⁶ However, for others, a second influx of immigrants during 1962 through 1965 marked the beginning of a new life in a foreign land with their reunited families.²⁷

An estimated 74,000 Cuban nationals emigrated during the 1962 to 1965 period. Most were middle class immigrants who had the means and connections within the United States to successfully emigrate from the island.²⁸ The number of immigrants during this period dramatically decreased due to the horrific event that emerged at the time, an event that may as well be classified as one, if not the most, terrifying event in American history.²⁹ After a group of CIA-trained Cuban exiles failed to overthrow Castro's regime in a covert operation better known as the "Bay of Pigs," the Soviet Union began to supply the Cuban government with much needed military artillery.³⁰ After sparking the United States' interest, surveillance revealed Soviet-made nuclear missiles strategically placed on the communist island.³¹ Obviously, the Kennedy administration took this as an immediate threat to national security and suspended all flights to and from Cuba.³² Tensions rapidly escalated and the world stood in amazement, as a nuclear confrontation between the United States and the Soviet Union seemed imminent.³³ Fortunately, the confrontation between the nuclear powers was resolved amicably, but the administration was still faced with Cuba and its emigration problem.³⁴

Flight restrictions to and from Cuba continued—a decision that Castro was not very pleased about, given his utilization of such flights to rid the

it his. It was my pen, but what could I do? It was then 11:30 a.m. We were to board the plane soon. All I could think about was that this trip would be temporary; I was to return to my country once Fidel Castro's regime was overthrown.

It has been forty-one years since that day, and I have yet to return to my country. But, I am grateful for the sacrifices my parents had to endure. Thankfully my parents were able to escape from Castro's regime a couple of years later. Both were to die in the States without ever returning to their home land. I have made the United States my home now, and I am grateful for the opportunities this country has given me, the freedom to speak my mind, the freedom to grow economically, but most of all the freedom to grow as an individual. I believe that all exiles still dream of one day returning to their country, and once again walk through the streets they once walked as children, as "Cubans."

Id.

26. *Id.*

27. Estevez, *supra* note 10, at 1274.

28. *Id.*

29. See Note, *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 903 (2001) [hereinafter *Don Quijote*].

30. *Id.*

31. *Id.* at 904.

32. *Id.*

33. *Id.*

34. *Don Quijote*, *supra* note 29, at 904.

island of individuals who he believed were anti-revolutionist.³⁵ In retaliation, and as a response to unfounded propaganda by the imperialist, Castro, in a speech dated September 28, 1965, announced that any Cuban national having relatives in the United States were free to be picked up by sea vessel from Cuba's shores without penalty or consequence.³⁶

Such a decision by Castro aggravated the already growing immigration influx problem which almost doubled in size, causing the United States to lose control over the situation, forcing negotiations between Cuba and the Johnson administration.³⁷ An agreement between both governments was reached and a more organized procedure was instituted.³⁸ This enabled the United States to have more control over Cuban emigrants who were Miami-bound.³⁹ The agreement called for the transportation of emigrants by flights, which were later referred to as "freedom flights."⁴⁰ An estimated 340,000 Cuban immigrants reached United States soil by way of "freedom flights."⁴¹ The United States Immigration Department was able to handle such an extraordinary influx of Cuban immigrants with ease, due to Congress' enactment of the Cuban Adjustment Act of 1966 ("CAA").⁴² The CAA enabled Cuban immigrants to declare political asylum without having to prove refu-

35. *Id.*

36. *Id.*; see generally Fidel Castro, Speech at Ceremonies Marking Fifth Anniversary of the CDR (Sept. 29, 1965), available at <http://lanic.utexas.edu/la/cb/cuba/castro/1965/19650929>. Fidel Castro, in his speech, proclaimed:

[T]he imperialists are making a campaign with those who go, when it is they who close all the ways.

We have mediated about this. Illegal departures are not permitted. Among other things, what is gained? The risks that are taken to join a family or simply because they do not like it here and want to go? . . . [W]e have no reason to force—absolutely anyone to like our revolution, to like socialism, to like our ideals and communist society. We have, enough people who fight for it and are ready to give their lives for it.

That is why we have never given reason for what they have done for almost three years, making propaganda, fraudulent and dirty, with these cases. It is said that we machinegun those that want to go and that we do horrible things against them. Well, we must put an end to this once and for all. How? Well, we think that there is a good method. It is not we who are opposed to the departure of those who want to go, but the imperialists, and since this is the fact, we are even ready to fix up a little place somewhere so that all who have relatives here will not have to run any risks, will not have to expose their relatives to any kind of risk.

We could for example, fix up the port of Camarioca in Matanzas, one of the closest points, so that to all who have relatives we could give a permit to come by ship, regardless of who they are, with all guarantees, giving advance notice in time, by correspondence, and if they cannot, let them then address the correspondence to the Ministry . . .

Id.

37. *Don Quijote*, *supra* note 29, at 904.

38. *Id.*

39. *Id.* at 905.

40. *Id.*

41. Estevez, *supra* note 10, at 1274.

42. See Sawczyn, *supra* note 4, at 346.

gee status, thus allowing them to easily obtain residence in the United States.⁴³ The act reads as follows:

That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act, the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least two years, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever date is later.⁴⁴

Congress enacted the CAA with four major reasons in mind: 1) to ensure national security; 2) to provide a safe haven for victims of persecution; 3) to reduce administrative burdens; and 4) to channel migrating Cubans into the American workforce.⁴⁵ However, the two underlying reasons for the CAA, were the underlying spread of communism across the neighboring Latin American countries and the destabilization of the Cuban island.⁴⁶ The Soviets' efforts to utilize Cuba as a tool to spread communism across the Latin American countries were evident.⁴⁷ It was no surprise that Cuba's revolution was highly viewed throughout the Latin American arena.⁴⁸ Concerns that the United States' Cold War influence was weakening within those countries and around the world rapidly escalated.⁴⁹ However, the United States, by way of immigration law, sent out a loud and clear message to communists across the world.⁵⁰ Thousands of Cuban immigrants entered the United States and sought safe haven in a democratic government, such denouncement of government was viewed as powerful anti-communist propa-

43. *Id.* at 346–47.

44. Cuban Adjustment Act, Pub. L. No. 89–732, § 1, 80 Stat. 1161, 1161 (1966).

45. *Don Quijote*, *supra* note 29, at 908.

46. *See id.*

47. Estevez, *supra* note 10, at 1279; *see also* Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W.L. REV. 39, 45 (1999).

