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United States Department of State v. Ray: The Distorted Application of the Freedom of Information Act's Privacy Exemption to Repatriated Haitian Migrants

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UNITED STATES DEPARTMENT OF STATE V. RAY:* THE DISTORTED APPLICATION OF THE FREEDOM OF INFORMATION ACT'S PRIVACY EXEMPTION TO REPATRIATED HAITIAN MIGRANTS

Jeffrey D. Zimmerman**

INTRODUCTION

Since the early 1970s, thousands of Haitians have fled their homeland by boat to seek refuge in the United States.[1] In 1981, United States President Ronald Reagan responded to the flow of Haitian migrants by creating an interdiction program directing the Coast Guard to intercept vessels carrying undocumented aliens and return the aliens to their point of origin.[2] The Haitian Government formally agreed to the interdiction program, which included a promise by Haiti not to prosecute returnees.[3]

United States State Department personnel, seeking to monitor Haiti's compliance with the interdiction agreement, interviewed a number of

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* 112 S. Ct. 541 (1991).

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1. LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEE REFOULEMENT: THE FORCED RETURN OF HAITIANS UNDER THE U.S.-HAITIAN INTERDICTION AGREEMENT 49 (1990) [hereinafter REFUGEE REFOULEMENT]. Prior to 1972, most Haitians who left their homeland went to the Bahamas. Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151, 154 (1984). In the early 1970s, after the Bahamian Government threatened Haitians with deportation, new migrants headed directly to the United States. *Id.* Between 1972 and 1981, 40,000 to 50,000 Haitians illegally entered the United States. *Id.*

2. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C. § 1182 app. at 1259 (1988) [hereinafter Proclamation 4865]; Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 app. at 1259 (1988) [hereinafter Exec. Order 12,324]. The interdiction program was established on September 29, 1981. *Id. See generally* Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325, 325-32 [hereinafter Helton, *Haitian Policy Implications*] (describing the establishment of the Haitian interdiction program).

3. Agreement on Migrants-Interdiction, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3560 [hereinafter Interdiction Agreement].

returnees approximately six months after they had been involuntarily repatriated.[4] Based on these interviews, the State Department concluded that the Haitian Government does not persecute repatriated Haitians who had attempted to emigrate unlawfully to the United States.[5] This conclusion is reflected in the advisory opinions the State Department provides to the Immigration and Naturalization Service (INS).[6] The INS often relies upon State Department advisory opinions when considering the claims of asylum applicants.[7]

Michael Ray, an attorney representing three Haitian nationals seeking asylum in the United States, filed a series of Freedom of Information Act (FOIA or the Act)[8] requests for copies of the interview reports.[9] Ray sought to contact the Haitian returnees interviewed by the State Department to determine whether the advisory opinions accurately re-

4. United States Dep't of State v. Ray, 112 S. Ct. 541, 544 (1991). The interviews were conducted by Department of State personnel from the United States Embassy in Haiti. Joint Appendix at 56, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter Joint Appendix].

5. Brief for the Petitioner at 4, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter Brief for Petitioner]. In the interviews, the returnees described their living conditions and treatment following their return to Haiti. Joint Appendix, *supra* note 4, at 53-54. In arranging the interviews, the United States promised to keep the returnees' identities confidential. *Id.* at 54.

6. Brief for Respondents at 1-2, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter Brief for Respondents]. INS regulations require that the INS seek comments from the State Department on each application for asylum. 8 C.F.R. § 236.3(6) (1992).

7. Arthur C. Helton, *Proposed Regulations on Asylum: An Improvement or Retrogression?*, NAT'L L.J., Feb. 8, 1988, at 18, 19 & n.20 [hereinafter Helton, *Proposed Regulations*].

8. 5 U.S.C. § 552 (1988). The Freedom of Information Act provides that "any person" has a right to access all records of all federal government agencies unless such records, or portions thereof, are protected from disclosure by one or more of nine specific exemptions. 5 U.S.C. § 552(a)(3), (b), (d) (1988); JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 1.02 (1993). Foreign citizens and aliens are included within the meaning of "any person." Stone v. Export-Import Bank of the United States, 552 F.2d 132, 136 (5th Cir. 1971), *cert. denied*, 434 U.S. 1012 (1978).

9. United States Dep't of State v. Ray, 112 S. Ct. 541, 544 (1991). Ray represented several Haitian refugees who petitioned for political asylum in the United States. *Id.* The INS claimed that the refugees had no reason to fear political persecution and cited to the series of interviews with the Haitian returnees. Joint Appendix, *supra* note 4, at 21. Ray contended that the INS falsely reported or fabricated statements made during the interviews. *Id.* at 25.

flected the experiences of forcibly repatriated Haitian migrants.[10] The State Department, in fulfilling the FOIA request, redacted the names and addresses of the returnees from the copies of the interview reports disclosed to Ray.[11] The State Department relied on FOIA Exemption 6,[12] which exempts from disclosure certain files that would result in a "clearly unwarranted invasion of personal privacy."[13] FOIA Exemption 6 requires a balancing of the public interest in the disclosure of the requested information with the privacy interests of individuals likely to be affected by such disclosure.[14] Congress intended the Freedom of Information Act to favor disclosure.[15] Thus, the FOIA places a heavy

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10. Brief for Respondents, *supra* note 6, at 3.

11. *Ray*, 112 S. Ct. at 544-45. The State Department provided Ray with twenty-five documents describing interviews with Haitian returnees. *Id.* at 544. Names and other identifying information concerning the returnees was redacted from seventeen of the documents before they were delivered to Ray. *Id.* at 544-45.

12. 5 U.S.C. § 552(b)(6) (1988).

13. *Ray*, 112 S. Ct. at 544. FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1988). The statute further requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (1988).

14. Cochran v. United States, 770 F.2d 949, 955 (11th Cir. 1985). Both the Senate and House Reports on the FOIA indicate Congress' intent that courts and agencies balance the personal right to privacy against the public interest in disclosure. Trina Jones, *Collective Bargaining in the Federal Public Sector: Disclosing Employee Names and Addresses Under Exemption 6 of the Freedom of Information Act*, 89 MICH. L. REV. 980, 986 n.37 (1991). The Senate Report notes that the "phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965). Likewise, the House Report states that the "limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right to privacy and the preservation of the public's right to governmental information . . . ." H.R. REP. NO. 1497, 89th Cong. 2d Sess. 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428. *See also* Patrick Carome & Allan R. Adler, *Exemption 6: Personal Privacy*, *in* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 119, 123-24 (Allan R. Adler ed., 17th ed. 1992) [hereinafter Carome, *Personal Privacy*] (summarizing case law related to the Exemption 6 requirement that the interest in personal privacy is balanced against the public interest in disclosure).

15. *See* S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) (stating that the FOIA was enacted by Congress to reflect "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."); Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (stating that "[d]isclosure, not

burden on governmental agencies that seek to withhold information under the Act.[16]

In *United States Department of State v. Ray*,[17] the United States Supreme Court held that the names and addresses of forcibly repatriated Haitian nationals were protected from disclosure under Exemption 6 of the Freedom of Information Act.[18] In reaching this conclusion, the Court failed to consider the substantial public interest in the requested information.[19] Additionally, the Court overstated the privacy interests involved in potential disclosure.[20] Through a distorted application of Exemption 6 balancing, the Court in *Ray* defeated an attempt to scrutinize governmental conduct regarding the highly controversial Haitian interdiction program.[21] Such scrutiny of governmental action is a prim-

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secrecy, is the dominant objective of the Act."). The FOIA revised portions of a previous public disclosure statute, the Administrative Procedure Act, c. 324, § 3(c), 60 Stat. 238 (1946) (current version at 5 U.S.C. § 522 (1988)). George S. Tolley III, *The Freedom of Information Act: Competing Interests in the Supreme Court*, 1990 ANN. SERV. AM. L. 497, 498 n.6 (1991). Federal agencies had a great deal of discretion under last clause of section 3 of the Administrative Procedure Act, which allowed them to withhold information from disclosure "for good cause found." *Id.* Congress, by 1966, considered the section too heavily weighted in favor of withholding, rather than disclosing, information. *Id.* In response, the Freedom of Information Act was enacted in 1966 to realize a philosophy of full agency disclosure. *Id.* at 498.

