

IN TIMES OF FAMINE, SWEET POTATOES HAVE NO  
SKIN:  
A HISTORICAL OVERVIEW AND DISCUSSION OF  
POST-EARTHQUAKE U.S. IMMIGRATION POLICY  
TOWARDS THE HAITIAN PEOPLE

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*In every other country on the globe a citizen of Haiti is sure of civil treatment. In every other nation his manhood is recognized and respected. Wherever any man can go, he can go. He is not repulsed, excluded, or insulted because of his color. All places of amusement and instruction are open to him. Vastly different is the case with him when he ventures within the border of the U.S.*

— Frederick Douglass<sup>1</sup>

*I. Introduction: “Economic Migrants” and the Fear of Mass Migration*

This article is an examination of the U.S. immigration policy towards Haitians both before and after the January 12, 2010 earthquake. In order to understand the U.S. policy response and the Haitian community’s reaction to said policy, it is imperative to first understand the historical framework of the U.S. immigration policy towards Haitians. Fundamentally, the U.S. immigration policy towards Haitians is based on two erroneous premises: (1) Haitians are only economic migrants; and (2) fair immigration treatment of Haitians will lead to a mass migration into the U.S.

Shortly after the January 12, 2010 earthquake, the U.S. Department of Homeland Security (DHS) announced that it would extend Temporary Protected Status (TPS) to Haitians who resided in the U.S. before January 12, 2010.<sup>2</sup> While the extension of TPS to the Haitian community was swift and generous in the wake of the earthquake, it was not swift when viewed from a historical perspective. Since the 2004 hurricane season devastated Haiti, the Haitian community in the U.S. and legal advocates had pled for TPS. The U.S. government rebuffed these requests by the Haitian community, its activists, and even Haiti’s President until the greatest

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<sup>1</sup> Frederick Douglass, *Lecture on Haiti*, in HAITI: A SLAVE REVOLUTION 67, 69 (Pat Chin et al. eds., 2004).

<sup>2</sup> Press Release, U.S. Dep’t. of Homeland Security, Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status (TPS) for Haitian Nationals (Jan. 15, 2010), available at [http://www.dhs.gov/ynews/releases/pr\\_1263595952516.shtm](http://www.dhs.gov/ynews/releases/pr_1263595952516.shtm).

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natural disaster in the western hemisphere struck this already devastated country.<sup>3</sup>

United States immigration policy towards Haitians following the January 12, 2010 earthquake affected Haitians currently residing in the U.S. and Haitians residing in Haiti. In the aftermath of the earthquake, U.S. military personnel courageously intervened at the Port-au-Prince airport to evacuate U.S. citizens, lawful permanent residents, as well as Haitian citizens who needed immediate medical attention.<sup>4</sup> In the haste to evacuate as many people to safety as possible, some Haitian citizens boarded the U.S. military flights without proper immigration documentation, but were waived onboard by U.S. military personnel.<sup>5</sup> Upon their arrival in the U.S., some of these humanitarian evacuees were arrested and detained for months by the DHS, primarily in a detention center in Pompano Beach, Florida.<sup>6</sup>

While many people were shocked to hear that the U.S. government would arrest and detain evacuees who boarded U.S. military flights after the earthquake, including some evacuated for medical reasons, many within the Haitian community were not. This was a tale that they had seen many times before. The Haitian community previously witnessed the interdiction of their countrymen at sea when they were not properly screened for a fear of persecution if returned to Haiti.<sup>7</sup> The Haitian community stood witness to the mass detention of their mothers, fathers, and children in sub-human conditions at Guantánamo Bay, Cuba and the Krome Detention

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<sup>3</sup> Hon. Alcee Hastings, Speech at the House of Representatives Introducing the Haitian Protection Act of 2009 (Jan. 6, 2009).

<sup>4</sup> Deferred Action Status for Haitians Earthquake Victims with B1/B2 Nonimmigrant Status, STATE OF FLA. DEP'T. OF CHILDREN AND FAMILIES (July 9, 2010), <http://www.dcf.state.fl.us/programs/refugee/docs/Deferred%20Action%20July%202010%20FINAL.pdf>.

<sup>5</sup> Nina Bernstein, *Rushed from Haiti, then Jailed for Lacking Visas*, N.Y. TIMES, April 1, 2010, at A1, available at <http://www.nytimes.com/2010/04/01/us/01detain.html>.

<sup>6</sup> *Id.*

<sup>7</sup> The Migrant Interdiction Act of 1981, U.S.-Haiti, Sept. 23, 1981, 33 U.S.T. 3559.

Center in Miami, Florida.<sup>8</sup> The Haitian community read in horror Attorney General John Ashcroft's 2003 decision that Haiti may be a staging ground for Islamic fundamentalist terrorists and, therefore, all Haitians in immigration custody must be detained without bond.<sup>9</sup>

Currently, the U.S.'s immigration policy towards Haitians remains woefully behind the generosity shown by the American people to Haiti in the wake of the earthquake. While the U.S. government continues to dither about the immigration status of Haitians who entered the U.S. for medical treatment after the earthquake, Haitian mothers are left with a difficult choice of staying in the U.S. past their authorized stay or taking their injured child back to Haiti to live in a tent. While the U.S. government contemplates a family reunification program, similar to one extended to the Cuban community, Haitians, whose immigrant petitions to enter the U.S. to join family members have already been approved, search daily for food and water in makeshift camps and may wait years more in Haiti before being allowed to enter the U.S.<sup>10</sup>

## *II. A Historic Overview of U.S. Immigration Policy Towards Haitians*

Haiti has endured a hostile relationship with the U.S. since Haitians overthrew their white slave masters and declared independence in 1804.<sup>11</sup> Thomas Jefferson, drafter of the Declaration of Independence and a slave owner, warned his country that Haiti set a bad example and that it was necessary to "confine the plague to the island."<sup>12</sup> Before the revolution of 1804, Haiti, then

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<sup>8</sup> Carlos Ortiz Miranda, *Haiti and the U.S. during the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 *SAN DIEGO L. REV.* 673, 682 (1995).

<sup>9</sup> *In re D-J-*, 23 I & N Dec. 572, 577 (B.I.A. 2003).

<sup>10</sup> Editorial, *Open the door, Mr. President*, *MIAMI HERALD*, Jan. 6, 2011, available at <http://www.miamiherald.com/2011/01/06/2002750/open-the-door-mr-president.html>.

<sup>11</sup> PAUL FARMER, *THE USES OF HAITI* 60 (2003).

<sup>12</sup> Eduardo Galeano, *The White Curse*, 370 *NEW INTERNATIONALIST*, Aug. 2004, at 5, available at <http://www.newint.org/columns/viewfrom/2004/08/01/white-curse/> (last visited May 10, 2011).

known as Saint Dominigue, was the U.S. second largest trading partner behind only Great Britain.<sup>13</sup> By 1810, the U.S. exports to Haiti amounted to only about two percent of their pre-1804 amounts.<sup>14</sup> The U.S. would not recognize Haitian independence and trade with Haiti until the second year of the U.S. Civil War in 1862.<sup>15</sup>

Out of the harsh beginnings of the United States' foreign relations with Haiti emerged an equally unjust, modern-day immigration policy towards the Haitian people. The Haitian people, more than any other immigrant groups to the U.S., suffer from discrimination, harsh policies, and mass detention.

*A. The Brutality of Papa Doc and Systematic Deportation and Detention by the U.S.*

François Duvalier (also known as "Papa Doc") came to power after an election held under the approval of the U.S. created Haitian Army on September 22, 1957.<sup>16</sup> Duvalier counted on U.S. influence to win the election.<sup>17</sup> Duvalier hoped for Haiti to become the "spoiled child" of the U.S. like Puerto Rico.<sup>18</sup> Despite U.S. reservations about methods employed by Duvalier, political turmoil in the neighboring Caribbean island of Cuba resulted in U.S. support for Duvalier's regime.<sup>19</sup>

By 1960, the U.S. government began to realize the extreme brutality of Duvalier; he even had a torture room in the National Palace complete with a peephole so the dictator could personally watch the death of an opponent.<sup>20</sup> However, Duvalier understood

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<sup>13</sup> RALPH PEZZULLO, *PLUNGING INTO HAITI* 56 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> Ramsey Clark, *Haiti's Agonies and Exaltations*, in *HAITI: A SLAVE REVOLUTION*, *supra* note 1, at 6.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> BERNARD DIEDRICH & AL BURT, *PAPA DOC: HAITI AND ITS DICTATOR* 76 (1991).

<sup>18</sup> *Id.* at 102.

<sup>19</sup> ELIZABETH ABBOT, *HAITI: AN INSIDER'S HISTORY OF THE RISE AND FALL OF THE DUVALIERS* 93 (1st Touchstone ed., 1991).

<sup>20</sup> *Id.* at 134.

that the U.S. government's primary interest lay with the threat of communism from Cuba and not the mass suffering of Haitians.<sup>21</sup> Duvalier stated that Haiti must choose between "two great poles of attraction in the world today to concretize its needs."<sup>22</sup> Recently declassified U.S. government documents from the 1960s show that the "overriding objective" of U.S. policy towards Haiti was to deny Haiti to the communists.<sup>23</sup> By this point of his reign, Duvalier had received \$21.4 million in aid from the U.S.<sup>24</sup>

Within Haiti, Papa Doc created an infamous paramilitary force, the *Tontons Macoutes*.<sup>25</sup> The *Tontons Macoutes* included nearly every government employee.<sup>26</sup> Some of the *Macoutes* received a monthly stipend of \$30 to \$50, while others maintained their loyalty for an unfettered license to torment and kill the masses of Haiti.<sup>27</sup> Duvalier was known to order the whole family of an enemy killed.<sup>28</sup> In some way, every Haitian was affected by the *Macoutes'* enforced curfews, roadblocks, midnight searches, and indiscriminate beatings.<sup>29</sup> This violence resulted in the death of tens of thousands of Haitians.<sup>30</sup> Duvalierism had become the antithesis of the black popular movement election platform Papa Doc initially ran on.

Papa Doc's regime targeted all perceived enemies regardless of race and economic background.<sup>31</sup> However, only the Haitian elites had the resources to flee Haiti.<sup>32</sup> It is estimated that by the

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<sup>21</sup> DIEDRICH & BURT, *supra* note 17, at 151.

<sup>22</sup> *Id.*

<sup>23</sup> FARMER, *supra* note 11, at 93.

<sup>24</sup> DIEDRICH & BURT, *supra* note 17, at 156.

<sup>25</sup> Karen Jenkins, *Traumatized Societies: Social Cubism and the Predatory State of Haiti*, 8 ILSA J. INT'L & COMP. L. 901, 907 (2002).

<sup>26</sup> DIEDRICH & BURT, *supra* note 17, at 173.

<sup>27</sup> *Id.*

<sup>28</sup> FARMER, *supra* note 11, at 92.

<sup>29</sup> ABBOT, *supra* note 19, at 105.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 105.

<sup>32</sup> Mike Clary, *Haitian Students Who Found Refuge in Florida Face Uncertain Future*, SUN SENTINEL, Jan. 12, 2011, at 1A, 11A; Maria Sacchetti, *Much Rests On Haiti Elite*, BOS. GLOBE, Jan 31, 2010, available at

mid-1960s, eighty percent of qualified professionals in Haiti were residing in the U.S., Canada, or Africa.<sup>33</sup> By 1976, 250,000 Haitians were residing in New York City, New York alone.<sup>34</sup> Around this time, poorer, black Haitians began to flee Haiti by any means necessary. This influx of Haitian nationals seeking refuge in the U.S. led to a backlog of asylum claims before the Immigration and Nationality Service (INS).<sup>35</sup> In response, INS developed a system of deportation that denied Haitians basic due process and undoubtedly repatriated many to certain torture and death in Haiti.<sup>36</sup>

### 1. *The “Haitian Program”*

The “Haitian Program” was developed in July and August of 1978 with the goal of expelling as many Haitian asylum applicants as possible.<sup>37</sup> The “Haitian Program” called for the detention of all Haitians arriving in the U.S. and for expediting the processing of Haitian cases.<sup>38</sup> On July 11, 1978, Director of Intelligence M.H. Landon, Jr. sent a memorandum to Associate Commissioner of Enforcement that stated bluntly that Haitians are “economic” refugees and not political refugees, wholly ignoring the brutality Haitians suffered from the Duvalier regime.<sup>39</sup> The memorandum further stated that if Haitians were too well received then others would be encouraged to immigrate.<sup>40</sup> This memorandum reflected the U.S. government’s reasoning for denying fair treatment to Haitians fleeing violence in their homeland. This reasoning led to an informal policy for Haitians that is followed to this day.