48. Estevez, *supra* note 10, at 1279–80.

49. *Don Quijote*, *supra* note 29, at 908 (citing FELIX ROBERTO MASUD-PILOTO, WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES 65, 129 (1988)).

50. *Id.* at 909; *see also* *If Castro Is Counting on a Deal with Kennedy*, U.S. NEWS & WORLD REP., Jan. 16, 1961, at 38.

ganda, which encouraged many concerned anti-communists.⁵¹ Furthermore, the CAA, also served as an effective tool that exhausted Cuba of its physicians, teachers, and technicians, a vital part of the population needed to carry out Castro's communistic views.⁵²

As a result of the mass professional exodus, in 1973, Castro found it necessary to terminate all flights from Cuba to the United States in the hopes that it would re-stabilize its social structure.⁵³ Predictably, once the Cuban dictator terminated all flights from Cuba, a sharp decrease in immigration occurred, and many illegal escapes ensued.⁵⁴ Many of these illegal escapes continued until the 1980s.⁵⁵ In an effort to burden the United States, Castro opened the Cuban port of El Mariel, emptied his prisons, and allowed over 125,000 Cuban nationals to flood the shore lines of the United States.⁵⁶ In response, the Carter administration welcomed the immigration influx with its "open hearts and open arms" policy, allowing immigrants who sought refuge from political persecution to seek asylum in the United States.⁵⁷ Fourteen years later, Castro attempted to repeat history by allowing any Cuban national to leave the communist island.⁵⁸ However, Cubans were not received with "open hearts and open arms" by the Clinton administration. President Clinton responded to Castro's attempt by enacting a new policy now known as the Wet-Foot/Dry-Foot Policy.⁵⁹ This new policy called for the interception and repatriation of Cuban immigrants at sea.⁶⁰ However, because the CAA was still in effect, those who reached United States soil were allowed to stay, hence the name Wet-Foot/Dry-Foot Policy.⁶¹

51. Estevez, *supra* note 10, at 1280.

52. Sawczyn, *supra* note 4, at 347; see MASUD-PILOTO, *supra* note 49, at 1.

53. Estevez, *supra* note 10, at 1274; see ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* 85 (1985).

54. Estevez, *supra* note 10, at 1274.

55. *Id.*

56. *Id.* at 1275.

57. *Id.*; Yvette M. Mastin, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 *SCHOLAR* 137, 142-43 (2000).

58. Estevez, *supra* note 10, at 1275; see Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens*, 15 *GEO. IMMIGR. L.J.* 319, 328 (2001).

59. Sawczyn, *supra* note 4; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *PUB. L. NO. 95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS* 4 (1995), available at <http://www.gao.gov/archive/1995/ns95211.pdf>.

60. Sawczyn, *supra* note 4; 140 *CONG. REC.* H8601-04 (1994); Tim Padgett, *War Over a Poster Boy*, *TIME*, Dec. 13, 1999, at 68.

61. Sawczyn, *supra* note 4.

III. HAITIAN EMIGRATION

A. *The Foundation of Haitian Emigration*

It has been stated that “[t]he United States’ ongoing involvement in Haitian affairs has contributed to the current economic and political crisis in Haiti.”⁶² These sentiments stem from long-standing Haitian immigration policies.⁶³ During the Kennedy administration, Haiti suffered the repressive rule of Duvalier, also known as “Papa Doc,” who engaged in ongoing human rights violations.⁶⁴ Yet, the United States “turned a blind eye” and received anti-Cuban support in return.⁶⁵ In 1963, the United States officially severed relations with Haiti.⁶⁶ However, the United States provided Haiti with military support for some years thereafter.⁶⁷ Duvalier continued his oppressive reign over Haiti until 1971.⁶⁸ In 1971, his son, Jean-Claude Duvalier, nicknamed “Baby Doc” took over the presidency.⁶⁹ His reign was just as oppressive as his father’s previous reign.⁷⁰ Baby Doc’s reign lasted fifteen years, until he was ousted in 1986.⁷¹

Due to the extraordinary amount of deaths continually occurring in Haiti, the United States joined many other countries in demand of Baby Doc’s departure from Haiti.⁷² After his departure, the United States provided Haiti with economic aide in the amount of \$200 million.⁷³ During the years that followed, specifically 1986 through 1990, Haiti encountered five different presidents: 1) Leslie Manigat, elected by popular vote; 2) Henri Namphy, came to power through a military coup; 3) Prosper Avril, came to power

62. Malissia Lennox, Note, *Refugees, Racism, and Repatriations: A Critique of the United States’ Haitian Immigration Policy*, 45 STAN. L. REV. 687, 692 (Feb. 1993).

63. See generally *id.*

64. *Id.* at 697; GILBERT LOESCHER & JOHN SCANLAN, HUMAN RIGHTS POWER POLITICS, AND THE INTERNATIONAL REFUGEE REGIME: THE CASE OF U.S. TREATMENT OF CARIBBEAN BASIN REFUGEES 12 (1985).

65. Lennox, *supra* note 62, at 697.

66. *Id.* (citing ROBERT I. ROTBERG, HAITI: THE POLITICS OF SQUALOR 238 (1971)).

67. Lennox, *supra* note 62, at 697. “The assistance severely crippled Haiti because Papa Doc promptly diverted funds to the *Tonton Macoutes* in order to maintain his stronghold. Without the Macoutes, Papa Doc would have been powerless; and without U.S. military aid, the militia would not have been so powerful.” *Id.*

68. *Id.* (citing JAMES FERGUSON, PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS 49 (1987)).

69. Lennox, *supra* note 62, at 697.

70. *Id.*

71. *Id.* at 697–98.

72. *Id.* at 698.