16. 5 U.S.C. § 552(a)(4)(B) (1988) (stating that the governmental agency bears the burden of sustaining an action to withhold records under the FOIA exemptions). *See* Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) (noting that, under the FOIA, there is a presumption that documents in the possession of a government agency are subject to disclosure).

17. 112 S. Ct. 541 (1991).

18. *See* United States Dep't of State v. Ray, 112 S. Ct. 541, 545 (1991) (reversing the Eleventh Circuit Court of Appeals' decision ordering disclosure of the names and addresses of Haitian returnees); *see also infra* notes 98-110 and accompanying text (describing relevant factors in the Supreme Court's *Ray* decision).

19. *See infra* notes 142-50 and accompanying text (describing the public interests associated with obtaining the names and addresses of Haitian returnees).

20. *See infra* notes 116-41 and accompanying text (discussing Haitian returnees' privacy interests in the withheld information).

21. *See* Clara Germani, *Battling for Boat People*, CHRISTIAN SCI. MONITOR, Sept. 17, 1992, at 13 (noting public protests of the interdiction program); *Haiti Watch, Port of Misery*, L.A. TIMES, July 31, 1992, at B6 (noting controversy over the United States Government's treatment of Haitian refugees); Susan McClain-Knight, *Bush's Haitian Policy Reflects Racist Atmosphere*, ATLANTA CONST., June 13, 1992, at A14 (asserting that the United States' actions regarding the Haitian boat people are racist and discriminatory); Thomas Palmer, Jr., *When is Asylum Justified? Haiti's Proximity Helps Fuel Emotional Debate*, BOSTON GLOBE, May 31, 1992, at 73 (noting contro-

ary purpose of the Freedom of Information Act.[22]

This Note examines the Supreme Court's application of FOIA Exemption 6 to Haitian returnees. Part I provides a historical background to the recent human rights abuses in Haiti.[23] In addition, Part I describes the United States-Haiti Interdiction Agreement and the State Department's monitoring program promulgated under that agreement.[24] Part II provides the factual background of *Ray* and reviews the opinions of the lower federal courts and the Supreme Court.[25] Part III evaluates the interests at issue in the *Ray* case.[26] Specifically, this section addresses the interests at stake in light of the recent turmoil in Haiti and the controversy surrounding the treatment of Haitian migrants by the United States. Part IV addresses the implications of the Supreme Court's decision in *Ray*.[27] This Note concludes that the Supreme Court, in allowing the State Department to withhold the names of Haitian returnees, incorrectly balanced the public and private interests in obtaining that information. As a result, the primary goal of the Freedom of Informa-

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versy over repatriation of Haitians seeking asylum). The United States' policy toward Haitian migrants has also been widely condemned in the editorials of major American newspapers. Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 320 (1993). One newspaper dubbed the interdiction program "Operation Racist Shield." *Id.* (citing *Operation Racist Shield*, MIAMI HERALD, Feb. 2, 1992, at 2C).

22. *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and hold the governors accountable to the governed."); Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (noting that the FOIA was written to "pierce the veil of administrative secrecy and open agency action to the light of public scrutiny."); EPA v. Mink, 410 U.S. 73, 80 (1973) (stating that the FOIA seeks to "create a judicially enforceable public right to secure [governmental] information from possibly unwilling official hands.").

23. *See infra* notes 29-52 and accompanying text (describing recent human rights abuses in Haiti).

24. *See infra* notes 53-63 and accompanying text (discussing the bilateral interdiction agreement between the United States and Haiti and the State Department's program to monitor Haiti's compliance with that agreement).

25. *See infra* notes 64-78 and accompanying text (recounting the factual background of the *Ray* opinion); *infra* notes 79-110 and accompanying text (reviewing opinions of the lower federal courts and the Supreme Court in *Ray*).

26. *See infra* notes 116-50 and accompanying text (analyzing the public and private interests in disclosure of the names and addresses of Haitian returnees).

27. *See infra* notes 161-69 and accompanying text (discussing the possible ramifications of the *Ray* opinion).

tion Act — public scrutiny of agency action — is not being served in the context of the United States-Haiti Interdiction Agreement.

I. THE INTERDICTION OF HAITIAN MIGRANTS

A. HUMAN RIGHTS ABUSES IN HAITI

Haiti, a nation located approximately 600 miles southeast of Florida,[28] has a long history of political repression.[29] The notorious twenty-nine year dictatorship of the Duvaliers began in 1957 when Francois Duvalier assumed power.[30] Following his death in 1971, Francois Duvalier was succeeded by his 19-year-old son, Jean-Claude Duvalier, as President-for-Life.[31] The Duvaliers' rule was characterized by violence and severe human rights violations,[32] including indiscriminate arrests, torture and extrajudicial executions.[33] The *Tonton Macoutes*, a secret police militia created by Francois Duvalier, were primarily responsible for these human rights violations.[34]

On February 7, 1986, Jean-Claude Duvalier was overthrown and replaced by the National Council of Government (CNG), a provisional body led by General Henri Namphy, which was created to govern the country and organize elections.[35] In March of 1987, the Haitians approved a new constitution containing guarantees of fundamental rights.[36]

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28. THOMAS E. WEIL ET AL., AREA HANDBOOK FOR HAITI 5 (1973). Haiti is located on the western third of the Caribbean island of Hispaniola. *Id.*

29. REFUGEE REFOULEMENT, *supra* note 1, at 4. *See* Gutekunst, *supra* note 1, at 152 (describing Haiti as "the poorest, most repressive country in the western hemisphere"); *infra* notes 30-52 (describing the recent history of human rights abuses in Haiti).

30. REFUGEE REFOULEMENT, *supra* note 1, at 26. *See generally* JAMES FERGUSON, PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS (1987) (describing the history of Duvalier dictatorship in Haiti).

31. REFUGEE REFOULEMENT, *supra* note 1, at 26. Jean-Claude Duvalier's age at the time of his succession to the presidency remains a matter of some speculation, as official records in Haiti are often altered or non-existent. FERGUSON, *supra* note 30, at 60.

32. REFUGEE REFOULEMENT, *supra* note 1, at 26.

33. AMNESTY INTERNATIONAL, AMR NO. 36/35/87, HAITI: DEATHS IN DETENTION, TORTURE AND INHUMANE PRISON CONDITIONS 1 (1987) [hereinafter AMNESTY, INHUMANE PRISON CONDITIONS].