On August 15, 1978, an inter-agency meeting took place in

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[http://www.boston.com/news/world/latinamerica/articles/2010/01/31/muchrestson\\_haiti\\_elite/](http://www.boston.com/news/world/latinamerica/articles/2010/01/31/muchrestson_haiti_elite/).

<sup>33</sup> Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 508 (S.D. Fla. 1980).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 512-13.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 513.

<sup>39</sup> Haitian Refugee Center, 503 F. Supp. at 513.

<sup>40</sup> *Id.*

Miami, Florida to deal with the “Haitian Problem” that the U.S. government believed was plaguing South Florida.<sup>41</sup> During this meeting, the U.S. State Department agreed to cooperate in deterring Haitians from immigrating to the U.S. and the INS agreed to revoke work authorization for Haitians.<sup>42</sup> In response, the U.S. State Department agreed to “initiate a propaganda campaign in the Caribbean area relative to the U.S. government refusal to grant such work permits to arriving Haitians.”<sup>43</sup>

The local INS district in Miami, Florida received directives to expedite the process of Haitian deportation cases.<sup>44</sup> Two additional immigration judges were detailed to Miami to assist with the Haitian Program.<sup>45</sup> The immigration judges in Miami were ordered to complete fifteen hearings per day with a minimum of fifty-five aliens being called for deportation hearings per day.<sup>46</sup> No guidance was provided about how to ensure due process and fundamental fairness. The only goal was speed and effectiveness of the Haitian Program.<sup>47</sup> Thousands of Haitian asylum cases were adjudicated during the first year of the Haitian Program. All were denied.<sup>48</sup>

## 2. *Detention and Deterrence*

During a seven-month period in 1980, more than 125,000 Cubans entered the U.S. through the “Mariel Boat Lift.”<sup>49</sup> In addition to the Cubans arriving in the U.S., 25,000 Haitians seeking refuge from the dictatorship of the Duvalier regime also arrived in the U.S.<sup>50</sup>

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<sup>41</sup> Haitian Refugee Center, 503 F. Supp. at 516.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 517.

<sup>46</sup> *Id.*

<sup>47</sup> Haitian Refugee Center, 503 F. Supp. at 517.

<sup>48</sup> *Id.* at 510.

<sup>49</sup> RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 1 n.2 (Mar. 31 2010), available at [http://assets.opencrs.com/rpts/RS21349\\_20100331.pdf](http://assets.opencrs.com/rpts/RS21349_20100331.pdf).

<sup>50</sup> *Id.*

Until 1981, there was an agreement between the INS and the National Council of Churches that allowed undocumented Haitians to be briefly detained for medical screening and then released to a sponsor with work authorization.<sup>51</sup> In response to the influx of Mariel Boat Lift, President Ronald Reagan changed the INS parole policy.<sup>52</sup> Instead of paroling (i.e. releasing pending proceedings) Haitian migrants who arrived in the U.S. without documentation, the U.S. government began detaining these individuals.<sup>53</sup>

In March 1981, President Reagan began the new, restrictive use of the government's parole authority and the larger, expansive use of detention.<sup>54</sup> President Reagan did not issue guidelines, and INS did not promulgate regulations, regarding the expansion of detention as an immigration policy.<sup>55</sup> In a case filed in federal court on behalf of Haitian asylum seekers, the Court found that, "[t]he evidence shows that both Haitians and non-Haitians are being detained, but that more Haitians are being detained and for longer periods of time than non-Haitians.<sup>56</sup> The evidence also demonstrates that a larger percentage of non-Haitians are granted parole or deferred inspection than the percentage of Haitians."<sup>57</sup>

The dramatic change in detention policy led to inevitable result of severe overcrowding at the Krome Detention Center in Miami, Florida.<sup>58</sup> The State of Florida sued the federal government over the horrible conditions at Krome, which included severe overcrowding and lengthy detention.<sup>59</sup> The lawsuit by the State of Florida led to Haitian asylum seekers being transferred to Puerto Rico, New York, Texas, Kentucky, and West Virginia.<sup>60</sup>

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<sup>51</sup> WASEM, *supra* note 49.

<sup>52</sup> Miranda, *supra* note 8.

<sup>53</sup> *Id.*

<sup>54</sup> Louis v. Nelson, 544 F. Supp. 973, 980 (S.D. Fla. 1982).

<sup>55</sup> *Id.* at 981.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 982.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 983.

<sup>60</sup> *Id.*

In a separate lawsuit, a federal appellate court found that during the week of June 1-5, 1981, INS held mass exclusion proceedings against Haitian asylum seekers.<sup>61</sup> The Court found that “[m]any hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred.<sup>62</sup> Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights.<sup>63</sup> Pursuant to these faulty hearings many Haitians were adjudged excludable from this country, and were subject to deportation.”<sup>64</sup> The Eleventh Court of Appeals rejected the Government’s argument that the detention policy was due to a massive influx of Haitians entering the U.S..<sup>65</sup> The Court pointed out that Haitians comprised no more than two percent of undocumented people entering the U.S. at the time.<sup>66</sup>

### *B. The Haitian Migrant Interdiction Act of 1981*

After the death of Papa Doc, his son Jean “Baby Doc” Duvalier took over as the “President” of Haiti.<sup>67</sup> It was first believed that Baby Doc would be a better leader than the tyrant his father had become. Unfortunately for Haiti, Baby Doc still utilized the Haitian Army and the *Tontons Macoutes* to terrorize the masses.<sup>68</sup> Conditions in Haiti became increasingly worse for the vast majority

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<sup>61</sup> Jean v. Nelson, 711 F.2d 1455, 1462 (11th Cir. 1983), *dismissed in part & rev’d n part* 727 F.2d 957, 978-79 (en banc), *aff’d*, 472 U.S. 486 (1985).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1463.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1492.

<sup>67</sup> At the time of this writing, Baby Doc Duvalier just returned to Haiti after many years of exile in France. His fate there is uncertain. Jacqueline Charles, et al., ‘Baby Doc’ Charged, *MIAMI HERALD*, Jan. 19, 2011, at 1A, 2A; Tim Padgett, Who Let ‘Baby Doc’ Duvalier Back Into Haiti?, *TIME*, Jan. 17, 2011, *available at* <http://www.time.com/time/world/article/0,8599,2042762,00.html> (last visited Mar. 31, 2011). See John Moody, *Haiti: Bad Times for Baby Doc*, *TIME*, Feb. 10, 1986, *available at* <http://www.time.com/time/magazine/article/0,9171,960612,00.html> (last visited Mar. 31, 2011).

<sup>68</sup> Moody, *supra* note 67.

of people.<sup>69</sup> William O' Neil of the Lawyers Committee for Human Rights described the situation this way: “[p]olitical dissent was forbidden, the Macoutes and the army arrested, extorted, tortured, and sometimes killed anyone suspected of opposing the Duvalier regime. The erosion of the justice system continued.”<sup>70</sup> Despite the U.S.’ knowledge of Baby Doc’s brutality, the U.S. entered into an unprecedented treaty that would allow the U.S. to return refugees fleeing Haiti back into the hands of a known dictator.<sup>71</sup>

The 1981 Haitian Migrant Interdiction Act made with Duvalier, allowed the U.S. Coast Guard to board Haitian vessels carrying migrants and interrogate the people on board.<sup>72</sup> The U.S. Coast Guard and the INS, working together, would return undocumented migrants back to Haiti. A person who feared returning to Haiti was required to announce or speak up that they feared persecution and wanted to seek asylum.<sup>73</sup> According to the Congressional Research Service, from 1981 to 1990, INS determined that only eleven Haitians of the 22,940 Haitians interdicted at sea were eligible to request asylum in the U.S.<sup>74</sup>

*C. The Overthrow of President Aristide and Mass Detention in the U.S.*

On December 16, 1990, Jean-Bertrand Aristide, a Catholic priest, won the first democratically held presidential election in Haiti’s history with two-thirds majority of the vote.<sup>75</sup> With the election of Aristide, respect for and protection of human rights and fundamental freedoms improved dramatically.<sup>76</sup> Aristide’s grassroots movement for the poor became known as Lavalas.<sup>77</sup>

<sup>69</sup> FARMER, *supra* note 11, at 100.

<sup>70</sup> *Id.*

<sup>71</sup> Migrant Interdiction Act, *supra* note 7.

<sup>72</sup> *Id.*

<sup>73</sup> WASEM, *supra* note 49, at 4.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> Thomas David Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT’L L. 77, 84 (1993).

<sup>76</sup> Jones, *supra* note 75.

<sup>77</sup> FARMER, *supra* note 11, at 139.

Upon taking office, President Aristide held a breakfast for the poor in the National Palace and said:

Today, I'm here to say to you that you are human beings just as important as anyone else. Rich and poor, we're all people, and we must love one another. If there's enough for the rich then there must be enough for the poor, too. If the National Palace was formerly for the rich, today it's for the poor.<sup>78</sup>

On September 30, 1991, after less than a year in office, Aristide's government was overthrown in a coup d'état in response to attempted reforms of the Haitian Army and supposed attacks on the status quo of the economic elites.<sup>79</sup> In the immediate aftermath of the coup an estimated 600 were killed in the first few days,<sup>80</sup> while altogether the aftermath of the coup would claim between 2,000 and 7,000 lives.<sup>81</sup> During the following eight months, more Haitians fled Haiti than the previous decade combined.<sup>82</sup>

### *1. Fleeing Violence and Detention*

Haitians fleeing the violence in the aftermath of the 1991 coup faced the same designation as those who fled in the decade before: economic migrants.<sup>83</sup> In 1992, President George H.W. Bush expanded the 1981 Haitian Interdiction Program through the Kennebunkport Order.<sup>84</sup> The order granted the Attorney General the authority to determine whether a Haitian encountered at sea would be returned involuntary without judicial review.<sup>85</sup> This policy led to

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<sup>78</sup> *Id.*

<sup>79</sup> Julie Ann Waterman, *The U.S.' Involvement in Haiti's Tragedy and the Resolve to Restore Democracy*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 187, 193 (1994).

<sup>80</sup> FARMER, *supra* note 11, at 157.

<sup>81</sup> *Id.*

<sup>82</sup> Janice D. Villers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the U.S.*, 60 BROOK. L. REV. 841, 848-49 (1994).

<sup>83</sup> *Id.* at 859.

<sup>84</sup> *Id.* at 878.