73. *Id.* (citing SIMON M. FASS, POLITICAL ECONOMY IN HAITI: THE DREAM OF SURVIVAL 15 (1988)).

through a military coup; 4) General Herard Abraham, appointed by Prosper Avril; and 5) Ertha Pascal Trouillot, appointed by General Herard Abraham.⁷⁴ Clearly, there was no stability in Haiti.⁷⁵

On February 7, 1991, Haiti's first democratic president was elected.⁷⁶ Out of fourteen candidates running for president, Jean-Bertrand Aristide, a Roman Catholic priest, succeeded in obtaining sixty-seven percent of the country's votes.⁷⁷ Aristide instilled democratic beliefs in the people of Haiti by giving them hopes of a fair government.⁷⁸ "He spoke for the impoverished majority and instilled hope that the corrupt politics of the elite governing class and vicious militia had come to an end. He immediately called for the resignation of several key military leaders and began to investigate and punish the criminal acts of his predecessors."⁷⁹ On September 30, 1991, Haiti's quick encounter with democracy came to an abrupt end.⁸⁰ "[T]he Tonton Macoutes ousted Aristide from power, throwing Haiti in to a spiral of political violence so brutal as to give rise to the recent refugee crisis."⁸¹

In *Haitian Refugee Center, Inc. v. Gracey*,⁸² the Haitian Refugee Center alleged that the United States' program of high seas interdiction violates Haitians' rights under the Refugee Act of 1980 and the Immigration and Nationality Act.⁸³ The Haitian Refugee Center further alleged that the United States had violated the Fifth Amendment of the Constitution by depriving refugees on interdicted vessels from Haiti the rights and liberties they were entitled to through the Refugee Act and Immigration and Nationality Act.⁸⁴ They also alleged "that the interdiction program fail[ed] to satisfy the 'nonrefoulement obligation' imposed by the United Nations Protocol and Universal Declaration of Human Rights by creating a substantial risk that political refugees [would] be forcibly returned to face persecution."⁸⁵ It was further alleged that the interdiction program violated Article Three of the United Nations Convention, relating to the section of racial and other discrimination.⁸⁶

74. Lennox, *supra* note 62, at 698.

75. *Id.* (citing HOUSE COMM. ON THE JUDICIARY, REPORT ON HAITIAN REFUGEE PROTECTION ACT OF 1992, H. R. REP. NO. 437, 102d Cong., 2d Sess. 3 (1992)).

76. Lennox, *supra* note 62, at 698.

77. *Id.*; 1 EUROPA PUBLICATIONS, THE EUROPA WORLDBOOK 1992, 1304 (33d ed. 1992).

78. Lennox, *supra* note 62, at 698.

79. *Id.* (citations omitted).

80. *Id.* at 698-99.

81. *Id.*

82. 600 F. Supp. 1396 (D.C. 1985).

83. *Id.* at 1401.

84. *Id.*

85. *Id.*

86. *Id.*

Lastly, the Haitian Refugee Center alleged that the interdiction program violated the extradition statute⁸⁷ and the Extradition Treaty between Haiti and the United States.⁸⁸

After taking these allegations into consideration, the court held:

Although the plaintiffs have standing to bring this suit, none of the four Counts contained in the instant complaint states a cause of action upon which this Court may grant relief. Because the interdiction program herein attacked occurs outside the jurisdiction of the United States, neither the statutes nor the treaty upon which plaintiffs rely can provide any relief. Because the interdicted Haitians never reach the shores of the United States, they are entitled to no protections contained within the Fifth Amendment of the Constitution. The plaintiffs also can find no relief in the United Nations Protocol Relating to the Status of Refugees and the Universal Declaration of Human Rights.⁸⁹

In *Haitian Refugee Center, Inc. v. Baker*,⁹⁰ the district court granted preliminary injunctions which forbade James Baker, III, the Secretary of State and others, from repatriating Haitians that were in their custody.⁹¹ On appeal, Baker argued that the Haitian plaintiffs did not have any “enforceable rights under Article 33 because Article 33 is not self-executing as to persons

87. Specifically referring to 18 U.S.C. § 3181 (2000), which states in part:

(a) The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

(b) The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that—

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and

(2) the offenses charged are not of a political nature.

Id.

88. *Gracey I*, 600 F. Supp. at 1401.

89. *Id.* at 1406–07. The court further held:

It is clear that the President instituted the interdiction program pursuant to ample constitutional and statutory authority. This program is carried out pursuant to an agreement with Haiti, and is therefore intricately interwoven with matters of foreign relations. Because such programs “are so exclusively entrusted to the political branches of government”, this Court’s review is correspondingly narrow Although the actions of the plaintiffs, and their representatives, are commendable, and stem from the highest form of humanitarian concern, the Court cannot allow its sympathy for the plight of the Haitians to blind it from the law. The Court simply can find no basis for relief. The Court has today issued an Order, consistent with this Opinion, which dismisses this action for the reasons herein stated.

Id. at 1407.

90. 949 F.2d 1109 (11th Cir. 1991).

91. *Id.* at 1110.

situated like the plaintiffs in this case,” since the Haitian plaintiffs have not reached United States territory.⁹² Further, Baker argued that the injunction issued by the district court was unrelated to the rights claimed by the Haitian Refugee Center.⁹³ Due to the arguments asserted by Baker, the Eleventh Circuit dissolved the injunction issued by the district court and remanded the case with instructions to dismiss the case.⁹⁴ Although once again Haitians were refused entry into the United States, it is important to note that Judge Hatchett dissented and recognized that Haitians are the only refugees that are intercepted in the waters and returned to their country.⁹⁵ The Haitian Refugee Center appealed to the United States Supreme Court for an application of stay and petitioned for writ of certiorari.⁹⁶ The Court denied the writ for certiorari.⁹⁷

Following *Baker*, the Supreme Court decided the case of *Sale v. Haitian Centers Council, Inc.*⁹⁸ The issue in *Sale* was “whether . . . forced repatriation, ‘authorized to be undertaken only beyond the territorial sea of the United States,’ violate[d] § 243(h)(1) of the Immigration and Nationality Act of 1952.”⁹⁹ The Haitian respondents in this case included both interdicted Haitians as well as detained Haitians.¹⁰⁰ They sued on the basis that the Haitians’ rights were not sufficiently protected under their statutory and treaty rights “to apply for refugee status and [prevent] repatriation to Haiti.”¹⁰¹ The Court found that there was no judicial remedy for the Haitians, agreeing with

92. *Id.*

93. *Id.* at 1111.

94. *Id.*

95. *Baker*, 949 F.2d at 1110. Judge Hatchett stated as factual matters the following:

1. Under existing law, any refugee may reach the shores of the United States and thereby acquire the right to enforce United States immigration laws in United States courts, except Haitian refugees.

Only Haitian refugees are intercepted in international waters and repatriated to their country of origin. This activity is conducted under an agreement between the Reagan administration and the totalitarian Haitian government in place in 1981, the regime of Jean-Claude Duvalier.

....

4. The government seeks to convince this court that its interdiction program was instituted as an effort to save the lives of Haitian refugees traveling in unseaworthy vessels. But the government’s own brief shows that the program was instituted in 1981, long before the current immigration wave, for the express purpose of more efficiently enforcing United States immigration law. The primary purpose of the program was, and has continued to be, to keep Haitians out of the United States.