34. REFUGEE REFOULEMENT, *supra* note 1, at 26.

35. REFUGEE REFOULEMENT, *supra* note 1, at 26.

36. REFUGEE REFOULEMENT, *supra* note 1, at 26. The constitution also established a more defined separation of powers, and forbade any former Duvalierist from run-

Presidential elections were held on November 29, 1987.[37] Three hours into the voting, however, the elections were suspended when unidentified men believed to belong to the *Tonton Macoutes* brutally murdered at least thirty people standing in line to vote.[38] The succeeding presidency of Professor Leslie Manigat, who became Haiti's leader through sham elections organized by the CNG,[39] ended in June 1988 when the CNG and Namphy again assumed power.[40] A few months later, on September 17, 1988, a coup ousted Namphy, and Lieutenant General Prosper Avril was installed as leader of Haiti.[41]

Due to mass protests against his rule, Avril stepped down on March 10, 1990.[42] Three days later, a coalition of more than a dozen parties known as the Unity Assembly appointed a Haitian Supreme Court Judge, Ertha Pascal-Trouillant, to be president.[43] Pascal-Trouillant was appointed with a mandate to organize elections under the supervision of the United Nations and the Organization of American States.[44]

On December 16, 1990, in the presence of at least 700 international election observers,[45] Haitians voted in the first truly democratic election in the nation's history.[46] Jean-Bertrand Aristide, a Roman Catholic priest, won over sixty-seven percent of the vote in an election that included eleven candidates.[47] Less than one year later, on September 29,

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ning for public office for ten years. *Id.*

37. REFUGEE REFOULEMENT, *supra* note 1, at 26.

38. AMNESTY, INHUMANE PRISON CONDITIONS, *supra* note 33, at 1; Lee Hockstader, *Haitian Voters View Today's Election With Mixed Hope and Apprehension*, WASH. POST, Dec. 16, 1990, at A34. The *Tonton Macoutes* were officially disbanded following the overthrow of Jean-Claude Duvalier. REFUGEE REFOULEMENT, *supra* note 1, at 29. Most of them, however, retained their weapons. *Id.* Many were believed to have been incorporated into the Haitian security forces. AMNESTY, INHUMANE PRISON CONDITIONS, *supra* note 33, at 1 n.1.

39. REFUGEE REFOULEMENT, *supra* note 1, at 26.

40. REFUGEE REFOULEMENT, *supra* note 1, at 26.

41. Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 440 (1993).

42. Kathie Klarreich, *Haiti Battles for Free Election*, CHRISTIAN SCI. MONITOR, May 4, 1990, at 6.

43. *Id.*

44. Forester, *supra* note 41, at 441.

45. Hockstader, *supra* note 38, at A34.

46. Forester, *supra* note 41, at 442.

47. Lee Hockstader & J.P. Slavin, *Haiti Vote Peaceful Despite Irregularities*, WASH. POST, Dec. 17, 1990, at A1, A16. *See also* Bella Stumbo, *From Horror to Hope: For the First Time in Decades, Haiti has a Popularly Elected President*, L.A.

1991, Aristide was overthrown in a military coup.[48]

Violent repression plagued Haiti immediately after the coup.[49] Hundreds of Aristide supporters and suspected supporters were arrested, detained without warrant, tortured and executed.[50] Hundreds more were shot indiscriminately when soldiers fired into crowds.[51] At least 1,000 Haitians are estimated to have been killed as a result of the coup.[52]

B. THE UNITED STATES-HAITI INTERDICTION AGREEMENT

Haitians began fleeing to the United States by boat in the early 1970s.[53] By 1981, approximately 40,000 to 50,000 Haitians had entered the United States illegally.[54] In 1981, the Reagan Administration expressed concern that illegal immigration had become a "serious national problem detrimental to the United States."[55] President Reagan responded

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TIMES, April 21, 1991, at 8 (describing events that culminated in the election of Aristide).

48. AMNESTY INTERNATIONAL, AMR NO. 36/03/92, HAITI: THE HUMAN RIGHTS TRAGEDY, HUMAN RIGHTS VIOLATIONS SINCE THE COUP 1 (1992) [hereinafter AMNESTY, HUMAN RIGHTS TRAGEDY]. Aristide was sent into exile in Venezuela after negotiations between the military and the ambassadors from France, Venezuela and the United States. *Id.*

49. *Id.* Violence was especially pronounced in Haiti's poor communities, which had strongly supported Aristide. *Id.*

50. AMNESTY INTERNATIONAL, AMR NO. 36/41/92, HAITI: HUMAN RIGHTS HELD RANSOM 3 (1992) [hereinafter AMNESTY, HUMAN RIGHTS HELD RANSOM].

51. AMNESTY, HUMAN RIGHTS TRAGEDY, *supra* note 48, at 1. Soldiers reportedly raided private homes, shot the unarmed occupants, and then forced relatives and neighbors to bury the bodies. *Id.*

52. LAWYERS COMMITTEE FOR HUMAN RIGHTS, HAITI: A HUMAN RIGHTS NIGHTMARE 9 (1992) [hereinafter LAWYERS COMMITTEE, HUMAN RIGHTS NIGHTMARE]. This figure is based on reports of people who had visited the hospital and morgue in the Haitian capital of Port-au-Prince. *Id.* In addition, the Platform of Haitian Organizations for the Defense of Human Rights has documented 1,021 cases of extrajudicial executions between October 1991 and August 1992. *Id.* at 9 n.7. *See also Rights Group: 1,500 Killed in Haiti; Climate of Fear, Repression is Blamed on Security Forces*, ATLANTA CONST., Jan. 22, 1992, at A5 (noting Amnesty International's calculation of the number of Haitians killed since the September 1991 coup which ousted President Jean-Bertrand Aristide).

53. REFUGEE REFOULEMENT, *supra* note 1, at 49. *See also supra* note 1 (describing the recent history of the migration of Haitian boat people to the United States).

54. Gutekunst, *supra* note 1, at 154. These numbers are based on INS estimates. *Id.*

55. Proclamation 4865, *supra* note 2, at 48,107. *See also Coast Guard Oversight: Hearings on Military Readiness of International Programs, Subcomm. on the*

by creating an interdiction program intended to discourage the future illegal migration of Haitians.[56] The interdiction program directed the Coast Guard to intercept and board vessels carrying undocumented aliens and, except for passengers deemed to qualify for refugee status,[57] to

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Coast Guard and Navigation, Comm. on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 4 (1981) (testimony of David Hiller, Special Assistant to the Attorney General) (describing the large increase in illegal immigrants from the Caribbean Basin and the need for the interdiction to prevent further negative impacts on communities such as Miami, Florida).

56. *See supra* note 2 and accompanying text (describing the establishment of the interdiction program). *See also* 8 U.S.C. § 1182(f) (1988) (granting the President authority to halt immigration which would be detrimental to national interests). At the inception of the interdiction program, only two percent of all illegal aliens in the United States were Haitians. REFUGEE REFOULEMENT, *supra* note 1, at 10.

57. A "refugee" is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988).

Article 33 of the United Nations Convention Relating to the Status of Refugees imposes on all nations the commitment not to return or expel ("*refouler*") refugees. Helton, *Haitian Policy Implications*, *supra* note 2, at 337. The Convention states, in pertinent part, that:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion . . . . Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33.1, 34, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150. Article 33 was incorporated in 1967 into the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268. Helton, *Haitian Policy Implications*, *supra* note 2, at 337. The United States acceded to the Convention by joining the Protocol in 1968. United States Dep't of State v. Ray, 112 S. Ct. 541, 543 n.1 (1991). The United States Supreme Court has asserted that the obligation of *non-refoulement*, the commitment not to forcibly return aliens to a country where their life or freedom would be jeopardized, is a "mandatory duty." Helton, *Haitian Policy Implications*, *supra* note 2, at 337-38 & n.75 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987)). The principle of *non-refoulement* is considered to be the central doctrine of international refugee law. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST THE REMOVAL OF REFUGEES WITH SPECIAL

return the aliens to their point of origin.[58]

In addition, President Reagan directed the Secretary of State to enter into cooperative agreements with foreign governments with the objective of preventing illegal migration to the United States by sea.[59] The United States and Haiti entered into a cooperative agreement on September 23, 1981.[60] The agreement included an assurance by the Haitian Government that interdicted Haitians would not be prosecuted for illegal departure.[61] The State Department, seeking to monitor Haitian compliance with the agreement, conducted interviews with a number of Haitian returnees approximately six months after they had been returned to Haiti.[62] On the recommendation of the United States Embassy in Haiti,

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REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 171 (1989).