<sup>85</sup> Villers, *supra* note 82, at 878.

thousands of Haitians being returned to Haiti or detained at Guantanamo Bay, Cuba.<sup>86</sup> The interdiction of Haitians at sea continued under the administration of Bill Clinton and was defended before the U.S. Supreme Court in *Sale v. Haitian Centers Council, Inc.*<sup>87</sup>

The Kennebunkport Order led to the detention at Guantanamo Bay, Cuba of thousands of Haitians who were “screened in by the U.S. Coast Guard” under a credible fear standard.<sup>88</sup> The Haitian asylum seekers were allowed to enter the U.S. after a federal judge issued a temporary injunction.<sup>89</sup> While being held in Guantanamo Bay, Haitians faced sub-human conditions. Paul Farmer writes that, “[s]hortly after the arrival of the first refugees, rumors of mistreatment, including beatings and arbitrary detention began to filter through Haitian advocacy organizations based in the U.S.”<sup>90</sup>

More than 10,000 Haitians were screened into the U.S., but they still faced an unjust asylum process.<sup>91</sup> As the asylum interviews began, the INS Deputy Commissioner stated that ninety percent of the cases would probably be denied.<sup>92</sup> To further this goal, special incentives were given to asylum officers, stating that the “INS could be encouraged to ... [count] a completed denial as a double case completion and a completed grant as a single case completion for the purposes of ... officer evaluation.”<sup>93</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

<sup>88</sup> CHERYL LITTLE & CHARU NEWHOUSE AL-SAHLI, IMMIGR. ADVOC. CTR., HAITIAN REFUGEES: A PEOPLE IN SEARCH OF HOPE 43 (May 1, 2004), available at <http://www.fiacfla.org/reports/HaitianRefugeesAPeopleinSearchofHope.pdf>.

<sup>89</sup> *Id.*

<sup>90</sup> FARMER, *supra* note 11, at 222.

<sup>91</sup> LITTLE & AL-SAHLI, *supra* note 88, at 44.

<sup>92</sup> *Id.*

<sup>93</sup> LITTLE & AL-SAHLI, *supra* note 88, at 44 (citing Memorandum from Jan C. Ting, Dir., Asylum Policy and Review Unit & Kristen A. Giuffreda, Assistant Dir., Asylum Policy and Review Unit to Rex J. Ford, Assoc. Deputy Att’y Gen., 3 (May 26, 1992) (on file with the N.Y.L. SCH. J. HUM. RTS.)).

In 1994, President Clinton resumed the detention of Haitians at Guantánamo Bay rather than repatriation to Haiti.<sup>94</sup> At its peak in 1994-1995, Guantánamo held as many as 32,362 Cubans and 21,638 Haitians.<sup>95</sup> Almost all of the Cuban detainees were eventually paroled into the U.S., while most of the Haitian detainees were repatriated to Haiti.<sup>96</sup>

## 2. *HIV and Detention*

Haitians have consistently faced an unwarranted stigma by the U.S. government as a primary carrier of HIV. The Center for Disease Control (CDC) labeled Haiti as one of the four “Hs” for contracting HIV: homosexual, hemophiliacs, hypodermic drug users, and Haitians.<sup>97</sup> More recently a biologist published an article that found “patient zero” for the spread of HIV almost certainly contracted the disease from Haiti.<sup>98</sup>

The discrimination surrounding Haitians and HIV was never more apparent than the U.S. policy to detain Haitian asylum seekers with HIV/AIDS in Guantánamo Bay, Cuba. All “screened in” Haitians brought to Guantánamo Bay were tested for the HIV virus.<sup>99</sup> Haitians were the only nationality seeking asylum in the U.S. that were tested for HIV.<sup>100</sup> Those who were found to carry the HIV virus were separated from their family and re-interviewed under a higher standard.<sup>101</sup> The U.S. Government established a separate camp, Camp Buckley, for these individuals.<sup>102</sup> This became the first detention camp for HIV-positive people in the world.

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Greg Dunkel, *Tenth Department Haitians Massively Mobilize*, in *HAITI: A SLAVE REVOLUTION*, *supra* note 1, at 155.

<sup>98</sup> Mary Carmichael, *Haunted by HIV's Origins*, *NEWSWEEK*, Nov. 2007, available at <http://www.newsweek.com/2007/11/03/haunted-by-hiv-s-origins.html>.

<sup>99</sup> Michael Ratner, *How We Closed the Guantamo HIV Camp: The Intersection of Politics and Litigation*, 11 *HARV. HUM. RTS. J.* 187, 195 (1998).

<sup>100</sup> *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

<sup>101</sup> Ratner, *supra* note 99, at 195.

<sup>102</sup> *Id.*

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A lawsuit was filed on behalf of the Haitians infected with HIV which argued that the “Haitians remain[ed] in detention solely because they are Haitian and have tested HIV-positive.”<sup>103</sup> During the proceedings the Government conceded that it did not have the medical capability to care for the individuals who developed full-blown AIDS.<sup>104</sup> A federal district court in New York ordered the Haitians be released to anywhere but Haiti. In its decision, the Court noted that it was:

disturbed to hear the testimony of Duane “Duke” Austin, the INS Special Assistant to the Director of Congressional and Public Affairs, who reportedly remarked to the press with regard to the Haitians with AIDS held on Guantánamo, “they’re going to die anyway, aren’t they?” It is outrageous, callous and reprehensible that defendant INS finds no value in providing adequate medical care even when a patient’s illness is fatal.<sup>105</sup>

The Government did not appeal the decision and eventually allowed the Haitians to enter the U.S.<sup>106</sup>

#### *D. The Haitian Refugee Immigrant Fairness Act*

The Haitian Refugee Immigrant Fairness Act (HRIFA) was passed shortly after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>107</sup> HRIFA was intended to finally ensure fairness and equity for Haitian refugees, after they were excluded from the protections granted to Cubans and Nicaraguans under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>108</sup> The statute was thus

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<sup>103</sup> *Id.* at 203.

<sup>104</sup> Haitian Ctrs. Council, Inc., 823 F. Supp at 1038.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538 (1998); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-638 (1996) [hereinafter IIRIRA].

<sup>108</sup> Senator Edward M. Kennedy, Statement on the Haitian Refugee

intended to encompass the entire class of Haitian immigrants who fled the murderous conditions in their homeland in the early 1990s and provide them with a path toward lawful permanent residency in the U.S.<sup>109</sup>

Congress initially sought to protect Nicaraguans, Cubans, and Haitians from the amendments brought about by the IIRIRA, through a single legislative vehicle.<sup>110</sup> When Haitians were inexplicably not included in the NACARA legislation, Haitian advocates in Miami mobilized.<sup>111</sup> Congress eventually passed HRIFA to remedy the discrimination displayed in providing relief to Nicaraguans and Cubans while excluding Haitians.<sup>112</sup> Senator Edward Kennedy spoke about these discriminatory practices when he addressed the Senate in 1998: “Last year, we adopted legislation to protect Nicaraguans and Cubans. But Haitians were unfairly excluded from that bill. The time has come for Congress to end the bigotry. We must remedy this flagrant omission and add Haitians to the list of deserving refugees.”<sup>113</sup>

HRIFA led to the adjustment of status of for tens of thousands of Haitians,<sup>114</sup> but flaws in the legislation have excluded some of the most vulnerable applicants the legislation was intended to protect.

There are three primary flaws with HRIFA as it was enacted in 1998. First, HRIFA does not provide age out protection of

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Immigration Fairness Act, 1998, (transcript available in Congressional Record – Senate S13003), *available at* [http://www.Kennedy's Statement on HRIFA.gov:80/fdsys/pkg/CREC-1998-11-12/pdf/CREC-1998-11-12-pt1-PgS13003.pdf#page=1](http://www.Kennedy's%20Statement%20on%20HRIFA.gov:80/fdsys/pkg/CREC-1998-11-12/pdf/CREC-1998-11-12-pt1-PgS13003.pdf#page=1) [hereinafter Kennedy's Statement on HRIFA].

<sup>109</sup> *Id.*

<sup>110</sup> Interview with Steven Forrester, Esq., Oct. 24, 2010.

<sup>111</sup> *Id.*

<sup>112</sup> Kennedy's Statement on HRIFA, *supra* note 108.

<sup>113</sup> *Id.*

<sup>114</sup> U.S. GOV'T ACCOUNTING OFFICE, GAO-08-267R, IMMIGRATION BENEFITS: SEVENTEENTH REPORT REQUIRED BY THE HAITIAN REFUGEE IMMIGRANT FAIRNESS ACT OF 1998 (2007), *available at* <http://www.gao.gov/new.items/d08267r.pdf> (pointing out that USCIS received 41,370 applications for HRIFA and approved 18,886. EOIR received 2,098 applications and approved 827).

children seeking to reunite with their parents in the U.S.<sup>115</sup> A parent granted HRIFA in the U.S. may petition for a child who otherwise may not independently qualify for HRIFA. Many of these children are paroled into the U.S. from Haiti in order to allow them the opportunity to apply before the U.S. Citizenship and Immigration Service (USCIS) for lawful permanent residency status. Historically, the processing of these applications can take years. Therefore, by the time the child appears for the interview at USCIS the child could be over the age of twenty-one and ineligible to become a lawful permanent resident. In other instances, the U.S. consulate in Port-au-Prince allows the child to travel to the U.S. months or even days before their 21st birthday. Before the child even has the opportunity to prepare an application, he or she has already “aged out.” Once children are denied residency in the U.S., they face removal back to Haiti and are separated from their family in the U.S.

The second major problem with HRIFA is that it does not allow a person to gain lawful permanent resident status if he or she entered the U.S. with false or fraudulent documents.<sup>116</sup> Unfortunately, many Haitians fleeing the persecution and violence of Haiti in the 1990s and beyond were forced to use fraudulent or photo-switched passports to save their own life or the lives of their family members.<sup>117</sup> As Steven Forrester stated in his testimony before Congress, “[s]ince at least 1981, when President Reagan initiated our Coast Guard interdiction and repatriation policy, Haitians had been fleeing by air to avoid it. Since dictators don’t give travel papers to those they want to repress, they were obliged to get false papers as the only way to get on the airplane.”<sup>118</sup> This is a common problem for refugees fleeing oppression, but by not recognizing this common issue for Haitian refugees, the HRIFA

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<sup>115</sup> *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009).

<sup>116</sup> *Id.* at 134-35 (noting grounds of inadmissibility that would normally prevent a person from gaining lawful permanent residency in the U.S. which are excluded from HRIFA, but still applicable under INA).

<sup>117</sup> Steven Forrester, Esq., *Senate Foreign Relations Committee on the Success and Challenges to U.S. Policy to Haiti*, (July 15, 2003), available at [foreign.senate.gov/imo/media/doc/ForesterTestimony030715.pdf](http://foreign.senate.gov/imo/media/doc/ForesterTestimony030715.pdf).

<sup>118</sup> Steven Forrester, Esq., at 4.

statute failed to assist many genuine refugees who the statute was passed to help.

The third major problem with HRIFA is the requirement that INS issue a parole under INA 212(d)(5) if the person never applied for asylum in order to qualify for HRIFA.<sup>119</sup> In practice, INS did not issue a 212(d)(5) parole to all Haitians seeking to enter the U.S. before 1995. Many Haitians were granted release on their own recognizance or a bond. Both the BIA and the Court of Appeals for the Eleventh Circuit have unjustly interpreted HRIFA's parole requirement to only include a 212(d)(5) parole and not other forms of released authorized by the INA.<sup>120</sup> Such a narrow interpretation of HRIFA's parole requirement is particularly unjustified in light of its companion statute, the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the statute on which both were modeled, the Cuban Adjustment Act of 1966. Like NACARA and the Cuban Adjustment Act, HRIFA was intended to provide humanitarian relief for immigrants who fled horrific conditions in their native countries and under those other statutes benefiting other immigrant groups, parole is more broadly interpreted.<sup>121</sup>

#### *E. Expedited Removal and Mandatory Detention*

A major change in immigration law occurred with the enactment of the IIRIRA.<sup>122</sup> Under IIRIRA, an undocumented person entering the U.S. is placed in expedited removal.<sup>123</sup> Unless the person expresses a fear of returning to their country, the person will be repatriated without a full administrative hearing.<sup>124</sup> If the person does express a fear, then the person will be detained and

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<sup>119</sup> Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538 (1998).

