Order Code RS21349
Updated January 22, 2007

CRS Report for Congress

U.S. Immigration Policy on Haitian Migrants

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Summary

The environmental, social, and political conditions in Haiti have long prompted congressional interest in U.S. policy on Haitian migrants, particularly those attempting to reach the United States surreptitiously by boat. While some observers assert that such arrivals by Haitians are a breach in border security, others maintain that these Haitians are asylum seekers following a 30-year practice of Haitians coming by boat without legal immigration documents. Migrant interdiction and mandatory detention are key components of U.S. policy toward Haitian migrants, but human rights advocates express concern that Haitians are not afforded the same treatment as other asylum seekers arriving in the United States. This report does not track legislation but will be updated if policies are revised.

Migration Trends

The dilemma of Haitians coming to the United States by boat without proper travel documents dates back at least 30 years. An estimated 25,000 Haitians were among the mass migration of over 150,000 asylum seekers who arrived in South Florida in 1980 during the Mariel boatlift.[1] The U.S. Coast Guard, as described below, has been interdicting vessels carrying Haitians since 1981. **Figure 1** presents the U.S. Coast Guard data on Haitian migrants that the Coast Guard has encountered on boats and rafts in the years following the Mariel boatlift. Most notably, there was a drop of migrants after the Haitian elections in 1990 followed by a dramatic upturn after the 1991 coup (discussed below). As country conditions in Haiti[2] and U.S. policy responses to the surges in Haitian boat people are considered, the spikes and valleys in **Figure 1** become more understandable.

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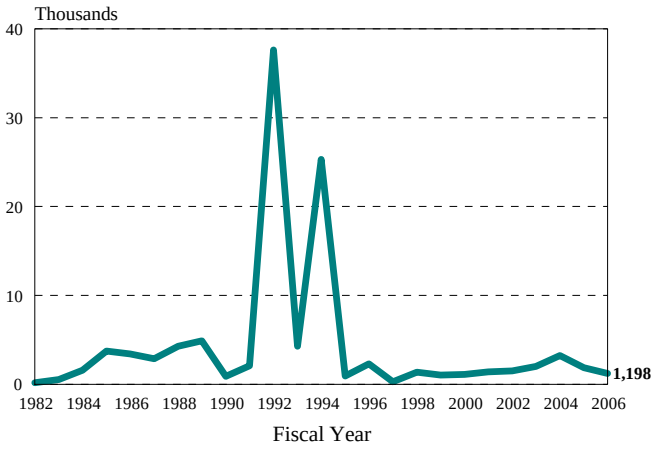
[1] During a seven-month period in 1980, approximately 125,000 Cubans and 25,000 Haitians arrived by boats to South Florida. This mass migration became known as the Mariel boatlift because most of the Cubans departed from Mariel Harbor in Cuba.

[2] For analysis of conditions in Haiti, see CRS Report RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns*, by Maureen Taft-Morales.

Figure 1.U.S. Coast Guard Interdiction of Haitians, 1982-2006



Source: CRS presentation of U.S. Coast Guard data.

Since FY1998, the Coast Guard had interdicted over 1,000 Haitians each year with 1,850 in FY2005 and 1,198 in FY2006. As of January 10, 2007, the Coast Guard has interdicted 262 Haitians in FY2007.[3]

Not all Haitian migrants are interdicted by the Coast Guard, as was apparent in the widely televised landing of over 200 Haitians in Biscayne Bay, Florida, in October 2002. Another noteworthy incident occurred in December 2001 when a boat bringing 167 Haitians ran aground in South Florida.