58. Proclamation No. 4865, *supra* note 2, at 48,107.

59. Exec. Order. No. 12,324, *supra* note 2, at 48,109.

60. Interdiction Agreement, *supra* note 3, at 3559. The cooperative agreement was actually an exchange of diplomatic letters between Ernest Preeg, American Ambassador to Haiti, and Edouard Francisque, Haitian Secretary of State for Foreign Affairs. *Id.*

61. Interdiction Agreement, *supra* note 3, at 3560, 3566. The agreement provides that the United States, "[h]aving regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees," is permitted to board Haitian vessels and to establish the "status of those on board the vessel." *Id.* at 3559. If authorities of the United States determine that a vessel is in violation of "United States immigration laws or appropriate Haitian laws," the Haitian Government agrees to permit the detention of the vessel on the high seas by the United States Coast Guard and the return of such a vessel to Haiti. *Id.* at 3559-60. The agreement further states that:

> The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.
>
> It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

Id. at 3560. The interdiction agreement was required because international law prohibits a country from intercepting another country's vessel on the high seas in the absence of such an agreement. Suzanne Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865, 870 n.24 (1993).

62. United States Dep't of State v. Ray, 112 S. Ct. 541, 544 (1991). The interviews were conducted by Department of State personnel from the United States Embassy in Haiti. Joint Appendix, *supra* note 4, at 56. The embassy obtained the names

these follow-up interviews were discontinued after the overthrow of Jean-Claude Duvalier in early 1986.[63]

II. *UNITED STATES DEPARTMENT OF STATE V. RAY*

A. FACTUAL BACKGROUND

Michael Ray, a Florida attorney, brought an action under the Freedom of Information Act (FOIA)[64] on behalf of three undocumented Haitian nationals.[65] Ray sought to prove that his clients faced a "well-founded fear of persecution" if returned to Haiti[66] and, therefore, were entitled to asylum in the United States.[67] The United States Government, rely-

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and addresses of all the Haitian returnees from the United States Coast Guard, but the embassy successfully interviewed very few due to the difficulties in locating the returnees later. REFUGEE REFOULEMENT, *supra* note 1, at 24. By May 1985, embassy officials, according to their own reports, had interviewed 1,052 of the returnees, or 23.28% of the total migrant returnee population at that time. *Ray*, 112 S. Ct. at 544 n.4. By November 1985, not a single Haitian interdicted at sea had been permitted to apply for asylum in the United States. Arthur C. Helton, *Organizational Schizophrenia in the I.N.S.*, N.Y. TIMES, November 12, 1985, at A34.

63. Susan Freinkel, *A Slow Leaking Boat to Limbo: The Plight of Haitian Boat People is Now Making Headlines, But INS Records Point to Years of Seeming Indifference to Their Asylum Claims*, RECORDER, Dec. 19, 1991, at 1. The embassy's rationale for discontinuing the interviews was the expectation that governmental persecution would cease once the National Governing Council replaced Duvalier on February 7, 1986. REFUGEE REFOULEMENT, *supra* note 1, at 24-25. The State Department also ended the interview program because, it claimed, the program was too expensive to maintain. *Id.* at 25.

64. 5 U.S.C. § 552 (1988). Under the Freedom of Information Act, all records of federal government agencies must be made accessible to the public unless they fall within a specific exemption to this disclosure requirement. Allan R. Adler, *Overview of the Freedom of Information Act*, *in* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 1, 1 (Allan R. Adler ed., 17th ed. 1992) [hereinafter Adler, *Overview of the FOIA*]. *See supra* note 8 (defining the Freedom of Information Act); *infra* note 74 (listing the nine exemptions to mandatory disclosure under the FOIA).

The Freedom of Information Act provides that, upon a complaint, the appropriate federal district court has jurisdiction to order the production of any improperly withheld agency records. 5 U.S.C. § 552(4)(B) (1988). *See also* H.R. REP. NO. 1497, 89th Cong., 2d Sess. § 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2466 (discussing use of judicial proceedings as a remedy for improper withholding of agency records).

65. United States Dep't of State v. Ray, 112 S. Ct. 541, 544 (1991).

66. *Id.*

67. *Id.* To obtain asylum in the United States, an applicant must prove an unwillingness or inability to return to the applicant's native country due to "persecution

ing in part on State Department interviews with Haitian returnees,[68] took the position that Ray's clients lacked the "well-founded fear of persecution" necessary for asylum.[69]

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or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988). This provision is nearly identical to the definition of "refugee" in Article 1 of the United Nations Protocol Relating to the Status of Refugees, Jan, 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268. Derek Smith, Comment, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 VA. L. REV. 681, 688 (1989). *See supra* note 57 (quoting at length from the Immigration and Nationality Act's definition of "refugee" and noting the United States' obligations under the United Nations Protocol Relating to the Status of Refugees).

68. *See supra* notes 62-63 and accompanying text (describing State Department interviews with Haitian returnees).

69. *Ray*, 112 S. Ct. at 544. The United States has consistently maintained that the Haitians interdicted at sea are fleeing economic hardship, not political persecution. Malissia Lennox, Comment, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 704 (1993). In 1978, for example, the INS insisted that Haitians were economic migrants, not political refugees. *Id.* at 704 n.135 (citing Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1030 (5th Cir. 1982)). State Department annual reports from 1981-1985 reflected the United States Government's position that few, if any, Haitians were fleeing political persecution. *Id.* The State Department recently maintained that it had not found any evidence that Haitian returnees were being persecuted. *See infra* note 72 (quoting State Department personnel).

Critics have strongly argued that Haitians fleeing to the United States are responding to political repression and not economic hardship. *See* Lennox, *supra*, at 705 (asserting that political factors have ignited the waves of Haitian boat people who seek entry into the United States and documenting those factors and the resulting migration); Little, *supra* note 21, at 311-15 (disputing the contention that fleeing Haitians are simply economic refugees and arguing that such a position is inconsistent with the statements of a number of United States officials regarding political repression in Haiti). Furthermore, human rights organizations have documented continual human rights abuses in Haiti in the years following the establishment of the interdiction program. *See* LAWYERS COMMITTEE, HUMAN RIGHTS NIGHTMARE, *supra* note 52, at 1, 9-20, 40 (stating that human rights abuses in Haiti from 1990 to mid-1992 were "worse than at any time since the Duvalier era" and documenting extrajudicial executions, arbitrary arrests and torture against Haitians during that period); AMNESTY, HUMAN RIGHTS HELD RANSOM, *supra* note 50, at 3-19 (documenting human rights violations in Haiti between 1991 and 1992); AMNESTY, HUMAN RIGHTS TRAGEDY, *supra* note 48, at 1-36 (documenting human rights abuses in the aftermath of the September 1991 coup which overthrew democratically-elected President Jean-Bertrand Aristide); AMNESTY, INHUMANE PRISON CONDITIONS, *supra* note 33, at 1-10 (documenting human rights violations in Haiti during 1987). *See also supra* notes 29-52 and accompanying text (describing the recent history of human rights abuses in

Ray filed FOIA requests for the reports of the follow-up interviews conducted by the State Department and subsequently used in the determination of asylum eligibility.[70] Ray wanted to challenge the accuracy of both the State Department's advisory opinions[71] and the Government's public assertions that involuntarily repatriated Haitians were not being persecuted upon their return to Haiti.[72] The State De-

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Haiti).