<sup>120</sup> *Sicar v. Chertoff*, 541 F.3d 1055 (11th Cir. 2008).

<sup>121</sup> Kennedy's Statement on HRIFA, *supra* note 108.

<sup>122</sup> IIRIRA *supra* note 107.

<sup>123</sup> Immigration and Nationality Act, ch. 477, § 235, 66 Stat. 163 (2010) (codified at 8 U.S.C. § 1225 (2010)).

<sup>124</sup> *Id.* (permitting the alien to request a review of a negative finding of credible fear of persecution).

referred to an asylum officer for a “credible fear” interview.<sup>125</sup> If the person passes their “credible fear” interview then the person will be referred to an immigration judge with the Executive Office for Immigration Review (EOIR) for a hearing.<sup>126</sup> There is no statutory requirement that the person remain detained during the pendency of their asylum/removal proceeding before the immigration judge.<sup>127</sup>

In 2003, Attorney General John Ashcroft overturned the decision of an immigration judge and the Board of Immigration Appeals that granted a \$2,500 bond to an undocumented Haitian who arrived in the U.S. by boat and proved a credible fear of returning to Haiti.<sup>128</sup> The former INS appealed the bond determination for two reasons. First, INS was concerned the release of the Respondent would encourage further surges of mass migration from Haiti.<sup>129</sup> Second, INS believed that in light of the terrorist attacks of September 11, 2001, there was an increased necessity in preventing undocumented persons from entering the U.S.<sup>130</sup>

In support of the proposition that releasing a Haitian on bond *after* passing a credible fear interview would lead to a mass migration, the INS submitted declarations from the U.S. State Department and the U.S. Coast Guard.<sup>131</sup> The Coast Guard stated that “[a]necdotal reporting and operational experience strongly suggests that detaining and swiftly repatriating those who illegally and unsafely attempt to enter the U.S. by sea is a significant deterrent to surges in illegal immigration and mass migration.”<sup>132</sup>

In support of the second contention, that the release of a Haitian on bond would be a threat to national security, the Attorney

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* (requiring only that the individual be detained pending a final determination of the credible fear interview).

<sup>128</sup> *In re D-J*, 23 I & N Dec. 572 (B.I.A. 2003).

<sup>129</sup> *Id.* at 577.

<sup>130</sup> *Id.*

<sup>131</sup> *In re D-J*, *supra* note 128, at 578.

<sup>132</sup> *Id.*

General relied primarily on a U.S. State Department declaration.<sup>133</sup> The U.S. State Department asserted that it has “noticed an increase in third country nations (Pakistanis, Palestinians, etc.) using Haiti as a staging point for attempted migration to the U.S.”<sup>134</sup>

The Attorney General’s decision applied to the Respondent, and “similarly situated seagoing migrants.”<sup>135</sup> In practice, migrants coming to the U.S. overwhelmingly arrive by sea from two countries: Haiti and Cuba. Tellingly, Cubans are specifically exempt from expedited removal and instead paroled directly into the U.S..<sup>136</sup> While Cuba is on the U.S. Department of State terrorism watch list, Haiti is not.<sup>137</sup> The Attorney General’s decision directly affects only one group of people on a large scale – Haitians.

#### *F. Pleas for TPS Ignored: 2004 – 2010*

Beginning in 2004, Haiti experienced more political upheaval and a string of devastating natural disasters. Throughout this period, the Haitian government, Haitian advocates within the U.S., and members of the U.S. Congress called for the extension of TPS to Haitians residing in the U.S.<sup>138</sup>

The Secretary of the DHS may designate nationals of a specific country for protections under TPS due to civil unrest or

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<sup>133</sup> *Id.* at 579.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Notice Designating Aliens Subject to Expedited Removal Under § 235(b) (1) (a) (iii) of the Immigration & Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002) (to be codified at 8 C.F.R. 235.3(b)(1)(ii)).

<sup>137</sup> *State Sponsors of Terrorism*, U.S. DEP’T. OF STATE, <http://www.state.gov/s/ct/c14151.htm> (last visited May 10, 2011).

<sup>138</sup> Bill Frelick, *Update on Human Rights in Haiti: Temporary Protection for Haitians?*, AMNESTY USA, <http://www.amnestyusa.org/all-countries/haiti/temporary-protection-for-haitians/page.do?id=1101882> (last visited May 10, 2011); Francesca Guerrier, *Hundreds Rally to Protest Planned Deportation of 30,000 Haitians*, HAITI LIBERTE, May 15, 2009, available at <http://sfbayview.com/2009/hundreds-rally-to-protest-planned-deportation-of-30000-haitians/>; Hon. Alcee Hastings, *supra* note 3.

natural disaster.<sup>139</sup> The U.S. Government has extended TPS to various nationalities in Latin America. For example, in 1998 Hurricane Mitch struck Central America. It is estimated that there were 6,500 deaths in Honduras and 4,000 deaths in Nicaragua.<sup>140</sup> On December 30, 1998, Attorney General Janet Reno extended TPS to citizens of Honduras and Nicaragua facing deportation in the U.S.<sup>141</sup> Despite repeated natural disasters and the overthrow of a democratically elected government, requests for TPS designation of Haitians were repeatedly rebuffed by the George W. Bush Administration.<sup>142</sup>

### *1. 2004 Political Overthrow and Natural Disasters*

In February 2004, a group of former military members set out on a path of destruction and terror through Central Haiti in an effort to overthrow the democratically elected government of Jean-Bertrand Aristide.<sup>143</sup> President Aristide allegedly resigned.<sup>144</sup> However, doubts persist as to whether Aristide's resignation was voluntary or whether the U.S. Government forced him out.<sup>145</sup> At a minimum, the U.S. Government appears to have acquiesced in the removal of a democratically elected president.<sup>146</sup> The removal of President Aristide led to another period of civil instability in Haiti.

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<sup>139</sup> Immigration and Nationality Act, § 244 (b)(1) (2010) (codified at 8 U.S.C. §1254a (2010)). The "Attorney General" has been replaced by the Secretary of Homeland Security for purposes of designating a country for TPS.

<sup>140</sup> RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICIES AND ISSUES CRS-5 (September 30, 2008), available at <http://www.au.af.mil/au/awc/awcgate/crs/rs20844.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> Hon. Alcee Hastings, *supra* note 3.

<sup>143</sup> RANDALL ROBINSON, AN UNBROKEN AGONY: HAITI, FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 45 (2007).

<sup>144</sup> *See generally id.*

<sup>145</sup> *See generally* Jordan E. Dollar, *Haiti is Black! Racial Essentialism and U.S. Involvement in the 2004 Overthrow of President Aristide*, 20 ST. THOMAS L. REV. 642 (2008).

<sup>146</sup> *Id.*

Further exacerbating the civil unrest in Haiti was a devastating natural disaster. On September 17-18, 2004, Tropical Storm Jeanne decimated the northwest department of Haiti with torrential rain. Flash floods ripped through the city of Gonaives leaving over 3,000 people dead and another 2,600 injured.<sup>147</sup> USAID estimated that the lives of 300,000 people were adversely affected and ten percent of schools in the area were destroyed.<sup>148</sup> Although the devastation was similar to that suffered in the wake of Hurricane Mitch, calls for TPS for Haitians went ignored.<sup>149</sup>

## 2. *The 2007-2008 Tropical Storm Season*

During the summers of 2007 and 2008 five large tropical systems struck Haiti, and the string of severe tropical storms in such a short period of time was unprecedented. In October 2007, Tropical Storm Noel caused flash floods and mudslides and lead to sixty deaths and 14,776 families losing their homes.<sup>150</sup> In mid-August 2008 Tropical Storm Fay killed fifty people.<sup>151</sup> Next, Tropical Storm Gustav killed 7seventy-five and was quickly followed by Tropical Storm Hanna.<sup>152</sup> Days later, Hurricane Ike killed at least sixty-five people.<sup>153</sup> Over 800 people died and sixty percent of the country's crops were destroyed.<sup>154</sup> The World Bank estimated that Haiti suffered over \$900 million in damage, constituting fifteen percent of Haiti's GDP.<sup>155</sup>

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<sup>147</sup> *Tropical Storm Recovery Report – Tropical Storm Jeanne, September 27-28, 2004: Quarterly Report Status as of June 2005*, USAID, [http://pdf.usaid.gov/pdf\\_docs/PDACF334.pdf](http://pdf.usaid.gov/pdf_docs/PDACF334.pdf) (last visited on May 10, 2011).

<sup>148</sup> *Id.*

<sup>149</sup> Hon. Alcee Hastings, *supra* note 3.

<sup>150</sup> *Infrastructure and Institutions Emergency Recovery Project*, WORLD BANK (Report No. AB5465), Feb. 8, 2010, at ¶ 1, [http://www.wds.Worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/02/16/000262044\\_2010021712/Rendered/PDF/PID0nego0clean.pdf](http://www.wds.Worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/02/16/000262044_2010021712/Rendered/PDF/PID0nego0clean.pdf). [hereinafter WORLD BANK REPORT 2010].

<sup>151</sup> *Id.*

<sup>152</sup> WORLD BANK REPORT 2010.

<sup>153</sup> *Id.*

<sup>154</sup> Rory Carroll, *We are Going to Disappear One Day*, GUARDIAN, Nov. 8, 2008, available at <http://www.guardian.co.uk/world/2008/nov/08/haiti-hurricanes>.

<sup>155</sup> WORLD BANK REPORT 2010, *supra* note 150, at footnote 1.

### 3. *The Fight for TPS*

From 2004 until 2010, Haiti suffered the overthrow of a democratically elected government and a devastating string of tropical storms, and yet TPS was never designated. Pleas went out to the U.S. Government to grant TPS to Haitians facing deportation in the U.S.<sup>156</sup> The administrations of George W. Bush and Barack Obama rejected these pleas until the massive earthquake of January 12, 2010.<sup>157</sup>

The call for TPS could not have been louder. Congressman Alcee Hastings stood on the floor of Congress to express his outrage and disappointment at the Bush Administration's refusal to grant TPS.<sup>158</sup> Congressman Hastings stated, "many Haitian nationals in the U.S. who previously sustained relatives in Haiti through remittances are being deported, further depriving Haiti of an important source of financial aid that is well-positioned to assist when based here in the U.S."<sup>159</sup> International groups such as Amnesty International fought for TPS and the protection of human rights on behalf of Haitians residing in the U.S.<sup>160</sup> In May 2009, the Haitian Diaspora in the U.S. protested the refusal to grant TPS outside of the Broward Transitional Center (BTC) in Pompano Beach, Florida where Haitians were being detained.<sup>161</sup> Despite these pleas, DHS Secretary Michael Chertoff wrote to Haiti's President René Prével that "[a]fter very careful consideration, I have concluded that Haiti does not currently warrant a TPS designation."<sup>162</sup>

This refusal led to legal action by law students at the Florida International University College of Law (FIU COL) and Catholic Legal Services (CLS) in Miami, Florida.<sup>163</sup> After traveling to the

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<sup>156</sup> Hon. Alcee Hastings, *supra* note 3.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Frelick, *supra* note 138.

<sup>161</sup> Guerrier, *supra* note 138.

<sup>162</sup> Hon. Alcee Hastings, *supra* note 3.

<sup>163</sup> Petition to the Inter-American Commission on Human Rights, dated Dec. 1, 2009 (on file with author).

areas of Haiti most affected by the tropical storms, students with the FIU COL Carlos A. Costa Immigration Clinic and an attorney with CLS filed a petition with the Organization of American States Inter-American Commission on Human Rights which outlined the international and human rights law violations committed by the U.S. in its refusal to grant TPS to Haitians.<sup>164</sup>

In its refusal to grant TPS to Haitians, the U.S. government harkened back to its historical reasoning: fear of a mass migration. This reasoning belied the fact that TPS has a cut off date and is only granted to persons physically present in the U.S., not those who arrive after the cut off date.<sup>165</sup> Sadly, this fear was greater than basic notions of fair treatment and human rights.