Id. at 1111–12 (Hatchett, J., dissenting).

96. *Haitian Refugee Ctr., Inc. v. Baker*, 502 U.S. 1122 (1992).

97. *Id.*

98. 509 U.S. 155 (1993).

99. *Id.* at 158.

100. *Id.* at 166.

101. *Id.*

Judge Edwards' concurring opinion in *Haitian Refugee Center, Inc. v. Gracey*, which stated, "[t]his case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape."¹⁰² The Court further stated that "[a]lthough the human crisis is compelling, there is no solution to be found in a judicial remedy."¹⁰³

B. Laws Relating to Haitian Emigration

On March 17, 1980, the ninety-sixth Congress enacted a public law to amend the Immigration and Nationality Act and the Migration and Refugee Assistance Act of 1962.¹⁰⁴ The purpose of this was to establish a more uniform procedure for admitting and assisting refugees.¹⁰⁵ The Act was titled Refugee Act of 1980.¹⁰⁶ The public law added a paragraph defining refugee as follows:

(42) The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecu-

102. *Id.* at 188 (citing *Haitian Refugee Ctr., Inc. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) [hereinafter *Gracey II*]).

103. *Sale*, 509 U.S. at 188 (citing *Gracey II*, 809 F.2d at 841).

104. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101(a) (1980)).

105. *Id.*

106. *Id.*

tion of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁷

On September 23, 1981, the United States and Haiti authorized the Coast Guard to intercept vessels with illegal undocumented aliens.¹⁰⁸ In return, the Haitian government agreed that it would not punish those who were returned in this interception process, and that those who qualified as refugees would not be returned to Haiti.¹⁰⁹ Following the United States-Haiti Agreement, President Reagan issued a presidential proclamation on September 29, 1981.¹¹⁰ He opened the proclamation by stating, “[t]he ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States.”¹¹¹ President Reagan, stated in the September 29, 1981 presidential proclamation, that “[t]he entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.”¹¹² Following this proclamation, about 25,000 Haitian emigrants were interdicted by the Coast Guard in the 1980s.¹¹³ Many emigrants were

107. *Id.*

108. *Sale*, 509 U.S. at 160.

109. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160 (1993). The actual agreement between the United States and Haiti stated the following:

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

....

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

....

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

U.S. Treaty, Aug. 1, 1981, U.S.-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10,241, 1981 WL 377055.

110. Proclamation No. 4865, 3 C.F.R. 50 (1981), *microformed on* Code of Fed. Reg. (William S. Hein & Co., Inc.).

111. *Id.*

112. *Id.* at 51.

113. *Sale*, 509 U.S. at 161.

“screened out” and repatriated, while some were “screened in” which led to applications for asylum.¹¹⁴

On May 23, 1992, President Bush issued Executive Order No. 12,807 which states:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

...

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.¹¹⁵

The reason for President Bush’s Executive Order was the military coup which took place in Haiti during September 1991.¹¹⁶ The emigrant facilities became saturated with Haitians fleeing their country because of their political beliefs.¹¹⁷ As such, the United States Government was placed in a bind because it “could no longer both protect [its] borders *and* offer the Haitians even a modified screening process.”¹¹⁸ The United States was left with two choices: allowing Haitians into the country for screening or repatriating Hai-

114. *Id.*

115. Exec. Order No. 12,807, 57 Fed. Reg. 23, 133 (May 24, 1992), *microformed on Fed. Reg.* (William S. Hein & Co., Inc.) (citations omitted).

116. *Sale*, 509 U.S. at 162.

117. *Id.* at 162–63.

118. *Id.* at 163.

tians without having an opportunity to establish refugee status.¹¹⁹ President Bush pursued the latter in an effort to assist in the restoration of democracy in Haiti.¹²⁰ Additionally, President Bush believed this decision was made in the interest of safety since so many Haitians were risking their lives in treacherous conditions to pursue freedom in the United States.¹²¹ As such, Executive Order Number 12,807, which was previously discussed, was implemented.¹²² Once President Clinton took office he continued to enforce this order originally implemented by President Bush.¹²³

The foregoing were the main presidential proclamations and executive orders that were implemented as a migration policy.¹²⁴ Prior to the definition of the term “refugee” in the Refugee Act of 1980, there was no definition of a “refugee.”¹²⁵ Today, the term as defined in the statute has incorporated the following into the definition:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.¹²⁶

It is in the discretion of the Attorney General to grant a refugee asylum.¹²⁷ This discretion only comes after the refugee proves that he or she is a refugee.¹²⁸ Many states, especially Florida, have a difficult task in protecting and responding to refugees.

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119. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993).
 120. *See id.* at 164.
 121. *Id.*
 122. *Id.* at 166.
 123. *Id.* at 164–65.
 124. *Id.*
 125. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101(a) (1980)).
 126. 8 U.S.C. § 1101 (2000).
 127. *Sale*, 509 U.S. at 161.
 128. *Id.*

IV. THE CURRENT CONTROVERSY INVOLVING CUBAN AND HAITIAN EMIGRATION

Currently, in Haiti, “about 80% of the population lives in abject poverty.”¹²⁹ There is widespread unemployment, with about two-thirds of the labor force working in non-formal jobs.¹³⁰

It is estimated that seventy percent of the population relies on the country’s agriculture sector, which composes thirty percent of the country’s working segment.¹³¹ Haiti’s life expectancy is estimated at a ghastly forty-nine years.¹³²

I saw grown men yoked to carts bulging with sacks of cement, their bodies bent and their leathery faces aged prematurely from backbreaking work. Naked prepubescent children, their chocolate skin draped over their rib cages, skipped through puddles of raw sewage. Bloated toddlers foraged through trash piles along with the pigs.

.....

I didn’t see bloated children in Cuba. I didn’t see open sewers and people who, on top of their abject poverty, being forced to buy something as essential to their survival as drinking water. I know that as tough as things may be for many Cubans, most of their babies won’t die within a year. Their infant mortality rate is seven dead per 1,000 births. In Haiti, it’s 93 per 1,000.

Yet, the Haitian refugees are treated as villains, while the Cuban refugees get treated as victims.¹³³

For many Haitian-Americans, the United States’ preferential treatment of Cuban immigrants has gone too far.¹³⁴ As previously discussed, Cubans, for the past forty years, have been afforded special privileges and favorable immigration laws.¹³⁵ Moreover, for years they have enjoyed the spoils of the

129. CIA II, *supra* note 1.

130. *Id.*

131. *Id.*

132. *Id.*

133. Tonyaa Weathersbee, *U.S. Immigration Policy on Haiti Must be Changed*, FLA. TIMES UNION (Jacksonville), Nov. 4, 2002, at B1–3, available at 2002 WL 26120488.