70. *Ray*, 112 S. Ct. at 544. The Immigration and Naturalization Service (INS) has primary responsibility to decide asylum cases. 8 C.F.R. §§ 2.1, 100.2 (1993). In asylum cases, the INS frequently relies on advisory opinions from the Bureau of Human Rights and Humanitarian Affairs (BHRHA), a branch of the State Department. Helton, *Proposed Regulations*, *supra* note 7, at 18. In cases involving Haitians, the BHRHA opinions are based to some extent on the interviews of Haitian returnees. Brief for Respondents, *supra* note 6, at 1-2.

Applicants for political asylum, according to the appropriate regulations, "must be provided with an opportunity to inspect, explain, and rebut" the BHRHA advisory opinions. 8 C.F.R. § 208.12(a) (1993). In addition, INS deportation procedures provide that aliens have a right to examine the evidence against them. 8 U.S.C. § 1252(b)(3) (1988). Nevertheless, neither the governing statute nor regulations authorize discovery in asylum proceedings, leaving the FOIA as the only procedure available to aliens who seek INS information relevant to their cases. Brief for Respondents, *supra* note 6, at 3 (citing Maycock v. INS, 714 F. Supp. 1558, 1560 (N.D. Cal. 1989)).

71. *Ray*, 112 S. Ct. at 544. *See supra* note 70 (discussing role of State Department advisory opinions in asylum proceedings).

72. *Ray*, 112 S. Ct. at 544. Ray's FOIA requests were prompted by statements of officials of the United States that the Haitian returnees were not being persecuted. Brief for Respondents, *supra* note 6, at 4. In March 1985, the Miami News printed an editorial stating that the INS District Director for Miami had "offered to provide names of 600 Haitians who had been sent back so that the doubters can go to Haiti and speak to the people directly." *Id.* at 5. Ray filed a FOIA request with the INS for that list of names of the 600 Haitians. *Id.* at 6. The INS claimed it did not have such records and that the INS District Director had been misquoted. *Id.* Ray then filed a FOIA request for written INS reports concerning the returnees and was told to submit his request to the State Department. *Id.* Ray submitted a FOIA with the State Department on July 30, 1985. *Id.* Nearly two years later, on July 3, 1987, the State Department sent Ray the redacted documents which were at issue in this case. *Id.* at 7.

As recently as February 1992, the State Department opined that repatriated Haitians were not being persecuted after their return. *See* Al Kamen, *State Dept. Finds No Evidence of Reprisals Alleged by Haitian Refugees*, WASH. POST, Feb. 11, 1992, at A12 (quoting State Department spokesperson Richard Boucher that there is "no evidence" that Haitian returnees are being persecuted); Al Kamen, *Haiti's Military Said to Beat, Kill Some Returnees*, L.A. TIMES, Feb. 10, 1992, at A1, A12 (quoting Secretary of State James A. Baker III that there is "not one single documented case" of a Haitian returnee suffering persecution following repatriation to Haiti).

partment released twenty-five documents, but redacted the names and other identifying information relating to the Haitian returnees on seventeen of those documents.[73] In refusing to disclose the redacted information, the State Department relied on FOIA Exemption 6, which exempts from release "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[74]

Ray filed suit against the State Department seeking disclosure of the redacted information.[75] The United States District Court for the Southern District of Florida ordered disclosure.[76] The Eleventh Circuit Court of Appeals affirmed.[77] The Supreme Court reversed the lower court's decision,[78] thus allowing the State Department to withhold the names and addresses of the Haitian returnees it had interviewed.

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73. *Ray*, 112 S. Ct. at 544-45.

74. 5 U.S.C. § 552(b)(6) (1988). The Freedom of Information Act contains nine exemptions which protect specific types of information from mandatory disclosure. *See* 5 U.S.C. § 552(b)(1)-(9) (1988) (listing the nine disclosure exemptions). The exemptions shield: (1) national security information; (2) internal agency rules; (3) information exempted by other statutes; (4) privileged or confidential business information; (5) inter-agency and intra-agency memoranda; (6) information that would constitute an invasion of personal privacy; (7) law enforcement records; (8) records of financial institutions; and (9) data concerning oil wells. *Id. See generally*, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 29-83, 99-173 (Allan R. Alder ed., 17th ed. 1992) (discussing the nine exemptions to the FOIA).

75. Ray v. United States Dep't of Justice, 725 F. Supp 502, 503 (S.D. Fla. 1989), *aff'd*, 908 F.2d 1549 (11th Cir. 1990), *rev'd sub nom.* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).

76. Ray v. United States Dep't of Justice, 725 F. Supp. 502, 505 (S.D. Fla. 1989) (ordering the release of information redacted by the State Department), *aff'd*, 908 F.2d 1549 (11th Cir. 1990), *rev'd sub nom.* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991). *See infra* notes 79-88 and accompanying text (discussing decision of the Florida District Court).

77. Ray v. United States Dep't of Justice, 908 F.2d 1549, 1552 (11th Cir. 1990) (affirming the district court's decision entitling Ray to the receipt of the names of Haitian nationals returned to Haiti), *rev'd sub nom.* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991). *See infra* notes 89-97 and accompanying text (discussing Eleventh Circuit decision).

78. United States Dep't of State v. Ray, 112 S. Ct. 541, 545 (1991) (holding that Haitians seeking asylum are not entitled to the State Department's list of names and addresses of Haitian returnees). *See infra* notes 98-110 and accompanying text (discussing Supreme Court's opinion).

B. THE DISTRICT COURT'S BASIS FOR ORDERING DISCLOSURE

In September 1987, Ray filed a motion in the United States District Court for the Southern District of Florida for an order requiring the State Department to release the unredacted interview summaries.[79] The State Department opposed the motion based on FOIA Exemption 6 and filed a supplemental motion for summary judgment.[80] The State Department supported its position with an affidavit by John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the State Department's Classification and Declassification Center.[81] The Eaves affidavit stated that disclosure of the names of those Haitians interviewed would subject them to "possible embarrassment in their social and community relationships."[82] The affidavit further stated that the Haitian returnees consented to be interviewed with the understanding that their conversations with embassy officers would be confidential.[83]

The district court began its analysis by asserting that an exemption claim under the FOIA requires that the government bear the burden of demonstrating the basis for nondisclosure,[84] a burden which could not be met solely through the use of an affidavit.[85] In balancing the Haitian

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79. Brief for Respondents, *supra* note 6, at 7. Ray argued for the release of the redacted information in order to assure the safe relocation of returnees and to determine if the United States had been adequately monitoring Haiti's commitment not to persecute the returnees. *Id.* at i. Ray also sought access to the information to determine whether the United States had actually investigated and accurately reported the returnees' claims. *Id.*

80. Brief for Respondents, *supra* note 6, at 7.

81. Brief for the Petitioner, *supra* note 5, at 5. Eaves stated that the redacted documents contained reports from Haiti of confidential interviews of involuntarily returned Haitians, which were conducted by State Department officials. *Id.* The purpose of the interviews, he noted, was to determine if any individuals had been mistreated once they were returned to Haiti. *Id.* He further asserted that, although the names and other identifying information had been redacted, the entire substance of the reports had been released to Ray. *Id.* at 5-6.

82. Joint Appendix, *supra* note 4, at 43. Eaves contended that disclosure would constitute an invasion into the privacy interests of the returned Haitians. *Id.* He further asserted that, in his opinion, the redacted material was protected from disclosure under FOIA Exemption 6. *Id.*

83. Joint Appendix, *supra* note 4, at 42-43.

84. Ray v. United States Dep't of Justice, 725 F. Supp. 502, 504 (S.D. Fla. 1989), *aff'd*, 908 F.2d 1549 (11th Cir. 1990), *rev'd sub nom.* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991). According to the language of the FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (1988).