### *III. The Earthquake of January 12, 2010 and U.S. Immigration Response*

On January 12, 2010, a catastrophic earthquake struck Haiti just outside of Port-au-Prince.<sup>166</sup> The amount of devastation was staggering. In April 2010, the head of the United Nations (U.N.) in Haiti estimated that 250,000 to 300,000 people died in the tragedy.<sup>167</sup> The economic damage was estimated from \$8.1 billion to \$13.9 billion.<sup>168</sup>

The U.S. government responded quickly to the disaster with financial and military aid. On January 15, 2010, the USS Carl Vinson and USS Higgins arrived in Haiti with relief supplies.<sup>169</sup> On

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<sup>164</sup> *Id.*

<sup>165</sup> Immigration and Nationality Act, § 244 (2010) (codified at 8 U.S.C. § 1254a (2010)).

<sup>166</sup> *Haiti's earthquake death toll revised to at least 250,000*, TELEGRAPH, Apr. 22, 2010, available at <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/haiti/7621756/Haitis-earthquake-death-toll-revised-to-at-least-250000.html> [hereinafter *Haiti's Death Toll*].

<sup>167</sup> *Id.*

<sup>168</sup> Eduardo A. Cavallo, et al., *Estimating the Direct Economic Damage of the Earthquake in Haiti* 3 (IDB Working Paper Series No. IDB-WP-163, 2010), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074108>.

<sup>169</sup> *Haiti Earthquake Relief*, U. S. DEP'T OF DEF., [http://www.defense.gov/home/features/2010/0110\\_haiti/military-support.html](http://www.defense.gov/home/features/2010/0110_haiti/military-support.html) (last visited May 10, 2011).

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January 21, 2010, the U.S. Navy's floating hospital, USNS Comfort, arrived in Haiti with 250 hospital beds and 550 medical professionals.<sup>170</sup> Within the first week after the earthquake 2,000 U.S. Marines and 3,500 paratroopers from the 82nd Airborne were in Haiti to provide desperately needed humanitarian assistance.<sup>171</sup>

The U.S. also responded with immigration relief for Haitians physically present in the U.S. On January 15, 2010, the Secretary of the Department of Homeland Security, Janet Napolitano, announced designated TPS for Haitians facing deportation in the U.S.<sup>172</sup> Despite the Obama Administration's quick response, and perhaps their good intentions, the U.S.' historical fear of a mass migration by Haitians led to the continuation of unfair immigration policies towards Haitians who entered the U.S. after the earthquake. These policies continued the historically unfair treatment of the Haitian people by the U.S. government.

*A. TPS for Haitians Residing in the U.S.*

A few days after the earthquake, after years of enormous pressure from advocates, Senators and Representatives, and the Haitian community, on Friday, January 15, 2009, the Secretary of Homeland Security, Janet Napolitano, finally announced the TPS designation of Haiti for eighteen months, calling the earthquake "a disaster of historic proportions."<sup>173</sup> TPS is an immigration benefit which allows individuals from certain countries to stay in the U.S. for a temporary time period;<sup>174</sup> a country designation for TPS may be based on armed conflict or an environmental disaster or other extraordinary conditions in the country.<sup>175</sup> TPS allows qualified

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Napolitano, *supra* note 2.

<sup>173</sup> *Id.*

<sup>174</sup> Immigration and Nationality Act, § 244 (2010) (codified at 8 U.S.C. § 1254a (2010)).

<sup>175</sup> *Id.* at § 244(b)(1) (allowing the Secretary of Homeland Security to designate a foreign state for TPS upon finding such state is experiencing an ongoing armed conflict, environmental disaster or other extraordinary and temporary conditions. TPS is available only to persons who were continuously

individuals to receive a work permit in order to work legally for the designated temporary time period.<sup>176</sup>

Given the unprecedented devastation in Haiti, TPS was ultimately granted for eligible Haitians already residing in the U.S. as of the date of the earthquake. In her statement announcing TPS, however, Secretary Napolitano reiterated the U.S. government's fear of a mass migration:

At this moment of tragedy in Haiti it is tempting for people suffering in the aftermath of the earthquake to seek refuge elsewhere. But attempting to leave Haiti now will only bring more hardship to the Haitian people and nation. Those [Haitians] who attempt to travel to the U.S. after January 12, 2010 will not be eligible for TPS and will be repatriated.<sup>177</sup>

The fear of a mass influx of Haitians was alive and well. Indeed, over the Martin Luther King Jr. long holiday weekend immediately following the Secretary's speech, Krome Service Processing Center (Krome), a major detention center in Miami, Florida, with a capacity for about 600 beds, was half-emptied in preparation for the feared mass influx of Haitians post-quake; individuals held there and already in removal proceedings in Miami were transferred to other immigration detention centers in Florida and around the country;<sup>178</sup> however, the mass influx so feared never came, and eventually Krome re-filled with its normal population.

According to the Washington Post, at the time of the TPS designation, Haitians living in the U.S. were estimated to send back about "about \$1.2 billion in remittances annually, accounting for about 20 percent of Haiti's economy."<sup>179</sup> One of the arguments for the TPS designation was that remittances were, as they have proved

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physically present in the U.S. as of the effective date of the designation).

<sup>176</sup> *Id.* at § 244.

<sup>177</sup> Napolitano, *supra* note 2.

<sup>178</sup> Kathleen McGrory, *Krome detention center readied for possible influx of Haitians*, MIAMI HERALD, Jan. 17, 2010.

<sup>179</sup> Spencer S. Hsu & N.C. Aizenman, *Administration to allow Haitians in U.S. illegally to stay for 18 months*, WASH. POST, Jan. 16, 2010, at A09.

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to be, absolutely essential for the massive emergency response and re-building effort.<sup>180</sup> The Obama Administration also recognized that TPS would be “an important complement to the U.S. government’s wider disaster relief and humanitarian response underway on the ground in Haiti” in the Federal Register Notice of the TPS designation on January 21, 2010.<sup>181</sup>

Local advocates in South Florida quickly mobilized to assist Haitians seeking TPS. Two of the largest immigration agencies in South Florida, CLS and the Florida Immigrant Advocacy Center (FIAC), who had been at the center of the repeated calls for TPS, mounted massive efforts to assist the Haitian community once the designation was finally announced. Not only did these organizations assist thousands of individuals to apply for TPS, but they also mounted educational campaigns in Creole and trained hundreds of volunteer lawyers to complete applications.

Some of their most important advocacy involved working with USCIS officials so that documents showing Haitian nationality were appropriately accepted. Initially, there was a response by USCIS to many TPS applications asking for further proof of nationality when appropriate proof in the form of a Haitian birth certificate had already been provided. In other cases, Haitian nationals who were born in the Bahamas but were Haitian citizens, and not Bahamian citizens, were asked for further proof of nationality. The legal aid non-profit organizations were able to work with USCIS so that in many cases, these issues were resolved and eligible Haitians were approved for TPS.<sup>182</sup>

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<sup>180</sup> Dilip Ratha, *Helping Haiti through migration and remittances*, WORLD BANK (Jan. 19, 2010), <http://blogs.worldbank.org/peoplemove/helping-haiti-through-migration-and-remittances>.

<sup>181</sup> Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 13,3476-9 (Jan. 21, 2010).

<sup>182</sup> For example, USCIS took the position that a Haitian birth certificate did not provide sufficient proof of Haitian nationality through an erroneous reading of the 1987 Haitian Constitution. In its analysis, USCIS ignored Haitian common law that recognized a birth certificate from Haiti as proof of nationality. After receiving numerous Requests for Evidence from USCIS, legal advocates were able to approach USCIS with a copy of the Haitian common law. FIAC and CLS also

Initial U.S. government estimates for the numbers of undocumented Haitians living in the U.S. who would be eligible and would apply for TPS have turned out to be overly optimistic. For example, in the Federal Register announcement, DHS estimated 100,000 to 200,000 Haitian nationals eligible for TPS.

Several factors led to the under-utilization of TPS by Haitians. First, the cost of applying is high. For an adult Haitian national, the total fee for an application for TPS, including the work permit, is \$470.<sup>183</sup> The fee for those under fourteen or over sixty-five years of age is \$130.<sup>184</sup> The total cost for TPS for many Haitian families ran into the thousands of dollars.<sup>185</sup> This fee was owed at the same time that many families were sending all their discretionary funds in remittances to surviving family members in Haiti, and many were also taking in destitute family members who had managed to make it to the U.S. There has also been misinformation and mistrust of the TPS program on the part of the Haitian community.

The Haitian community's mistrust is based on the community's previous experience with U.S. immigration.<sup>186</sup> Haitians, more than most other nationalities arriving in the U.S., overwhelmingly applied for political asylum in the U.S. and made themselves known to the immigration authorities. In return, Haitians were unfairly labeled economic migrants which led to a high denial rate of their asylum claims.<sup>187</sup> To many Haitians, TPS was merely a foil for U.S. immigration authorities to obtain their name and address in order to try and deport them in the future.

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worked with the Haitian consulate in Miami, Florida, on a number of issues, for example, to ask for the issuance of national identification cards that USCIS did accept as proof of nationality.

<sup>183</sup> Haiti for Temporary Protected Status, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Section I: *Introduction* above.

<sup>187</sup> From fiscal year 2001 to 2006, 18,266 Haitians applied for asylum before EOIR. 82% of the cases were denied. *Asylum Denial Rates by Nationality 2001 – 2006*, Transactional Records Access Clearinghouse, Syracuse University, [http://trac.syr.edu/immigration/reports/183/include/6\\_natlist.html](http://trac.syr.edu/immigration/reports/183/include/6_natlist.html) (last visited May 10, 2011).

On July 12, 2010, the government announced that it would extend the initial registration period for TPS from the initial end date of July 22, 2010 to January 18, 2011.<sup>188</sup> USCIS reports that as of January 21, 2011, 63,036 TPS applications were received nationwide.<sup>189</sup> Out of that total 37,953 had been submitted by applicants residing in Florida.<sup>190</sup> Out of this total number only 4,436 applicants requested a fee waiver.<sup>191</sup> As of the time of this writing, the total number of denials of the TPS applications is unknown.

*B. Deferred Action for Post-Earthquake Arrivals*

Haitians who arrived in the U.S. after the January 12, 2010 earthquake are not eligible for TPS.<sup>192</sup> Many Haitians were allowed to enter the U.S. after the earthquake to receive critical medical care. Many of them, including a number of minors, were given “humanitarian parole” in order to enter the U.S. to receive medical care, at institutions including Jackson Memorial Hospital in Miami, Florida.<sup>193</sup> The parole period given to Haitians varied; for example, some received a humanitarian parole for a period of three months, but this period could be renewed with immigration authorities, for example, if someone needed to stay to continue to receive treatment.

In addition, the U.S. State Department issued tourist visas (B-1/B-2 visas) for others seeking medical care through the U.S. Embassy following the earthquake. The State Department acted swiftly in issuing tourist visas to these earthquake victims and likely saved many lives. On January 13, 2010, emergency medical flights began bringing Haitian-Americans to South Florida through the U.S.

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<sup>188</sup> Alfonso Chardy & Trenton Daniel, *Haitians given six more months to file for TPS*, MIAMI HERALD, July 12, 2010, available at <http://www.miamiherald.com/2010/07/12/1726753/haitians-given-six-more-months.html> (last visited Mar. 16, 2011).

<sup>189</sup> Information request from Jordan Dollar to USCIS (on file with author).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Haiti for Temporary Protected Status, *supra* note 181.

<sup>193</sup> Ian Urbina, *Paperwork Hinders Airlifts of Ill Haitian Children*, N.Y. TIMES, Feb. 9, 2010, at A1, available at <http://www.nytimes.com/2010/02/09/world/americas/09airlift.html>.