Policy Evolution

Post-Mariel Policy. The Carter Administration labeled Haitians as well as Cubans who had come to the United States during the 1980 Mariel Boatlift as "Cuban-Haitian Entrants" and used the discretionary authority of the Attorney General to admit them. It appeared that the vast majority of Haitians who arrived in South Florida did not qualify for asylum according to the newly-enacted individualized definition of persecution in §207-208 of the Immigration and Nationality Act (INA, as amended by the Refugee Act of 1980).[4] Subsequently, an adjustment of status provision was included in the Immigration Reform and Control Act (IRCA) of 1986 that enabled Cuban-Haitian Entrants to become legal permanent residents (LPRs).[5]

Interdiction Agreement. In 1981, the Reagan Administration reacted to the mass migration of asylum seekers who arrived in boats from Haiti by establishing a program to interdict (i.e., stop and search certain vessels suspected of transporting undocumented Haitians). This agreement, made with then-dictator Jean-Claude Duvalier, authorized the U.S. Coast Guard to board and inspect private Haitian vessels on the high seas and to interrogate the passengers. At that time, the United States generally viewed Haitian boat people as economic migrants deserting one of the poorest countries in the world.

Under the original agreement, an inspector from the former Immigration and Naturalization Service (INS) and Coast Guard official, working together, would check the

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[3] For interdiction data, see [http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm].

[4] Aliens must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.

[5] §202 of the Immigration Reform and Control Act of 1986 (P.L. 99-603).

immigration status of the passengers and return those passengers deemed to be undocumented Haitians. An alien in question must have volunteered information to the Coast Guard or INS inspector that she or he would be persecuted if returned to Haiti in order for the interdicted Haitian to be considered for asylum. Ultimately, INS would determine the immigration status of the alien in question. From 1981 through 1990, 22,940 Haitians were interdicted at sea. Of this number, INS considered 11 Haitians qualified to apply for asylum in the United States.

Crisis After the Coup. The 1991 military *coup d'etat* deposing Haiti's first democratically elected President, Jean Bertrand Aristide, however, challenged the assumption that all Haitian boat people were economic migrants. The State Department reportedly hesitated on whether the Haitians should be forced to return given the strong condemnation of the *coup* by the United States and the Organization of American States. By November 11, 1991, approximately 450 Haitians were being held on Coast Guard cutters while the administration of then-President George H. W. Bush considered the options. The former Bush Administration lobbied for a regional solution to the outflow of Haitian boat people, and the United Nations High Commissioner for Refugees (UNHCR) arranged for several countries in the region — Belize, Honduras, Trinidad and Tobago, and Venezuela — to temporarily provide a safe haven for Haitians interdicted by the Coast Guard. Some of the other countries in the region were each willing to provide safe haven for only several hundred Haitians. Meanwhile, the Coast Guard cutters were becoming severely overcrowded, and on November 18, 1991, the United States forcibly returned 538 Haitians to Haiti.

Pre-Screening and Repatriation. The options for safe havens in third countries in the region proved inadequate for the sheer numbers of Haitians fleeing their country, and the former Bush Administration began treating the Haitians fleeing by boat as asylum seekers. The Coast Guard took them to the U.S. naval base in Guantanamo, Cuba, where they were pre-screened for asylum in the United States. During this period, there were approximately 10,490 Haitians who were paroled into the United States after a pre-screening interview at Guantanamo determined that they had a credible fear of persecution if returned to Haiti. On May 24, 1992, citing the surge of Haitians that month, then-President Bush ordered the Coast Guard to intercept all Haitians in boats and immediately return them without interviews to determine whether they were at risk of persecution. The Administration offered those repatriated the option of in-country refugee processing.[6]

Safe Haven and Refugee Processing. The repatriation policy continued for two years, until then-President Bill Clinton announced that interdicted Haitians would be taken to a location in the region where they would be processed as potential refugees. The refugee processing policy lasted only a few weeks — June 15 to July 5, 1994. Much like the former Bush Administration, the Clinton Administration cited the exodus of Haitian boat people as a reason for suspending refugee processing. Instead, the new policy became one of regional "safe havens" where interdicted Haitians who expressed a fear of persecution could stay, but they would not be allowed to come to the United States. In 1993, in-country refugee processing was further expanded to Les Cayes and Cape Haiten.

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[6] CRS Report 93-233, *Asylum Seekers: Haitians in Comparative Context*, by Ruth Ellen Wasem. (Archived report available from author.)