85. *Ray*, 725 F. Supp. at 504. "[T]he District Court must do something more to

returnees' right to privacy against the public's right to governmental information, the district court asserted that the invasion of privacy must be "actual rather than just theoretical" and more than a "mere possibility."[86] The district court considered the invasion of privacy from the "mere disclosure" of the names and addresses of interviewed Haitian returnees to be minimal and speculative.[87] Finding the safety of repatriated Haitians to be a legitimate public interest, the district court ordered disclosure of the redacted information.[88]

C. THE ELEVENTH CIRCUIT'S BASIS FOR AFFIRMING THE ORDER COMPELLING DISCLOSURE

The Eleventh Circuit affirmed the district court's order compelling disclosure.[89] In contrast to the lower court, the court of appeals began the balancing process by expressly acknowledging that Ray intended to use the redacted information to contact Haitian returnees.[90] This resulted in a "significant" privacy interest to be weighed against disclosure.[91]

The court of appeals, however, held that disclosure was still mandated due to the public interest in determining whether the United States Gov-

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assure itself of the factual basis and bona fides of [an] agency's claim of exemption than rely solely upon an affidavit." *Id.* (citing Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980)).

86. *Id.* (citing Department of Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976)).

87. *Id.* at 505.

88. *Id.* The court held that the State Department's promise of confidentiality was only one factor to be considered and not a sufficient basis to protect the names and other identifying information from disclosure. *Id.* at 504. *See* Washington Post v. United States Dep't of Health and Human Servs., 690 F.2d 252, 263 (D.C. Cir. 1982) (noting that promises of confidentiality, standing alone, do not defend against disclosure); Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973) (stating that an agency's promise of confidentiality is insufficient to override disclosure mandated by the FOIA); Ackerly v. Ley, 420 F.2d 1336, 1339-40 n.3 (D.C. Cir. 1969) (stating that an agency cannot avoid disclosure simply by asserting that it received information under a pledge of confidentiality).

89. Ray v. United States Dep't of Justice, 908 F.2d 1549, 1552 (11th Cir. 1990), *rev'd sub. nom.* United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).

90. *Ray*, 908 F.2d at 1554. The district court had weighed the degree of invasion of personal privacy only by considering the invasion caused by the *actual disclosure* of the names of interviewed Haitian returnees. *Ray*, 725 F. Supp. at 505. *See supra* notes 84-88 and accompanying text (discussing the analysis of the district court).

91. *Ray*, 908 F.2d at 1554. The court also stated that, although the promise of confidentiality added weight to the privacy interests, it was a factor which, by itself, could not override the disclosure requirements of the FOIA. *Id.*

ernment is adequately monitoring Haiti's compliance with its promise not to persecute returnees.[92] In addition, the court of appeals found a legitimate public interest in learning whether or not the Government is being truthful in its public statements concerning Haiti's treatment of returnees.[93] The court of appeals noted that the information sought by Ray and his clients will assist them in judging the accuracy of the United States Government's assertions.[94] Consequently, the public interests outweighed any heightened privacy concerns.[95] Reflecting the reasoning of the lower court, the court of appeals noted that the Government had the burden of proving that Exemption 6 applied and had failed to sustain that burden.[96] Thus, disclosure was ordered.[97]

D. THE SUPREME COURT'S REVERSAL

1. The Opinion of the Court

The Supreme Court unanimously reversed the judgment of the Eleventh Circuit Court of Appeals,[98] holding that the redaction of names and other identifying information was lawful under FOIA Exemption 6.[99] The Court initiated its discussion of Exemption 6 balancing by noting that Congress had explicitly authorized the redaction of identifying details which were construed to constitute a "clearly unwarranted" invasion of privacy.[100] The Court then resolved the question of whether

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92. *Id.* at 1554-55.

93. *Id.* at 1555.

94. *Id.*

95. *Id.* The court noted that its decision reflected an obligation to construe the FOIA disclosure requirements broadly and its exemptions narrowly. *Id.* at 1556. *See supra* notes 15-16 and accompanying text (noting that the FOIA was intended to heavily favor disclosure).

96. *Ray*, 908 F.2d at 1556.

97. *Id.* at 1556-57.

98. United States Dep't of State v. Ray, 112 S. Ct. 541, 543 (1991). Justice Stevens delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, and Souter. *Id.* Justices Scalia and Kennedy joined in all but Part III of the opinion, which discussed the privacy interests of the Haitian returnees. *Id.* Justice Scalia filed a concurrence in which Justice Kennedy joined. *Id. See infra* notes 111-15 and accompanying text (describing the Scalia concurrence). Justice Thomas took no part in the consideration or decision of the case. *Ray*, 112 S. Ct. at 543.

99. *Ray*, 112 S. Ct. at 550.

100. *Id.* at 547 & n.9. The Freedom of Information Act states, in relevant part, that, "[t]o the extent required to prevent a clearly unwarranted invasion of personal

the redacted interview summaries complied with the disclosure mandates of the Freedom of Information Act.[101]

The Supreme Court found the privacy interest of the Haitian returnees to be more substantial than recognized by the court of appeals.[102] Specifically, the Court emphasized the significance of Ray's intention to contact the Haitian returnees that had been interviewed by State Department personnel.[103] This fact, asserted the Court, "magnifies the importance" of the privacy interest at stake.[104] The Court stated that "great weight" must be given to the privacy interest in protecting Haitian returnees from "any retaliatory action that might result from a renewed interest in their aborted attempt to emigrate."[105]

The Court acknowledged a public interest in determining whether the State Department had adequately monitored Haiti's formal assurances not to prosecute Haitian returnees.[106] The Court, however, asserted that the public interest in the redacted information was minimal because disclosure of that information, by itself, would not provide any additional insight into the State Department's performance of its obligation to ensure that the Haitian Government was not prosecuting the returnees.[107]

The Court recognized that the value of the redacted information stemmed not from actual disclosure, but from the possible use of that information to contact returnees.[108] Nonetheless, Justice Stevens asserted that the Court did not need to address the question of whether the "de-

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privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction." 5 U.S.C. § 552(a)(2) (1988). Following redaction, FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (1988).

101. *Ray*, 112 S. Ct. at 548.

102. *Id.*

103. *Id.* at 549. The Court asserted that it could not "overlook the fact that respondents plan to make direct contact with the individual Haitian returnees identified in the reports." *Id.*

104. *Id.*

105. *Id.* at 548.

106. *Id.* at 549. *See* Interdiction Agreement, *supra* note 3, at 3560 (stating that Haiti will not prosecute repatriated Haitians for attempting to emigrate to the United States); *supra* note 61 (quoting the interdiction agreement between the United States and Haiti).

107. *Ray*, 112 S. Ct. at 549. The Court stated that the public interest in the State Department's performance had been adequately satisfied by the redacted interview summaries. *Id.*

108. *Id.*

rivative use"[109] of documents would justify the release of information concerning private individuals.[110] Thus, the Supreme Court applied derivative use considerations in determining the "great weight" to be accorded the privacy interests in the redacted information, but refused to address derivative use when considering public interests in that same information.

2. Justice Scalia's Concurrence

Justice Scalia wrote a concurring opinion in which he stressed his

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109. *Id.* "Derivative use" refers to use of requested information, which may or may not have an intrinsic public value, to generate publicly valuable information through investigations made possible only by disclosure of that information. *Id.* at 550 (Scalia, J., concurring in part and concurring in the judgment).

110. *Id.* at 549-50. The government had urged the court to adopt a *per se* rule prohibiting the consideration of "derivative use" in weighing the public interest side of FOIA balancing. *Id.* at 549. *See* Brief for Petitioner, *supra* note 5, at 26 (arguing for categorical rule excluding "derivative use" factors in determining significance of public interest).