134. See Andres Viglucci & Alfonso Chardy, *Images from Causeway Renew Debate on Migrants’ Treatment*, MIAMI HERALD, Oct. 30, 2002, at A20, available at 2002 WL 10128874.

135. Berta E. Hernandez-Truyol, *On Becoming the Other: Cubans, Castro, and Elian—A LatCritical Analysis*, 78 DENV. U. L. REV. 687, 689 (2001).

Cold War fervor.¹³⁶ Cubans, during that time, fled the communist island in pursuit of happiness, leaving behind all their belongings, choosing freedom of speech, freedom to vote, and freedom to travel over their material wealth.¹³⁷ Moreover, Cuban emigrants were the depiction of democracy, evidence to the world that capitalism was unmistakably superior to communism.¹³⁸ As a result of such elevation, Cuban immigrants who arrived during the Cold War era enjoyed the benefits of special immigration laws such as the Cuban Adjustment Act of 1966 (CAA).¹³⁹ However, when the Soviet Union fell, sentiments concerning the Cubans preferential treatment began to change.¹⁴⁰ Consequently, in response to public outcry, immigration law for the first time took an unfavorable turn for Cuban emigrants.¹⁴¹ In May of 1995, the Wet-Foot/Dry-Foot Policy was put into effect.¹⁴² This policy, as previously discussed, calls for the repatriation of Cuban emigrants who are intercepted at sea; and those who are fortunate enough to make it to United States soil become eligible for adjustment under the CAA.¹⁴³ Many Cuban-Americans in the United States believe that the Wet-Foot/Dry-Foot Policy purposely prevents the intended role of the CAA, and the United States' "principle that '[e]veryone has the right to seek and enjoy asylum if they are forced to flee their country to escape persecution.'" ¹⁴⁴ Additionally, many of the exiled population whose relatives are repatriated worry for their loved ones' safety because they fear Fidel Castro's heartless regime will persecute them.¹⁴⁵

Haitians, on the other hand, believe that the Wet-Foot/Dry-Foot Policy is discriminatory, racist, and plain unfair.¹⁴⁶ On October 29, 2002, over two

136. *Id.*

137. *Id.*

138. *Id.* at 690.

139. See Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966).

140. Erin M. O'Callaghan, Note, *Expedited Removal and Discrimination in the Asylum Process: The Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1764 (2002).

141. *Id.*

142. Sartori, *supra* note 6, at 353.

143. Sawczyn, *supra* note 4, at 348.

144. O'Callaghan, *supra* note 140, at 1765 (quoting Amnesty International, *Amnesty International Testimony on INS Detention: Before the U.S. Commission on Civil Rights 8* (Dec. 8, 2000), available at <http://www.amnestyusa.org/refugee/testimony.pdf>); see also Estevez, *supra* note 10, at 1290.

145. See Elaine De Valle, *My Brother Was Not a Terrorist, Woman Says*, MIAMI HERALD, Apr. 12, 2003, at A1, available at 2003 WL 17410591.

146. See *The Travis Smiley Show: Interview: Marlene Bastien Talks About the Plight of Haitian Immigrants* (National Public Radio, May 28, 2003), at 2003 WL 7629081 [hereinafter *Marlene Bastien Interview*].

hundred Haitian emigrants successfully reached American soil; many scrambled in desperation through bumper-to-bumper traffic on the Rickenbacker Causeway in Miami, in an effort to elude authorities.¹⁴⁷ Unfortunately, touching American soil for Haitians means nothing, unless they evade authorities and seek refuge with family, friends, and/or human right organizations.¹⁴⁸ Haitians, who decide to take the antagonistic voyage through shark-infested waters, leave their country well aware that, historically, emigrants from Haiti have a difficult time gaining asylum.¹⁴⁹ From 1997 to 2002, immigration courts received 21,374 asylum applications from Haitians, and a vile 1,284 have been approved.¹⁵⁰ Jacques Despinosse, a North Miami City Councilman who represents the city of Miami's Haitian-American community stated in a recent newspaper article; "[i]f you come here from a communist country, it's OK. If you come from a white country, it's OK. If you come here from a black country, noncommunist, it's not OK."¹⁵¹ However, two weeks after the October twenty-ninth incident, the Bush administration, in an attempt to alleviate rising tensions, announced "that all illegal immigrants who arrive by sea, except those who fall under the 1966 Cuban Adjustment Act, would be detained."¹⁵² After hearing the Bush administration announcement, Harold Vieux, President of the Conference of Haitian Pastors United in Christ stated, "[i]f they have one exception then it doesn't apply to everyone . . . I'm not saying that the policy should be lenient, but I'm saying that it should be fair."¹⁵³ Marlene Bastien, Executive Director of the Haitian Women of Miami Incorporated had this to say about United States immigration policies toward Cubans:

Haitians, when they come here, they come here also because of political reasons, political problems, because it is a very young democracy. Democracy takes time to grow, especially for a country that has been living under dictatorships for almost 200 years. You can't expect things to change in a couple of years. So, of course, there are political problems there.¹⁵⁴

147. See Viglucci & Chardy, *supra* note 134.

148. *See id.*

149. *See id.*

150. *Id.*

151. Sabra Ayres, *Haitians Seek Same Treatment as Cubans*, SUN-NEWS (Myrtle Beach, S.C.), Nov. 17, 2002, at A15, available at 2002 WL 101837645.

152. Georgia East & Thomas Monnay, *Haitian Activists Plan National Protest*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Nov. 10, 2002, at 2B, available at 2002 WL 102435011.

153. *Id.*

154. *Marlene Bastien Interview*, *supra* note 146.

For years, Haitian-Americans have vocalized their frustrations toward the treatment Haitians receive under United States immigration policies; they have even gone as far as threatening to mount a legal challenge to the Wet-Foot/Dry-Foot Policy.¹⁵⁵ “‘I’d like them to eliminate this wet foot/dry foot policy. It’s unfair to immigrants.’”¹⁵⁶

V. RATIONAL BASIS SCRUTINY AS APPLIED TO ALIEN REGULATIONS AND THEIR CONSTITUTIONALITY

Paramount within our democratic values is the separation of powers among the three co-equal branches of government. The law teaches us that the power to control a nation’s borders is so fundamental to its sovereignty that we must abide by the lawfully enacted policy decisions made by the Legislative and Executive branches, or seek change at the ballot box. In immigration matters, neither individuals nor the Court can substitute their policy perspectives for the judgments made by Executive officials, based upon facially legitimate and bona fide reasons, pursuant to statutory and delegated authority.¹⁵⁷

155. BBC News Online, *U.S. Immigration Policy Branded ‘Racist,’* Jan. 3, 2000, at <http://news.bbc.co.uk/1/hi/world/americas/589848.stm>.