Repatriation Program.<sup>194</sup> Over 27,000 U.S. citizens and their families were evacuated to the U.S. through this program.<sup>195</sup> Seventy-seven percent of the individuals brought to the U.S. were U.S. citizens; the remaining individuals were Haitian citizens who were allowed to enter the U.S. on a B1/B2 tourist visa.<sup>196</sup> Unfortunately, a tourist visa only allows a person to enter the U.S. for short period of time, normally six months, and more importantly it only allows them to enter as a tourist.<sup>197</sup> Any person who obtains employment or any child who attends school violates the terms of their tourist visa.<sup>198</sup>

A second group of Haitians already had multiple-entry tourist visas prior to the earthquake. Many of these Haitians traveled to the U.S. after they were able to obtain passage on a commercial airline. A large majority of Haitians comprising this second group included minor children, many of whom are U.S. citizens. The State Department also issued new tourist visas in many cases to Haitians accompanying U.S. citizens and permanent resident minors returning to the U.S., so that one adult, usually a relative, could accompany the U.S. citizen minor children back to the U.S. to reunite with family there.<sup>199</sup>

Local advocates, led by Randy McGrorty of Catholic Legal Services and Cheryl Little of FIAC, met with USCIS officials to request a remedy for these Haitians who were in danger of violating the terms of their visas merely by working to send remittances or sending their children to school. USCIS took the position that they did not have the authority to issue paroles under INA § 212(d)(5) because the person was already “admitted” on the tourist visa.<sup>200</sup>

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<sup>194</sup> STATE OF FLA. DEP’T. OF CHILDREN AND FAMILIES, *supra* note 4.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Immigration and Nationality Act, § 101(a)(15)(B).

<sup>198</sup> *Id.*

<sup>199</sup> See e.g. Shaila Dewan, *For Disaster-Struck Haitians, Arrival in the U.S. Does Not Mean an End to Problem*, N.Y. TIMES, Jan. 27, 2010, available at <http://www.nytimes.com/2010/01/28/world/americas/28immig.html>.

<sup>200</sup> An alien may be paroled into the U.S. for “urgent humanitarian reasons” or where a grant would result in a “significant public benefit.” Immigration and Nationality Act, § 212(d)(5).

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This left only one course of action: deferred action. USCIS officials stated that they would consider Haitians in the U.S. for this type of administrative remedy.

Deferred action has no statutory authority in the INA. 8 C.F.R. 274a.12(c)(14) describes deferred action as a an act of “administrative convenience. . .which gives some cases lower priority.”<sup>201</sup> Decision to grant or deny deferred action is made on a case-by-case basis. A person cannot maintain a valid visa and deferred action simultaneously. This leads to a very difficult decision for many Haitians in deciding whether to request deferred action or comply with the terms of their visa and return to the destruction of Haiti. USCIS officials indicated they would consider deferred action on a case by case basis for Haitians temporarily in the U.S. who entered on tourist visas using the same standard as for other deferred action decisions, and encouraged advocates to provide information on medical problems or other humanitarian factors when requesting the deferred action status.

Some Haitians determined that given the situation in their homeland, including the loss of their family members, homes, and livelihood, they were better off seeking permission to stay in the U.S. following the expiration of their temporary stay of six months authorized upon their entry to the U.S. on a tourist visa. Non-profit organizations such as FIAC and CLS assisted Haitians who arrived after the earthquake who decided to request deferred action. This became the only option for those whose authorized stay in the U.S. was about to expire and who were afraid of returning to homelessness, unemployment or the cholera epidemic in Haiti, or who desired to stay in the U.S. in order to be able to work to send money back to relatives in Haiti to assist in the rebuilding effort. Most of the FIAC and CLS clients who applied for deferred action were still waiting for decisions from USCIS in January 2011, so it is unclear at the time of writing which types of cases immigration officials determined to grant or deny.<sup>202</sup>

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<sup>201</sup> Aliens and Nationality, 8 C.F.R. § 274a.12(c)(14) (1987).

<sup>202</sup> USCIS instituted an extensive review process for deferred action request. Initial determinations were made by the local District Director. In cases where the

The major benefit of deferred action for individuals, which is usually granted for a period of one-year, renewable, is that a person who is granted deferred action can apply for a work permit to work legally in the U.S. during their authorized period.<sup>203</sup> However, as it is not a legal status, individuals with deferred action are not able to leave the U.S. and re-enter, such as to visit Haiti for a short period, or to adjust status to legal permanent residence, for example, such as in the case of a person whose relative has petitioned for them.<sup>204</sup>

### *C. Haitians in Immigration Detention at the Time of the Earthquake*

The DHS announced in a press release on January 13, 2010, the day after the earthquake, that it was halting all removals, or deportations, to Haiti “for the time being.”<sup>205</sup> Days later, a Washington Post article on January 16, 2010, stated that, “About 31,000 [Haitians] have outstanding deportation orders, and about 160 are in immigration detention.”<sup>206</sup>

In retrospect, this number in detention appears to be a significant undercount. An Immigration and Customs Enforcement (ICE) internal policy statement, released pursuant to a Freedom of Information Act (FOIA) request, entitled “Reevaluating the Custody Status of Haitian Nationals,” states that, “As of January 11, 2010, 528 Haitian nationals were in ICE custody, including 124 criminal aliens and 56 non-criminal aliens with final orders and 294 criminals and 74 non-criminal aliens not subject to a final order and in some form of proceeding.”<sup>207</sup>

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District Director recommended denial then the request would move up the chain of command to DHS headquarters in Washington, D.C. If, however, the District Director recommended approval then the decision was final. The majority of approvals were for individuals who entered on “medical flights” shortly after the earthquake and those who entered with minor U.S. citizen children.

<sup>203</sup> 8 C.F.R. § 274a.12.

<sup>204</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>205</sup> Press Release, Department of Homeland Security, Statement by Deputy Press Secretary Matt Chandler, (Jan. 13, 2010), [http://www.dhs.gov/ynews/releases/pr\\_1263409824202.shtm](http://www.dhs.gov/ynews/releases/pr_1263409824202.shtm).

<sup>206</sup> Hsu & Aizenman, *supra* note 179.

<sup>207</sup> Of the 528 Haitians detained as of Jan. 11, 2010, 198 were detained under

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The Washington Post article also noted what had been a quiet government policy prior to the quake, to only effectuating the removal orders of Haitians with criminal convictions.<sup>208</sup> Thousands of Haitians without criminal convictions also had final removal orders, but were not actively being deported.<sup>209</sup> When the earthquake occurred, however, the U.S. government recognized the obvious: Haiti would not be in position to accept any Haitian deportees for quite some time given the widespread devastation.<sup>210</sup>

Given the new TPS designation, DHS directed its Office of Chief Counsel to review the files of those currently in removal proceedings and to administratively close the cases of those who were prima facie eligible for TPS and who showed that a TPS application had been submitted. The Office of Chief Counsel in Miami, Florida communicated this policy to local immigration advocates and did conduct a review of cases in removal proceedings in order to administratively close appropriate cases.

ICE officials were also told to provide TPS information to all Haitian nationals in their custody in the various immigration

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the Miami Field Office's region of responsibility, primarily at five detention centers in Florida: Glades County Detention Center, Baker County Sheriff's Detention Center, Broward Transitional Center, Wakulla County Jail, and Krome SPC. The San Antonio Field office had responsibility for 56 Haitian detainees, the Boston Field Office for 45, and New York City, Newark and Philadelphia Field offices for 39, 38, and 32 respectively. The other detained Haitians were scattered at immigration detention centers around the U.S. Immigration detainees are frequently transferred between detention facilities and different regions of the country due to bed space and other issues (statistics on file with author).

<sup>208</sup> Hsu & Aizenman, *supra* note 179.

<sup>209</sup> Suzanne Gamboa, *US halts deportations to Haiti; illegal immigrants will remain in detention centers*, SEATTLE TIMES, Jan. 13, 2010, available at <http://community.seattletimes.nwsourc.com/mobile/?type=story&id=2010782101> (quoting Kendrick Meek, former Democratic U.S. Representative from Florida, "the Obama administration quietly stopped deporting Haitians without criminal records last March"). The government of Haiti had a long-standing policy of detaining the Haitians deported from the U.S. and some of the police holding cells and the National Penitentiary where Haitians deported from the U.S. had been held in poor conditions, sometimes indefinitely, upon returning to Haiti over the previous years were badly damaged in the earthquake.

<sup>210</sup> *Id.*

detention centers around the country, regardless of one's apparent eligibility for the relief.<sup>211</sup> On January 29, 2010, ICE's Assistant Director for Detention and Removal Management and the Assistant Director for Field Operations issued a message to all field office directors and deputies to review the custodial status of its detained Haitian nationals to assess whether further detention was warranted.<sup>212</sup> The message further stated:

In light of the possibility of TPS for some Haitians currently in ICE custody, field offices must review the cases in their area of responsibility and consider whether release is appropriate. As a general matter, Haitian nationals who are not precluded from qualifying for TPS as a result of criminal convictions or other factors should be released from custody, absent a national security risk, history of human rights violations, danger to the community, gang affiliation, medical or mental health conditions affecting the viability of release, and any other such relevant factors.<sup>213</sup>

Some Haitians were released from immigration detention pursuant to this guidance, though exact numbers are currently unknown.<sup>214</sup>

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<sup>211</sup> A high-level internal ICE message dated January 25, 2009, and released pursuant to the same FOIA request mentioned *supra*, from ICE's Assistant Director for Detention and Removal Management and the Assistant Director for Field Operations, directed field office directors and deputies to provide this information by February 1, 2010 (on file with author).

<sup>212</sup> Memo on file with author.

<sup>213</sup> This message went on to state that "non-detained, non-criminal, and non-dangerous Haitian nationals" currently supervised by the Alternatives to Detention program and who appear to be eligible for TPS should no longer be supervised through that program, but that "officers shall take steps to ensure awareness of the addresses and intended residences of all Haitian nationals granted TPS in order to enforce any final orders of removal when the TPS period expires." This directive shows ICE's intent to deport non-criminal, non-dangerous Haitians when deportations to Haiti resume. See *Haiti Temporary Protected Status Guidance*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/haititempprotectedstatusguidance.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/haititempprotectedstatusguidance.pdf) (last visited May 10, 2011).

<sup>214</sup> *Id.*

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This same message, however, also stated clearly that:

ICE will detain and pursue the removal of any Haitian nationals who arrive in the U.S. after January 12, 2010, without lawful authority to enter or remain in the U.S.; and ICE will continue to detain and pursue the removal of Haitian nationals who are ineligible for TPS-recognizing the need to work closely with the Government of Haiti and likelihood of logistical impediments in the near term.<sup>215</sup>

This businesslike language foreshadowed the terrible ordeal that many Haitians fleeing the earthquake and evacuated by the U.S. military on U.S. military planes were already beginning to undergo at the hands of ICE.