The Court struggled to avoid addressing the issue of "derivative use" in the context of the public interest in the redacted information. The Court asserted that "nothing in the record" suggested that a second series of interviews with Haitian returnees would produce any additional relevant information. *Ray*, 112 S. Ct. at 549. The Court further stated that:

> We are . . . unmoved by respondents' asserted interest in ascertaining the veracity of the interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord government records and official conduct a presumption of legitimacy.

Id. at 550. Notwithstanding the Court's unequal application of "derivative use" considerations to shield information from disclosure, this assertion of a "presumption of legitimacy" that protects government records from disclosure is directly counter to the explicit purpose and function of the FOIA. *See* Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) (stating that, under the FOIA, information held by the government is "presumed subject to *disclosure*") (emphasis added); *supra* note 22 (citing cases which note that the basic function of the FOIA is to hold the government accountable by opening agency action up to public scrutiny). The public interest in determining that government actions are legitimate is certainly as important as determining that they are not. *See* Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 264 (D.C. Cir. 1982) (stating that "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper . . . . [T]he public interest in disclosure is not diminished by the possibility or even the probability that [the government] is doing its . . . job right."); *infra* note 146 (noting that the principal purpose of the Freedom of Information Act is permit public oversight of governmental actions).

belief that, in balancing an Exemption 6 claim, the only consideration should be what the information itself reveals, not the invasion of privacy that results from use of disclosed information.[111] Scalia noted that, while the Court had explicitly abstained from addressing derivative use when discussing the public interest side of FOIA Exemption 6 balancing, the majority applied derivative use considerations when according weight to the privacy interest side of the equation.[112] Scalia asserted that any consideration of derivative use was unnecessary to the Court's decision because the disclosure of the redacted information would itself reveal the names of individuals who had reported to a foreign power the conduct of their own government.[113] This, Scalia noted, was "information that a person did not ordinarily wish to be known about himself."[114] Finding no public interest in disclosure itself, Scalia asserted that disclosure thus constituted a "clearly unwarranted" privacy invasion justifying redaction under Exemption 6.[115]

III. THE APPLICATION OF THE FOIA PRIVACY EXEMPTION TO HAITIAN RETURNEES

A. THE MINIMAL PRIVACY INTERESTS OF HAITIAN RETURNEES

Under the Freedom of Information Act, foreign nationals are entitled to the same privacy rights as United States citizens.[116] Thus, the initial

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111. *Ray*, 112 S. Ct. at 550. Scalia asserted this position eight years earlier, while sitting on the District of Columbia Circuit Court of Appeals, in Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983). Scalia, writing for the court, stated that "Exemption [6] does not apply to an invasion of privacy produced as a *secondary effect* of the release . . . . it is the very production of the documents which must constitute a clearly unwarranted invasion of personal privacy" *Arieff*, 712 F.2d at 1468 (internal quotations omitted). In 1989, however, the District of Columbia Circuit stated that "secondary effects" could be considered an invasion of privacy under Exemption 6. *See* National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989) (stating that "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."), *cert. denied*, 494 U.S. 1078 (1990).

112. *Ray*, 112 S. Ct. at 551. *See supra* notes 102-10 and accompanying text (discussing the Court's balancing of the interests in the redacted information).

113. *Ray*, 112 S. Ct. at 551.

114. *Id.*

115. *Id.*

116. FRANKLIN & BOUCHARD, *supra* note 8, § 1.09[3] (citing Shaw v. Department of State, 559 F. Supp. 1053, 1067 (D.D.C. 1983)). *See also* David C. Boyle, Note,

step in the Exemption 6 balancing process with respect to Haitian returnees is an assessment of the personal privacy interests at issue.[117] To withhold documents under Exemption 6, a governmental agency must establish that disclosure would constitute an invasion of privacy and, then, that the invasion would be clearly unwarranted.[118] Courts have weighed a number of factors when considering the magnitude of the privacy interest implicated by governmental disclosure of lists of names and addresses.[119] One factor particularly relevant to Haitian returnees is

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Proposal to Amend the United States Privacy Act to Extend Its Protections to Foreign Nationals and Non-Resident Aliens, 22 CORNELL INT'L L.J. 285, 288-89 & n.23 (1989) (noting that the FOIA applies to aliens and foreigners).

117. *See supra* note 14 and accompanying text (discussing Exemption 6 balancing process). Under the language of the FOIA, Exemption 6 only protects "personnel", "medical", and "similar" files from disclosure. 5 U.S.C. § 552(b)(6) (1988). Most courts, however, have declined to focus on the nature of the file, moving quickly to an analysis of the privacy interests implicated by disclosure. Carome, *Personal Privacy*, *supra* note 14, at 120. *See* United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982) (holding that the phrase "similar files" has a broad meaning and that the applicability of Exemption 6 is governed by the balancing of public and private interests, not the nature of the files); Department of the Air Force v. Rose, 425 U.S. 352, 376-77 (1976) (stating that "similar files" were those files that implicated privacy values similar to those implicated by disclosure of personnel or medical files); Committee on Masonic Homes v. NLRB, 556 F.2d 214, 219 (3rd Cir. 1977) (emphasizing that the term "similar files" is not to be construed in a narrow or technical way); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (stating that the term "similar files" does not narrow Exemption 6 to permit the release of files that would otherwise qualify for exemption due to privacy considerations).

In addition, courts have specifically held that lists of names and addresses are "similar files" within the meaning of FOIA Exemption 6. *See* IBEW Local Union No. 3 v. NLRB, 845 F.2d 1177, 1181 (2d Cir. 1988) (holding that names and addresses of present government employees were "similar files"); Minnis v. Department of Agric., 737 F.2d 784, 786 (9th Cir. 1984) (holding that the names and addresses of applicants for permits to travel down a river were "similar files"), *cert. denied*, 471 U.S. 1053 (1985). The requestors in *Ray* did not challenge the classification of the State Department interview report summaries, and it was therefore not an issue in the case. *Ray*, 725 F. Supp. at 504 n.2.

118. *See supra* note 14 and accompanying text (describing the Exemption 6 balancing process).

119. *See generally* Paul A. Rubin, Note, *Applying the Freedom of Information Act's Privacy Exemption to Requests for Lists of Names and Addresses*, 58 FORDHAM L. REV. 1033, 1038-41 (1990) (discussing factors considered by courts applying FOIA Exemption 6); Carome, *Personal Privacy*, *supra* note 14, at 137-38 (discussing Exemption 6 privacy considerations with respect to lists of names and addresses); FRANKLIN & BOUCHARD, *supra* note 8, § 1.09[3] (describing considerations that may affect the significance of the Exemption 6 privacy interest).

whether it is reasonably likely that disclosure would result in serious harm to the individuals named in the State Department interview summaries.[120]

Based on an affidavit by a State Department employee,[121] the United States Government in *Ray* argued that disclosure of the names of Haitian interviewees would subject the interviewees to "possible embarrassment" because such disclosure would publicly identify them as people who cooperated with the United States Government by furnishing information concerning Haiti's treatment of the returnees.[122] Courts have, however, generally found declarations, standing alone, to be insufficient to bring information within the scope of Exemption 6 protection.[123] The privacy interest at stake must be tangible and substantial;[124] it is

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120. Brief *Amicus Curiae* of the American Civil Liberties Union and Computer Professionals for Social Responsibility at 8, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter *Amicus* Brief of ACLU]. A number of judicial decisions reflect a consideration of whether disclosure is likely to cause significant harm to the subject of the requested information. *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (holding that a private citizen had a strong privacy interest in a rap sheet that contained information likely to hurt his reputation); United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599, 601 (1982) (noting that Iranian nationals living in Iran may have a significant privacy interest in records indicating their American citizenship as disclosure would place them in physical danger); Department of the Air Force v. Rose, 425 U.S. 352, 381 (1976) (stating that Air Force Academy cadets had a strong privacy interest in summaries of ethics hearings identifying them as honor code violators, as their professional military standing would likely be damaged). In addition, the legislative history of Exemption 6 reflects Congress' intent to exempt from disclosure "those kinds of files the disclosure of which might harm the individual." H.R. REP. NO. 1497, 89th Cong. 2d Sess. § 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428.