156. *Id.* (quoting *Marlene Bastien Interview*, *supra* note 146).

157. *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1383–84 (S.D. Fla. 2002). In *Jeanty*, 167 Haitian nationals brought an action for injunctive relief and declaratory relief expressing confusions as to why they were detained in a facility while their asylum applications remained pending. *Id.* at 1368. Since none of the aliens entered the country with proper documentation under the Immigration and Naturalization Act (INA), they were considered legally inadmissible. *Id.* at 1369. One hundred and sixty-five of the 167 Haitian nationals passed their “credible fear” interviews with an Immigration and Naturalization Services (INS) Asylum Officer. *Id.* at 1369 n.3. Passing the credible fear interview allowed each Haitian national a “Notice to Appear” form for non-expedited removal proceedings, the chance to apply for asylum, and being released pending final adjudication of the asylum applications. *Id.* However, the INS “reversed its general presumption of release for undocumented Haitians arriving in South Florida.” *Jeanty*, 204 F. Supp. 2d at 1369. Only pregnant women and unaccompanied minors were given authorization to be released. *Id.* From the date the court issued the decision, the Haitian nationals had been in detention for over five months. *Id.* at 1368. The court reiterated what many previous courts have held and stated the following:

[W]ith regard to aliens seeking initial admission to this country, the role of federal courts is limited. The Supreme Court “has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application for the power to admit or exclude aliens is a sovereign prerogative.”

Id. at 1375 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). In support of its decision to deny the Haitian nationals injunctive and declaratory relief, the court continues to quote previous decisions by the Eleventh Circuit and the United States Supreme Court. *Id.* As such, the court stated that “[e]xcludable aliens are ‘those who seek admission but who have not been granted entry into the United States,’” so as to point at that “[e]ven if [the Haitian nationals are] physically present in this country, they are legally considered detained at the border’

In *Mathews v. Diaz*,¹⁵⁸ the United States Supreme Court decided the constitutionality of Congress passing laws that discriminate in favor of citizens disparately from aliens.¹⁵⁹ The appellees in *Mathews* were Cuban refugees who were over sixty-five years of age and were denied Medicare on the basis that they had to be admitted for permanent residence and have to have resided in the United States for a minimum of five years.¹⁶⁰ The appellees were “two of over 440,000 Cuban refugees who arrived in the United States between 1961 and 1972,”¹⁶¹ however they did not meet the statutory requirements to receive Medicare.¹⁶² The Court commenced its analysis of the statute’s constitutionality by discussing that the Fifth Amendment and Fourteenth Amendment safeguards all aliens within the jurisdiction of the United States from “deprivation of life, liberty, or property without due process of law.”¹⁶³

Despite an alien’s entrance into the United States, the alien is still afforded constitutional protection, regardless of whether the alien entered the United States illegally, legally, involuntary, or transitory.¹⁶⁴ However, the Court made a distinction between the extent of protection aliens are entitled to as opposed to citizens.¹⁶⁵ “The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or . . . that all aliens must be placed in a single homogenous classification.”¹⁶⁶ Invidious discrimination cannot be subsumed from a statutory treatment distinguishing between aliens and citizens because Congress has the expansive powers over naturalization and immigration, such that it “regularly makes rules that would be unacceptable if applied to citizens.”¹⁶⁷

[which] is known as the ‘entry fiction.’” *Jeanty*, 204 F. Supp. 2d at 1375 (quoting *Garcia-Mir v. Smith*, 766 F.2d 1478, 1483–84 (11th Cir. 1985) (citations omitted)). Finally, the court made a point to assert that “[e]xcludable aliens have fewer rights than do deportable aliens, and those seeking initial admission to this country have the fewest of all.” *Id.* (quoting *Landon*, 459 U.S. at 32).

158. 426 U.S. 67 (1976).

159. *Id.* at 74.

160. *Id.* at 70.

161. *Id.* at 81.

162. *Id.* at 67.

163. *Mathews*, 426 U.S. at 77 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48–51 (1950); *Russian Fleet v. United States* 282 U.S. 481, 489 (1931); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

164. *Id.*

165. *Id.* at 78.

166. *Id.*

167. *Id.* at 80. The Court further stated the reason Congress has such expansive powers over naturalization and immigration as the following:

Determining that Congress has the power to make laws that disparately treat aliens from citizens, the Court recognized that the actual issue in this case was “whether statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible.”¹⁶⁸ It falls upon the hands of the legislative branch, executive branch, and the federal government to regulate matters regarding aliens.¹⁶⁹ The Court asserted that “[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”¹⁷⁰ In deciding that Congress indeed had the power to distinguish among aliens, the Court held:

Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others In short, it is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and the duration of his residence. Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind.¹⁷¹

Based on the Court’s holding in *Mathews*, subsequent cases have established that rational basis scrutiny is the type of scrutiny applied when determining the constitutionality of regulations regarding aliens.¹⁷² One of these

Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of a constitutional adjudication Any rule of constitutional law that would inhibit the flexibility of the political branches government to respond to changing world conditions should be adopted only with the greatest caution.

Mathews, 426 U.S. at 81.

168. *Id.* at 80.

169. *Id.* at 81. The Court quoted the following:

“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”

Id. at 81 n.17 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)).

170. *Id.* at 81–82.

171. *Mathews*, 426 U.S. at 82–83 (emphasis added).