In December 1997, President Clinton instructed the Attorney General to grant deferred enforced departure (DED) to Haitians for one year.

Currently interdicted Haitians who expressed a fear of persecution are taken for a credible fear hearing at the Guantanamo Bay detention center. If deemed a refugee, they are resettled in the third country. In 2005, only 9 of the 1,850 interdicted Haitians received a credible fear hearing and, of those — one man was granted refugee status.[7]

Haitian Refugee Immigration Fairness Act (HRIFA). When Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA) in November 1997 that enabled Nicaraguans and Cubans to become legal permanent residents and permitted certain unsuccessful Central American and East European asylum applicants to seek another form of immigration relief, it opted not to include Haitian asylum seekers. The following year, Congress enacted the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998 (S. 1504/H.R. 3049) that enabled Haitians who filed asylum claims or who were paroled into the United States before December 31, 1995, to adjust to legal permanent residence. HRIFA was added to the FY1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277) at the close of the 105th Congress.[8] According to the most recent data available, over 22,500 Haitians have adjusted under HRIFA through FY2005.

Mandatory Detention of Aliens in Expedited Removal. Since enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208), aliens arriving in the United States without proper immigration documents are immediately placed in expedited removal. If an alien expresses a fear of being forced to return home, the immigration inspector refers the alien to a asylum officer who determines whether the person has a "credible fear." IIRIRA requires that those aliens must be kept in detention while their "credible fear" cases are pending.[9] As a result, those Haitians who do make it to U.S. shores and do express a fear of repatriation are placed in detention. After the credible fear determination, the case is referred to an Executive Office for Immigration Review (EOIR) immigration judge for an asylum and removal hearing, (during which time there is no statutory requirement that aliens be detained). EOIR granted asylum to 563 Haitians and denied asylum to 2,778 Haitians in FY2005.[10]

National Security Risk. The former INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled are to be placed in expedited removal proceedings and detained (subject to humanitarian parole) in November 2002.[11] This notice concluded that illegal mass migration by sea threatened national security because it diverts the Coast Guard and other resources from their homeland security

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[7] *Miami Herald*, "U.S. Policy Unjust to Haitians Fleeing Violence," Jan. 9, 2006; data confirmed in telephone conversation with DHS officials, Jan. 12, 2006.

[8] CRS Report 98-270, *Immigration: Haitian Relief Issues and Legislation*, by Ruth Ellen Wasem.

[9] CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[10] U.S. Department of Justice, Executive Office for Immigration Review, *FY2005 Statistical Yearbook*.

[11] *Federal Register*, vol. 67, no. 219, pp. 68923-68926 (Nov. 13, 2002).

duties. The Attorney General expanded on this rationale in his April 17, 2003 ruling that instructs EOIR immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations..." in making bond determinations regarding release from detention of unauthorized migrants who arrive in "the United States by sea seeking to evade inspection."[12] The case involved a Haitian who had come ashore in Biscayne Bay, Florida, on October 29, 2002, and had been released on bond by an immigration judge. EOIR's Board of Immigration Appeals (BIA) had upheld his release, but the Attorney General vacated the BIA decision.[13]

Revised Administrative Roles. The Homeland Security Act of 2002 (P.L. 107-296) abolished INS and transferred most of its functions from the Department of Justice (DOJ) to the Department of Homeland Security (DHS). At least five federal agencies now handle Haitian migrants: DHS's Coast Guard (interdiction); Customs and Border Protection (apprehensions and inspections); Immigration and Customs Enforcement (detention); U.S. Citizenship and Immigration Services (credible fear determination); and DOJ's EOIR (asylum and removal hearings).

Current Issues

Parole from Detention. DOJ acknowledges that it instructed field operations "to adjust parole criteria with respect to all inadmissible Haitians arriving in South Florida after December 3, 2001, and that none of them should be paroled without the approval of headquarters."[14] The Administration maintains that paroling Haitians (as is typically done for aliens who meet the credible fear threshold) may encourage other Haitians to embark on the "risky sea travel" and "potentially trigger a mass asylum from Haiti to the United States." The Administration further argues that all migrants who arrive by sea pose a risk to national security and warns that terrorists may pose as Haitian asylum seekers.