*D. Long-term Immigration Detention of Haitians with Final Removal Orders*

Individual Haitians located in Glades County Detention Center and Baker County Sheriff's Detention Center in Florida repeatedly told FIAC legal staff about how during their immigration proceedings, the government told them if they took a final order of removal, they would be released ninety days afterwards. One gentleman in particular, who had a strong claim for withholding of removal, said that he was having such a difficult time living in immigration detention that when he finally went to court and was told he would likely be released in ninety days after an order, he decided to accept the order rather than continue to fight his case.<sup>216</sup> It is not completely clear why some deportation officers, trial attorneys, and maybe even immigration judges told Haitians in removal proceedings that they would likely be released ninety days post-order. Legally, every individual in immigration detention is supposed to have his custody status reviewed ninety days after the date of the removal order; as the government officials and many detainees knew, releasing at the ninety-day mark is the general ICE

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<sup>215</sup> *Id.*

<sup>216</sup> He recalled that the Immigration Judge told him when he got out, he could write a letter asking to re-open his case given the persecution he faced in Haiti (on file with author).

policy for Cubans who the U.S. government is also not able to physically deport at this time (with a small exception of those individuals subject to a 1984 Repatriation Agreement between the U.S. and Cuba).<sup>217</sup>

However, despite this misleading information, to our knowledge, there was no ICE policy in place to release Haitians in immigration detention at the ninety day post-order mark. To the contrary, when a legal team from FIAC spent a week at Baker County Detention Center in Macclenny, Florida at the end of April 2010, they found about sixty post-order Haitians in immigration detention. Approximately two-dozen of them had already been detained more than ninety-days after the date of their removal order, and a few were already at the 180 day post-removal order mark.<sup>218</sup>

All the Haitians in immigration detention were perplexed as to why they were still being held, despite the official U.S. government announcement months before on January 13, 2010, which halted all deportations to Haiti.<sup>219</sup> Given the lack of reasonable foreseeability of a resumption of removals to Haiti, the continued detentions also appear to be legally unjustifiable.<sup>220</sup> Despite this, for cases such as all those in Florida arising under the Eleventh Judicial Circuit and the weight of its precedent, filing a habeas motion in federal district court to ask for a release from custody is not generally possible until 180 days have elapsed post-order. Post-quake, legal advocates have provided dozens of Haitians with pro se assistance with habeas motions and have successfully represented some Haitians in habeas motions. In some cases in 2010, the filing of the habeas itself triggered the release of the individual from ICE custody, but it was frustrating to legal advocates that this is even necessary when there were no deportations to

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<sup>217</sup> See *Matter of Barrera*, 19 I&N Dec. 837, 844 (B.I.A. 1989); 8 U.S.C. § 1253(a)(1)(1996).

<sup>218</sup> *Matter of Barrera*, *supra* note 217.

<sup>219</sup> *Id.*

<sup>220</sup> *Matter of Barrera*, at 844 (stating that every individual in immigration detention is supposed to have his or her custody status reviewed ninety days after the date of a removal order).

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Haiti.<sup>221</sup> In late 2010, as immigration officials prepared to resume deportations to Haiti, as detailed below, this long-term detention continued and a habeas remedy was no longer possible for many Haitians.<sup>222</sup>

*E. Detention of Post-Earthquake Arrivals: A Continuing Fear of Mass Migration*

After the earthquake, hundreds of Haitians were evacuated on U.S. military planes.<sup>223</sup> Some were medical evacuees, many of whom were given humanitarian parole which permitted them to temporarily enter the U.S. to be treated for their medical problems.<sup>224</sup> Others were U.S. citizens of Haitian descent who were in Haiti when the earthquake struck, or Haitians who were lawful permanent residents or who had other visas to enter the U.S., such as tourist visas.<sup>225</sup> Others were Haitians who were at the Port-au-Prince airport, some looking for food aid, or work, in the chaotic aftermath of the quake and who were allowed to enter on military planes headed to the U.S. - in some cases, planes boarded chaotically as aftershocks shook the ground and everyone in the vicinity was quickly waved on the planes by U.S. military personnel presumably concerned about their safety.<sup>226</sup> After commercial flights resumed from Haiti to the U.S., even more Haitians were brought to the U.S., many fleeing from their destroyed homes and grieving for the loss of multiple family members in the deadly quake.<sup>227</sup>

As planes landed from Haiti, usually in airports in Florida, U.S. Customs and Border Patrol (CBP) processed the Haitian

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Military resumes medical airlifts from Haiti*, MSNBC, Feb. 1, 2010, [http://www.msnbc.msn.com/id/35185004/ns/world\\_news-haiti/](http://www.msnbc.msn.com/id/35185004/ns/world_news-haiti/).

<sup>224</sup> *Id.*

<sup>225</sup> See e.g. Anne Barnard, *Haitians in the U.S. Double Up to Take in their Own*, N.Y. TIMES, Mar. 5, 2010, at A1.

<sup>226</sup> See Bernstein, *supra* note 5.

<sup>227</sup> *U.S. commercial flights resume to Haiti*, CNN, Feb. 19, 2010, [http://articles.cnn.com/2010-02-19/travel/haiti.flights\\_1\\_haitian-capital-toussaint-louverture-international-airport-american-airlines?\\_s=PM:TRAVEL](http://articles.cnn.com/2010-02-19/travel/haiti.flights_1_haitian-capital-toussaint-louverture-international-airport-american-airlines?_s=PM:TRAVEL).

arrivals. Unfortunately, especially in the first few weeks in the midst of the chaotic aftermath of the earthquake, as U.S. military planes continued to arrive at U.S. airports evacuating grieving and traumatized Haitians, there was not a consistent decision-making process about what to do with Haitians who arrived whose immigration papers were not in order.<sup>228</sup> Many were allowed to call relatives in the U.S. and were released to their family members; others were initially told that, but then were transferred into ICE custody and sent to immigration detention centers. One young man explained that he was told upon arrival to call his family members in Florida to tell them to pick him up, when another U.S. military plane arrived carrying another load of evacuated Haitians. The officer then explained that there were “too many Haitians” arriving all at once, and he would be sent to a detention center for a few days and then released.<sup>229</sup> Two and a half months later, he was still waiting.<sup>230</sup>

During routine Know Your Rights presentations at Broward Transitional Center in Pompano Beach, Florida in February 2010, dozens of Haitians were discovered who had arrived post-earthquake, were grieving the loss of loved ones, and were traumatized and perplexed by their detention.

FIAC enlisted the assistance of law students from University of California-Irvine, Columbia Law School, and Yale Law School spending their spring break in Florida to assist with Haitian cases in the aftermath of the earthquake. FIAC and the law students interviewed all of the Haitians who arrived post-quake and were detained at BTC. Most of them had come to the U.S. on U.S. military planes in the chaotic aftermath of the earthquake and most had family members in the U.S. with whom they could live.<sup>231</sup> FIAC and the law students interviewed all of the Haitian earthquake survivors, sent individualized release requests for each earthquake survivor to the appropriate immigration officials, and lined up

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<sup>228</sup> See e.g. Bernstein, *supra* note 5.

<sup>229</sup> Interview with James Dorinville, FIAC client, during his detention by ICE in March 2010 (on file with author).

<sup>230</sup> *Id.*

<sup>231</sup> See e.g. Bernstein, *supra* note 5.

sponsors with whom they could live when released from detention. Their stories were horrific - one individual had lost both his mother and father in the earthquake; another lost his nine-year old twins.<sup>232</sup> All were suffering from symptoms of anxiety, depression, and post-traumatic stress disorder due to the earthquake and their detention in the U.S. upon arrival for months - none had received any counseling for their trauma while in detention.<sup>233</sup> None had any criminal histories, and most had already quickly received removal orders, which could not be effectuated because of the halt on removals to quake-ravaged Haiti, and yet they were detained for months after being evacuated in the aftermath of an extraordinarily traumatic event.<sup>234</sup>

Unfortunately, ICE denied the individual release requests and so on March 19, 2010, FIAC requested to the Field Officer Director in Florida and officials in Washington, D.C. to immediately release the earthquake survivors.<sup>235</sup> Despite this high-level advocacy, none of the earthquake survivors were released until the New York Times broke the story on its front page on April 1, 2010.<sup>236</sup> Suddenly, within twenty-four hours, forty Haitian earthquake survivors were released from immigration detention after weeks of immigration officials refusing to release them to family members in the U.S.<sup>237</sup> The story was covered internationally on the radio by the BBC World program and on television by CNN with Soledad O'Brien and

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<sup>232</sup> Letter from Charu Newhouse al-Sahli & Allison Kent, FIAC to Michael Meade, Miami Field Office Director of ICE (Mar. 19, 2010) (requesting the release from detention of the Haitian earthquake survivors) (on file with author).

<sup>233</sup> Letter to ICE Miami Field Director, *supra* note 233.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Bernstein, *supra* note 5.

<sup>237</sup> See e.g. Nina Bernstein, *Quake Survivors Freed from Immigration Jails*, N.Y. TIMES, Apr. 2, 2010, at 11; , Jennifer Kay, *30 Haitians who came to Fla. without visas freed*, ASSOCIATED PRESS, Apr. 2, 2010, [http://www.breitbart.com/article.php?id=D9EQF0181&show\\_article=](http://www.breitbart.com/article.php?id=D9EQF0181&show_article=); Jennifer Rizzo, *33 Haitian quake survivors freed by immigration officials in Florida*, CNN, Apr. 1, 2010, [http://articles.cnn.com/2010-04-01/world/haiti.quake.refugees\\_1\\_haitians-florida-immigrant-advocacy-center-immigrationofficials?\\_s=PM:WORLD](http://articles.cnn.com/2010-04-01/world/haiti.quake.refugees_1_haitians-florida-immigrant-advocacy-center-immigrationofficials?_s=PM:WORLD).

on Al Jazeera.<sup>238</sup> Ordinary American citizens were surprised and outraged to learn that while the U.S. was doing so much to help injured and traumatized Haitians in Haiti, dozens of those evacuated to safety in the U.S. by U.S. military forces were detained by immigration officials for two and a half months, while grieving for loved ones, because their paperwork was not in order.

*F. Haitian Minors Arriving Post-Quake Haitian Minors Arriving Post-Quake*

Among the thousands of Haitians who have come to the U.S. following the earthquake many are minors, and the types of cases fall into a number of different categories, with the adoption cases being the most numerous and well-publicized.<sup>239</sup> The federal government has designated the Office of Refugee Resettlement, Division of Unaccompanied Children's Services (ORR-DUCS), which is under the U.S. Department of Health and Human Services, as the central program with responsibility for unaccompanied immigrant and refugee children.<sup>240</sup>

While in many cases, Haitian children entered the U.S. after the earthquake with a parent or legal guardian,<sup>241</sup> in other cases Haitian minors entered the country with other relatives or adults who sometimes did not have the proper paperwork showing that the child was with a legal guardian or parent. Moreover, some of those Haitian children have been taken into custody by immigration officials. It has been observed by legal staff working with unaccompanied minors in Florida that those Haitian teenagers without proper documentation who are male have been more likely

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<sup>238</sup> Rizzo, *supra* note 237.

<sup>239</sup> See generally SUSANA BARCIELA ET AL., AFTER THE EARTHQUAKE: HAITIAN CHILDREN SEEKING SAFETY IN THE U.S. (Jan. 2011) (giving an in-depth discussion of Haitian minors post-earthquake), [http://fiacfla.org/34841\\_FL\\_Advocacy\\_news\\_letter\\_haiti.pdf](http://fiacfla.org/34841_FL_Advocacy_news_letter_haiti.pdf).

<sup>240</sup> See U.S. DEP'T OF HEALTH AND HUM. SERVICES, <http://www.acf.hhs.gov/programs/orr/> (last visited May 10, 2011).

<sup>241</sup> See e.g. Dewan, *supra* note 199.

to be placed into removal proceedings than younger children in the same situation or Haitian teenage girls.

In other cases, Haitian children were evacuated for medical reasons and treated at hospitals, primarily in Florida.<sup>242</sup> Many of the children evacuated for medical treatment were granted humanitarian parole for a temporary period, such as three months; in some cases, this period was extended as the injured or sick children continue to recuperate in medical settings. Other children were treated and then discharged and sent back to Haiti by ORR and other governmental agencies. It is unclear whether the children were received in Haiti by family members or are now receiving social services.