172. See, e.g., *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001); *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999).

cases is *Rodriguez ex rel. Rodriguez v. United States*.¹⁷³ In *Rodriguez*, the court determined the requirement that regulations involving aliens be “wholly irrational” as held by the Court in *Mathews*, was another way of describing rational basis scrutiny.¹⁷⁴ In ascertaining whether a regulation satisfies rational basis scrutiny, the court set forth the following:

Under rational basis scrutiny, “a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity,” and should be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” The Supreme Court has cautioned that “rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices [A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”¹⁷⁵

The court concluded in *Rodriguez* that the statute in question making supplemental security income benefits and food stamps available to only certain categories of aliens, which reduced the number of aliens qualified for the same, was rationally related to Congress’ legitimate purpose of decreasing the cost of certain welfare programs.¹⁷⁶ The court emphasized that “[p]art and parcel of Congress’ power to regulate immigration is the power to control the effects of immigration.”¹⁷⁷ Additionally, and most importantly the court further stressed that, “[w]here Congress makes a judgment that immigration is creating, or adding to, financial burdens, it lies within Congress’ plenary sovereign power over immigration to take action to alleviate such burdens.”¹⁷⁸

A further decision deriving the rational basis standard from *Mathews* is *Moore v. Ashcroft*.¹⁷⁹ In *Moore*, the court concluded, that “Congress’ decision to prohibit lawful permanent resident aliens who commit aggravated felonies from seeking discretionary relief . . . is . . . [r]easonable even though

173. 169 F.3d at 1342.

174. *Id.* at 1347. “The Court concluded, there is no ‘political hypocrisy’ in applying strict scrutiny to a state’s classification of aliens, but the considerably narrower ‘wholly irrational’ or rational basis test to Congress’ classification of aliens.” *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976)).

175. *Rodriguez*, 169 F.3d at 1350 (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (citations omitted)).

176. *Id.* at 1350–51.

177. *Id.* at 1351.

178. *Id.*

179. 251 F.3d 919 (11th Cir. 2001).

such relief is theoretically still available to illegal aliens.”¹⁸⁰ Although this may initially appear to be an astonishing decision, the court averred that Congress had substantial reasons for this regulation, such that those reasons fell within Congress’ “broad power to regulate the admission and exclusion of aliens.”¹⁸¹ In so deciding, the court asserted that one of the reasons rational basis existed for Congress’ regulation was because it is appropriate to hold permanent legal aliens “to a higher standard and level of responsibility than illegal aliens” due to the substantial rights and privileges they are granted through such status.¹⁸² The court concluded that Moore failed to assert a significant equal protection claim since a rational basis existed for Congress’ decision to regulate lawful permanent residents.¹⁸³

It has been made abundantly clear by the judicial branch that Congress need only have a rational basis when formulating and adopting regulations concerning aliens, even if such regulations discriminate among different classes of aliens.¹⁸⁴ As such, the following will analyze the constitutionality of the Cuban Adjustment and the Wet-Foot/Dry-Foot Policy, specifically with regard to the distinguishing of certain classes of aliens, namely Cubans and Haitians. The reason for such an analysis stems from the history of protection Cuban refugees have received throughout the years, while Haitian refugees have historically been denied such protection. This has caused continuous controversy over the years.

VI. CONSTITUTIONALITY OF THE WET-FOOT/DRY-FOOT POLICY

In order to establish whether the Haitians may bring a cause of action against the government alleging that the Wet-Foot/Dry-Foot Policy is unconstitutional, as it discriminates against them, it must be determined that the Haitians have standing to bring such a cause of action.¹⁸⁵ The two elements involved in the “standing doctrine” are “the minimum constitutional re-

180. *Id.* at 926. The court reasserted its observations of the Supreme Court’s concern with rational basis review. *Id.* (quoting *Rodriguez*, 169 F.3d at 1351).

181. *Id.* at 924.

182. *Id.* at 925. The court alluded in a footnote to the Government’s brief by stating: As the Government points out in its brief, the opportunity that U.S. immigration law extends to lawful permanent residents to enter and remain in this country is a privilege, not an entitlement. Lawful permanent residents who abuse the privilege and commit crimes usurp immigration opportunities that might otherwise be extended to other potentially more deserving immigrants.

Moore, 251 F.3d at 925 n.9.

183. *Id.* at 926.

184. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976); *Moore*, 251 F.3d at 919; *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999).

185. *See Cuban Am. Bar Ass’n, Inc. v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995).

quirements of Article III, and the prudential considerations of judicial self-government.”¹⁸⁶ The plaintiff must establish the following factors in order to meet the Article III constitutional requirements: “(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling.”¹⁸⁷ “The party must also show that prudential considerations do not weigh against consideration of the claims.”¹⁸⁸

The Eleventh Circuit has held and reaffirmed that aliens who are “unadmitted and excludable” are not entitled to the equal protection privilege pursuant to the Fifth Amendment.¹⁸⁹ It is only when aliens are admitted into the United States that constitutional rights form and commence.¹⁹⁰ “[The] decision that the . . . Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court’s decisions declining to apply extraterritorially either the Fourth Amendment or the Fifth Amendment.”¹⁹¹ In *Cuban American Bar Ass’n, Inc. v. Christopher*, the Eleventh Circuit concluded that “aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.”¹⁹² As such, it is unrealistic for intercepted Haitian refugees who are repatriated to challenge the constitutionality of the Wet-Foot/Dry-Foot Policy, since they are considered “unadmitted and excludable” aliens, and according to the courts are not afforded constitutional protection until they are admitted into the United States.¹⁹³ Accordingly, although intercepted Haitian refugees may have standing to bring such a claim, several decisions have already ruled that they are not protected under the Constitution.¹⁹⁴

However, it seems that family members of the intercepted and repatriated Haitian refugees may have a cause of action and meet the factors necessary to establish standing in such a cause of action.¹⁹⁵ Of course, the family members must reside in the United States, otherwise the same hurdle in establishing equal protection rights would occur as with intercepted Haitian

186. *Id.* at 1423.

187. *Id.* (quoting *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994)).

188. *Christopher*, 43 F.3d at 1423.

189. *Id.* at 1428 (describing its holding in *Jean v. Nelson*, 727 F.2d 957, 968–70 (11th Cir. 1984) (stating that the plaintiffs, “unadmitted and excludable aliens,” have no constitutional rights to challenge decisions regarding admission, asylum, or parole applications)).

190. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

191. *Christopher*, 43 F.3d at 1428 (citations omitted).

192. *Id.* at 1428–29.

193. *Id.* at 1428.

194. *Id.*

195. *Id.* at 1423; see also *Harris*, 20 F.3d at 1121.

refugees.¹⁹⁶ In establishing standing to challenge the Wet-Foot/Dry-Foot Policy as discriminatory against Haitians, the family members suffer injury through the loss of companionship and familial ties. Secondly, “the injury is fairly traceable” to the discriminatory nature of the Wet-Foot/Dry-Foot Policy. Lastly, if it is ruled that the Wet-Foot/Dry-Foot Policy is unconstitutional, Haitian refugees will be able to seek asylum in the same manner as Cuban refugees, which will allow the family members companionship and familial ties.