Critics of the Administration's Haitian parole policy focus on the 167 Haitians detained after their boat ran aground in South Florida on December 3, 2001, a majority of whom reportedly passed the initial credible fear hearing. Critics maintain that the Haitians are being singled out for more restrictive treatment.[15] They challenge the view that Haitians pose a risk to national security and assert that the term is being construed too broadly, being applied arbitrarily to Haitians, and wasting limited resources.[16]

Access to Legal Counsel. Concern has also arisen that the detention of Haitians is interfering with access to legal counsel to aid with their asylum cases. According to

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[12] 23 I&N Dec. 572 (A.G. 2003).

[13] CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

[14] Letter from Daniel J. Bryant, Assistant Attorney General, to Sens. Edward Kennedy and Sam Brownback, dated Sept. 25, 2002.

[15] U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration, *Hearing on the Detention and Treatment of Haitian Asylum Seekers*, Oct. 1, 2002. (Hereafter cited as Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*.)

[16] George Lardner Jr., "More Illegal Immigrants Can Be Held Ashcroft's Ruling Cites National Security Issues," *The Washington Post*, Apr. 25, 2003, p. A6.

congressional testimony, attorneys in South Florida for the detained Haitians maintain that they face various obstacles, including restricted hours to meet with clients and a serious lack of adequate visitation space. Pro bono lawyers working with Haitians argued that they experienced long delays waiting to see clients.[17] Others point out that the expedited removal provisions in INA were enacted to do just that — *expedite removals*. Aliens without proper immigration documents who try to enter the United States, they argue, should not be afforded the same procedural and legal rights as aliens who enter legally.

Contrast with Cubans. U.S. immigration policy toward migrants from Cuba and Haiti are often discussed in tandem because there are several key points of comparison.[18] Both nations have a history of repressive governments with documented human rights violations. Both countries have a history of sending asylum seekers to the United States by boats. Finally, although U.S. immigration law is generally applied neutrally without regard to country of origin, there are special laws and agreements pertaining to both Cubans and Haitians (as discussed above). Despite these points of similarity, the treatment of Cubans fleeing to the United States differs from that of Haitians. Cuban migration policy is embodied in the Cuban Adjustment Act (CAA) of 1966 (P.L. 89-73), as amended, which provides that certain Cubans who have been physically present in the United States for at least one year may adjust to permanent residence status. As a consequence of special migration agreements with Cuba, a "wet foot/dry foot" practice toward Cuban migrants has evolved. Put simply, Cubans who do not reach the shore (i.e., dry land) are interdicted and returned to Cuba unless they cite fears of persecution. Those Cubans who successfully reach the shore are inspected for entry by DHS and generally permitted to stay and adjust under CAA the following year.

Temporary Protected Status. Some have called for DHS to grant Temporary Protected Status (TPS) to Haitians in the United States.[19] For example, they point out that the U.S. Ambassador declared Haiti a disaster in September 2004 due to the magnitude of the effects of Tropical Storm Jeanne. The massive storm and flooding killed almost 2,000 people and left over 200,000 people homeless. An estimated 80% of crops were destroyed. They maintained that Haiti could not handle the return of nationals due to the environmental disaster and that there are extraordinary and temporary conditions in Haiti that prevent Haitians from returning safely. Others state that conditions in Haiti do not warrant TPS. They warned that any policy shift to provide immigration relief would prompt a mass exodus of Haitians, which in turn would divert and strain homeland security resources. Legislation that would provide TPS to Haitians was introduced in the 109th Congress, and similar legislation has been introduced in the 110th Congress.

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[17] Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*

[18] CRS Report RS20468, *Cuban Migration Policy and Issues*, by Ruth Ellen Wasem.

[19] TPS is blanket relief from removal that the Administration may grant for humanitarian reasons. CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.