The most famous and numerous cases involving Haitian minors are of those children who were somewhere in the adoption pipeline, such as many who were living in orphanages before the earthquake and who were then brought to the U.S.<sup>243</sup> This category includes children as the planeload of Haitian children escorted by Pennsylvania Governor Ed Rendell.<sup>244</sup> There was a lot of news coverage following the Haitian orphans brought to the U.S. directly after the earthquake, but there has been little sustained media follow-up.<sup>245</sup> About 1,150 children were brought to the U.S. in the first four months after the earthquake through the U.S. Special Humanitarian

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<sup>242</sup> *Haiti earthquake evacuation flights to US resume*, BBC NEWS, (Feb. 1, 2010), <http://news.bbc.co.uk/2/hi/americas/8490469.stm> (detailing how the U.S. military resumed efforts to evacuate critically injured people after the massive earthquake).

<sup>243</sup> James C. McKinley Jr. & Sean D. Hamill, *53 Haitian Orphans are Airlifted to U.S.*, N.Y. TIMES, Jan. 19, 2010, available at <http://www.nytimes.com/2010/01/20/world/americas/20orphans.html>.

<sup>244</sup> *Id.*

<sup>245</sup> See generally Rose Arce, & Soledad O'Brien, *Most have homes, but some Haitian orphans still in shelters*, CNN, Jan. 11, 2011, [http://articles.cnn.com/2011-01-11/us/haiti.us.orphans\\_1\\_haitian-orphans-aadoptive-families-haitian-children?\\_s=PM:US](http://articles.cnn.com/2011-01-11/us/haiti.us.orphans_1_haitian-orphans-aadoptive-families-haitian-children?_s=PM:US); David Crary, *Fate Uncertain for 12 Haitian Kids Airlifted to U.S.*, SEATTLE TIMES, July 27, 2010, available at [http://seattletimes.nwsourc.com/html/nationworld/2012460619\\_apushhaitiankidsinlimbo.html](http://seattletimes.nwsourc.com/html/nationworld/2012460619_apushhaitiankidsinlimbo.html); Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. TIMES, Aug. 3, 2010, available at <http://www.nytimes.com/2010/08/04/world/americas/04adoption.html> (last visited Apr. 3, 2011).

Parole Program for Haitian Orphans.<sup>246</sup> Some of these children are now living with adoptive parents and are presumptively adapting well in their new homes.<sup>247</sup> Although some of the children brought to the U.S. were designated as orphans, for some their eligibility for adoption was unclear - sometimes due to a lack of proper paperwork about the status and whereabouts of their biological parents and whether parental rights were properly terminated, for example.<sup>248</sup> Some of the children who arrived in the U.S. are quite young and if their paperwork is not complete, it can be difficult even to definitely determine the child's identity, much less the location of possible surviving relatives. President Obama in December 2010 signed the Help Haiti Act, which tries to resolve some of these issues.<sup>249</sup>

There are other Haitian minors whose adoptions were disrupted, because their presumptive adoptive parents returned the children, and who have now been placed in the custody of ORR-DUCS.<sup>250</sup> What is happening in these disrupted adoption cases is unclear, but it appears that many of these children are essentially remaining in federal foster care without a permanent solution, either

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<sup>246</sup> Arce & O'Brien, *supra* note 245.

<sup>247</sup> Thompson, *supra* note 245.

<sup>248</sup> See *id.*; Arce & O'Brien, *supra* note 246; Crary, *supra* note 245.

<sup>249</sup> Memorandum from U.S. Citizenship & Immigr. Services on Implementation of the HELP Haiti Act of 2010 (Dec. 21, 2010), <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/602-0020-Help-HAITI-Act-12-22-10.pdf>.

<sup>250</sup> See Deborah Sontag, *In Haiti, the Displaced Are Left Clinging to the Edge*, N.Y. TIMES, July 11, 2010, at A1, available at [http://www.nytimes.com/2010/07/11/world/americas/11haiti.html?pagewanted=1&\\_r=1&ref=haiti](http://www.nytimes.com/2010/07/11/world/americas/11haiti.html?pagewanted=1&_r=1&ref=haiti); Elaine M. Kelley, Associate Director Child Welfare, DHHS/ACF/Office of Refugee Resettlement, Presentation at the Eight Annual Adoption Law and Policy Conference at New York Law School (Mar. 4, 2011), [http://www.nyls.edu/centers/harlan\\_scholar\\_centers/justice\\_action\\_center/annual\\_conferences/adoption\\_conference/eighth\\_annual\\_conference](http://www.nyls.edu/centers/harlan_scholar_centers/justice_action_center/annual_conferences/adoption_conference/eighth_annual_conference) (last visited May 10, 2011) (scroll page to 3:45 p.m. - 4:45 p.m. panel, click on hyperlink titled "Powerpoint"); CENTER FOR ADOPTION POLICY, <http://www.adoptionpolicy.org/archive/2010/jul10.html> (last visited Apr. 3, 2011); *USCIS Responds to Haiti Earthquake*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=9cf75869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=9cf75869c9326210VgnVCM100000082ca60aRCRD> (last visited May 10, 2011).

of repatriation through successful family tracing in Haiti, or a best interest determination by a trained juvenile court judge to determine the children's future. Legal advocates fear that these children will continue to languish in federal custody for years and not acquire any legal status in the U.S. These children do not currently have appointed legal counsel or child advocates assisting the children in their immigration cases.

### *G. The Resumption of Removals to Haiti*

On December 9, 2010, ICE informed a small group of non-profit and legal aid organizations that ICE would resume removals to Haiti of individuals with criminal records.<sup>251</sup> Prior to this policy, some Haitians with final orders were released from immigration detention ninety days after receiving an order of removal; others were usually released after 180 days.<sup>252</sup> ICE previously placed these Haitians on an intensive monitoring program.<sup>253</sup> Although legal advocates were informed on December 9, 2010, the policy change had actually already begun to be implemented before such date.<sup>254</sup>

At the time of ICE's announcement Haiti was in the middle of an unprecedented cholera outbreak and outrage over the disputed Presidential elections.<sup>255</sup> In fact, on the same day ICE announced the resumption of deportations, the U.S. Department of State issued a travel advisory to U.S. citizens discouraging non-essential travel to Haiti due to "continued high crime, the cholera outbreak, frequent

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<sup>251</sup> See *Rights Groups Denounce U.S. Government's Decision to Resume Some Deportations to Haiti Amid Spiraling Cholera Outbreak and Worsening Humanitarian Situation*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/content/blog/rights-groups-denounce-us-governments-decision-resume-some-deportations-haiti> (last visited Apr. 3, 2011).

<sup>252</sup> On file with author.

<sup>253</sup> *Id.*

<sup>254</sup> One FIAC client states, "the country conditions has [sic] changed in Haiti allowing for your removal." This client had been released by ICE on an Order of Supervision in February 2010 and had not violated the terms of that order when he was re-detained on November 29, 2010. Notice of Revocation of Release, ICE, Nov. 29, 2010 (on file with author).

<sup>255</sup> See Padgett, *supra* note 67.

disturbances in Port-au-Prince and in provincial cities, and limited police protection and access to medical care.”<sup>256</sup>

The Haitian community responded to ICE’s announcement of the resumption of deportations to Haiti with outrage, shock, and fear. The announcement came one month before the deadline for registration of TPS.<sup>257</sup> This led to widespread confusion in the U.S. Haitian community and even more trepidation by individuals about applying for TPS. In response to the announced resumption of deportations, several law school clinics and non-profit organizations filed a request to the Organization of American States to stop the deportations of these Haitians.<sup>258</sup> Despite the community outcry and legal action, on January 20, 2011, ICE removed twenty-six Haitians with criminal records and one Haitian acquitted of terrorism related charges.<sup>259</sup> ICE stated that the deportations were consistent with the agency’s policy of removing aliens with criminal records.<sup>260</sup> However, although ICE initially stated to legal advocates and publicly that it was focusing on removing Haitians with the most serious criminal records, some of the Haitians in line for deportation merely had a drug possession conviction. ICE officials stated even those with only traffic offense convictions could be removed under this policy of resumed deportations.

Most deported had U.S. citizen and permanent resident family members, and all were deported to an uncertain future in a country still reeling from one of the largest natural disasters in history and the cholera epidemic.<sup>261</sup> In a shocking development, one

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<sup>256</sup> *Travel Warning: Haiti*, U.S. BUREAU OF CONSULAR AFFAIRS (Jan. 20, 2011), [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_5239.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_5239.html).

<sup>257</sup> Haiti for Temporary Protected Status, *supra* note 181.

<sup>258</sup> Request by the University of Miami Human Rights Clinic, The University of Miami Immigration Clinic, The Florida Immigrant Advocacy Center, Alternative Chance, The Center for Constitutional Rights, and Loyola Law Clinic & Center for Social Justice to the Inter-American Commission on Human Rights, Organization of American States. (on file with author).

<sup>259</sup> *US Resumes Deportations to Haiti*, VOICE OF AMERICA, Jan. 21, 2011, <http://www.voanews.com/english/news/americas/US-Resumes-Deportations-of-Haitians-114351819.html>.

<sup>260</sup> *Id.*

<sup>261</sup> See Padgett, *supra* note 67.

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of the twenty-seven Haitians deported from the U.S. on January 20, 2011 in the first plane of deported individuals to Haiti after the earthquake was dead within about a week of his deportation from cholera-like symptoms of extreme vomiting and uncontrollable diarrhea.<sup>262</sup>

#### *H. Family Reunification Parole Program*

In 2007, USCIS announced a program to expedite the processing of family based petitions for Cuban nationals.<sup>263</sup> For most nationalities the beneficiary of a family-based petition must wait in their home country for the visa to become available. Often this wait can last several years. However, under the special parole program for Cubans the beneficiary family member is allowed to wait in the U.S. rather than Cuba.<sup>264</sup> The stated purpose of the program is to expedite family reunification for safe, legal, and orderly immigration to the U.S..<sup>265</sup>

After the January 12, 2010 earthquake, Haitian advocates called on the Obama Administration to implement a similar program for Haitian family members who have an approved family petition. Currently there are 55,000 Haitians waiting in Haiti with *approved* family petitions to enter the U.S.<sup>266</sup> But for the visa backlog they would already be reunited with their family in the U.S. and working to send remittances back to their suffering country.<sup>267</sup> Instead, the U.S. government continues to employ an unfair double standard towards the Haitian people.

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<sup>262</sup> Press Release, Fla. Immigr. Advocacy Center, Death by Deportation (Jan. 31, 2011), *available at* <http://www.pacificfreepress.com/news/1/7937-haitian-deported-into-cholera-epidemic-dies-in-prison.html>.

<sup>263</sup> *Immigrant Visas: Cuban Family Reunification Program*, U.S. INTEREST SECTION IN HAVANA, CUBA, [http://havana.usint.gov/cuban\\_family\\_reunification\\_parole\\_program2.html](http://havana.usint.gov/cuban_family_reunification_parole_program2.html) (last visited May 10, 2011).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Open the door, supra* note 10.

<sup>267</sup> *Id.*

*IV. Final Thoughts*

The U.S. immigration policy towards the Haitian people has been historically unjust. It is a policy based on faulty assumptions about what motivates Haitians to migrate to the U.S. Following the January 12, 2010 earthquake, the U.S. alleviated some suffering in Haiti through its domestic immigration policy. Unfortunately, the old assumptions that all Haitians are economic refugees and that Haitian immigrants' fair treatment will lead to a mass migration that the U.S. government must work to avoid at all cost led to the continuation of historically draconian immigration policies. Haitians, more than any other migrant group, have suffered systematic barriers to acceptance in the U.S. As one author stated, "[t]ragically, there isn't much common sense or decency to be found in the history of how Haitian boat people have been treated. It doesn't matter whether they land at a bridge or a beach or the steps of the Statue of Liberty. They still can't get in."<sup>268</sup>

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<sup>268</sup> Carl Hiaasen, *Policy is 'white foot, black foot'*, MIAMI HERALD, Feb. 5, 2006, available at 2006 WLNR 2008588.