Nonetheless, such an argument for standing will be difficult to maintain because the Eleventh Circuit has recognized three circumstances for rejecting a party’s assertion for prudential reasons, the second determination that must be made in order to establish standing: “(1) assertion of a third party’s [putative] rights rather than individual legal rights; (2) allegation of a generalized grievance rather than an injury peculiar to such litigant; or (3) assertion of an injury outside the statute’s or constitutional provision’s zone of interests.”¹⁹⁷

A substantial argument can be made that the family members would be asserting an injury that is beyond the scope of the statute’s interest, since the purpose in instituting the Wet-Foot/Dry-Foot Policy was to deter to illegal departures and casualties caused by such departures, and not to provide companionship and familial ties.¹⁹⁸ Companionship and familial ties are incidental happenings that result or do not result from the Wet-Foot/Dry-Foot Policy.

Even so, should a court decide that a family member has standing to bring such a cause of action that the Wet-Foot/Dry-Foot Policy discriminates against Haitians, the court must analyze the constitutionality of the policy. As mentioned above, Congress need only have a rational basis when formulating and adopting regulations concerning aliens, even if such regulations discriminate among different classes of aliens.¹⁹⁹ In analyzing the policy through a rational basis scrutiny standpoint, the court must determine whether “there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²⁰⁰ As previously stated, Congress has the power to “control the effects of immigration” and “where [it] makes a judgment that immigration is creating, or adding to, financial bur-

196. *Landon*, 459 U.S. at 32.

197. *Cuban Am. Bar Ass’n, Inc. v. Christopher*, 43 F.3d 1412, 1423 (11th Cir. 1995) (quoting *F.D.I.C. v. Morley*, 867 F.2d 1381, 1386 (11th Cir. 1989)).

198. *Estevez*, *supra* note 10, at 1290.

199. *See, e.g., Mathews v. Diaz*, 426 U.S. 67 (1976); *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1989); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001).

200. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

dens, it lies within Congress' plenary sovereign power over immigration to take action to alleviate such burdens."²⁰¹

As such, it can be easily argued that Congress has instituted such a policy to deter mass amounts of immigration. In allowing Cubans a chance at asylum, it has made such a decision because of the political state of the country.²⁰² On the other hand, Haiti is a democratic country.²⁰³ Although it is a poor country with many problems, theoretically and politically it is a democratic country.²⁰⁴ Clearly, this is a reason that is rationally related to a legitimate governmental purpose.²⁰⁵ Since the legislature has plenary power over immigration, it is difficult to challenge such a policy.²⁰⁶

However, a Haitian emigrant who arrives to the United States through the seas and touches land should be afforded some constitutional protection. This is truly where the discrimination comes in with the Wet-Foot/Dry-Foot Policy. Haitians who arrive in Florida and touch land are sent to Guantanamo Bay pending an asylum hearing.²⁰⁷ In contrast, Cubans who arrive in the same exact manner, and of course, touch land are given the adjusted status of permanent residency.²⁰⁸ Given these sets of circumstances, Haitian immigrants should be afforded some constitutional rights to bring a claim that the policy discriminates against Haitians. Theoretically, illegal aliens have been afforded some rights in the past; however, "illegal aliens are assumably removable at any time."²⁰⁹

It has not been said that Haitian emigrants who touch land are considered illegal aliens, rather that they are detainees, since they are detained pending an asylum hearing.²¹⁰ However, should they be considered illegal aliens for purposes of challenging the constitutionality of the policy, they clearly would have met the factors required to establish standing for such a cause of action.²¹¹ Such a Haitian emigrant would have suffered an actual injury of being sent back to Haiti and the obvious lack of permanent residency as Cubans are afforded. Further, the injury is a result of the policy issued by Congress, and should the Haitian emigrant(s) receive a favorable verdict, the injury would likely be redressed. Additionally, none of the three

201. *Rodriguez*, 169 F.3d at 1351.

202. *See Estevez*, *supra* note 10, at 1292.

203. *See id.* at 1293.

204. *See id.*

205. *Heller*, 509 U.S. at 319–20.

206. *Rodriguez*, 169 F.3d at 1351.

207. *See East & Monnay*, *supra* note 152.

208. *Estevez*, *supra* note 10, at 1277.

209. *Moore*, 251 F.3d at 925.

210. *East & Monnay*, *supra* note 152.

211. *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994).

circumstances for rejecting a party's assertion for prudential reasons would apply in this situation.²¹² As such, the Haitian emigrant(s) in this case would clearly have standing should they be afforded some constitutional protection.²¹³ However, there still remains one more hurdle: rational basis scrutiny.²¹⁴ This is one hurdle that would be difficult to overcome, since the same argument can be made that Cuba is a communist country, while Haiti is "democratic." Thus, it seems that even if Haitians were given the opportunity to challenge the Wet-Foot/Dry-Foot Policy, there is a slim chance that they would prevail because the legislature simply has to argue that the policy is rationally related to a legitimate governmental purpose.²¹⁵

VII. CONCLUSION

The Wet-Foot/Dry-Foot Policy has generated a tremendous amount of controversy. Here we have two freedom-loving nations, Haiti and Cuba, which have been subjected to the most dire political and economic conditions known to man.²¹⁶ Their leaders have taken two different roads: one to a "democracy," and the other attempting to perpetuate the remnants of a rapidly vanishing political system, "communism."²¹⁷ The people of Haiti and Cuba, however, look out in the horizon and only see one thing: a beacon of light emanating from the land of opportunity. That shining ray of light spells freedom in two languages: LIBERTAD and LIBERTE! They are not concerned with whether they reach the American shores with wet or dry feet. They are concerned with that elusive concept which we Americans cherish the most: a free and democratic society. Thus, it is all in the hands of the politicians.²¹⁸ Although, legally Haitians have a nominal chance of achieving treatment equal to that of Cubans, the Legislature has the power to change this.²¹⁹ The consensus seems to be that [I]t is imperative to fight for the legislative equivalent to the [Wet-Foot/Dry-Foot Policy] for Haitians and not equality through the retraction of it.²²⁰

212. *F.D.I.C. v. Morley*, 867 F.2d 1381, 1386 (11th Cir. 1989).

213. *Harris*, 20 F.3d at 1121.

214. *Mathews v. Diaz*, 426 U.S. 67 (1976); *see also Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999); *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001).

215. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

216. *See generally* CIA I, *supra* note 1; CIA II, *supra* note 1.

217. *Id.*

218. *See Heller*, 509 U.S. at 319–20.

219. *Id.*

220. *Estevez*, *supra* note 10, at 1294.