121. Joint Appendix, *supra* note 4, at 40. *See supra* notes 81-83 and accompanying text (describing affidavit submitted by the government in *Ray*).

122. Brief for the Petitioner, *supra* note 5, at 29. *See supra* note 82 and accompanying text (quoting affidavit).

123. *See, e.g.*, King v. United States Dep't of Justice, 830 F.2d 210, 218-19 (D.C. Cir. 1987) (stating that declarations are insufficient if they are conclusory, vague or sweeping); Perry v. Block, 684 F.2d 121, 126 (D.C. Cir 1982) (stating that "glib government assertions" are insufficient and declarations must be detailed and nonconclusory); Campbell v. United States Dep't of Health & Human Servs., 682 F.2d 256, 265-66 (D.C. Cir. 1982) (noting that the government fails to meet its burden by submitting conclusory declarations which lack supporting detail).

124. FRANKLIN & BOUCHARD, *supra* note 8, § 1.09[3]. *See* Department of Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976) (noting that "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities").

insufficient that disclosure causes only embarrassment.[125]

Furthermore, any "embarrassment" or stigma that Haitian returnees might suffer as a result of their failed attempt to emigrate would have been inflicted at the time of the repatriation itself[126] or at the initial government interview prior to repatriation.[127] As the Haitian Government can already identify those who attempted to flee,[128] the disclosure of the names of the interviewees will only reveal the identities of Haitians who, subsequent to their return, spoke to representatives of the United States Government.[129] Thus, the Florida District Court correctly recognized that the privacy invasion from the actual disclosure of the

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125. Schell v. United States Dep't of Health & Human Servs., 843 F.2d 933, 939 (6th Cir. 1988).

126. Brief of *Amici Curiae* The Lawyers Committee for Human Rights, Human Rights Watch, The Haitian Refugee Center, Inc., The National Coalition for Haitian Refugees, Public Citizen and The Freedom of Information Clearinghouse at 11, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter *Amicus* Brief of Lawyers Committee]. Following the interdiction of a boat carrying Haitian nationals, the Coast Guard notifies the State Department Returnee Officer in Haiti of the number of people on the boat and the estimated time of arrival in Haiti. REFUGEE REFOULEMENT, *supra* note 1, at 23-24. The Returnee Officer relays this information to the Haitian Foreign Ministry, the Haitian Immigration Service, and the Haitian Red Cross. *Id.* at 24. Representatives from each of these organizations meet the Coast Guard cutter on its arrival in Port-au-Prince and receive a copy of the ship's manifest bearing the names, ages, and places of residence of the Haitian returnees. *Id.*

127. *Amicus* Brief of Lawyers Committee, *supra* note 126, at 11. After a vessel carrying Haitians is interdicted, the interdictees board a Coast Guard cutter to be interviewed by an INS officer. REFUGEE REFOULEMENT, *supra* note 1, at 20. The INS examiners ask each interdictee questions concerning his or her name, age, address, reason for leaving, and fear of return. *Id.* at 20-22. Although each person is interviewed individually, these inquiries are sometimes conducted within the hearing of other Haitian passengers. *Id.* at 20. In addition, the Haitian Government is no doubt aware that these interviews take place.

128. *See supra* note 126 (noting that branches of the Haitian Government are given a list of the names and addresses of all Haitian interdictees).

129. Disclosure of the names could actually benefit the returnees. *Amicus* Brief of Lawyers Committee, *supra* note 126, at 11. For example, human rights groups such as Amnesty International often use the publication of names as a method to try to protect victims of human rights abuses against further persecution. *Id. See, e.g.*, AMNESTY, HUMAN RIGHTS HELD RANSOM, *supra* note 50, at 36-40 (listing the names of Haitians who have been illegally arrested); AMNESTY, HUMAN RIGHTS TRAGEDY, *supra* note 48, at 29-32 (naming Haitian trade unionists, human rights monitors, and students that have been harassed and beaten by Haitian authorities); AMNESTY, INHUMANE PRISON CONDITIONS, *supra* note 33, at 2-13 (containing names and photographs of Haitians tortured while in detention).

names of Haitian interviewees is minimal and does not meet the "clearly unwarranted" standard of Exemption 6.[130]

The Eleventh Circuit Court of Appeals noted, however, that Ray's intention to contact the Haitian interviewees creates an invasion of privacy beyond that implicated by the disclosure itself.[131] The Supreme Court reinforced this construction by finding that Ray's plan to interview the Haitian returnees magnified the returnees' privacy interests.[132] Neither court, however, explained why a private citizen's intention to interview returnees is more intrusive than the government's own behavior in conducting fundamentally the same interviews with the same individuals.[133]

If the returnees have not suffered persecution, as the United States Government publicly maintains, then simple confirmation of that fact is unlikely to impact negatively on contacted individuals.[134] If, however, the returnees are being persecuted, any contact with them may help substantiate their claims, and benefit any asylum claim in the future.[135]

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130. *See supra* notes 84-88 and accompanying text (outlining the opinion of the district court).

131. *Ray*, 908 F.2d at 1554. *See supra* notes 89-97 and accompanying text (outlining the opinion of the court of appeals).

132. *Ray*, 112 S. Ct. at 549. *See supra* notes 102-05 and accompanying text (discussing the Supreme Court's construction of the privacy interests at stake).

133. *Amicus* Brief of Lawyers Committee, *supra* note 126, at 10. Although the State Department discontinued the interviews after the overthrow of Jean-Claude Duvalier in 1986, it was not due to privacy concerns. *Id.* at 11. Rather, the State Department believed that the interviews were unnecessary after the fall of the Duvalier government, and the interview program was too expensive to maintain. REFUGEE REFOULEMENT, *supra* note 1, at 24-25.

134. Brief for Respondents, *supra* note 6, at 23. Although even benign contact with the returnees may still constitute an invasion of privacy, this invasion must outweigh the public interests at stake to qualify for exemption from disclosure. *See supra* note 14 (discussing the requirement of a balancing test when applying the Freedom of Information Act's privacy exemptions). *See also infra* notes 142-50 and accompanying text (describing the substantial public interests at issue in *Ray*).

135. *Amicus* Brief of Lawyers Committee, *supra* note 126, at 11. Asylum claims are considered in light of State Department advisory opinions based, in part, on the interview summaries at issue in *Ray*. *See supra* note 70 (describing the reliance by the INS on advisory opinions). Consequently, the discovery that the advisory opinions inaccurately reflect the situation in Haiti, and that Haitian returnees are being persecuted following their return, would future impact asylum proceedings. *See supra* note 61 (noting that the interdiction agreement between the United States and Haiti includes an assurance by the Haitian Government that it will not prosecute returnees); *supra* note 57 (noting that the United States is obligated, under both domestic and international refugee law, to not return aliens to a country where they would likely

Finally, it is important to recognize that Haitians are free to simply refuse to respond to inquiries concerning their situation in Haiti and their contact with State Department personnel.[135]

Thus, both the Eleventh Circuit Court of Appeals and the Supreme Court overstated the significance of the privacy interest of the Haitian returnees.[137] The court of appeals nonetheless ordered disclosure of the redacted names due to the importance of the public interests at stake.[138] The Supreme Court reversed.[139]

In allowing the State Department to withhold the requested names, the Supreme Court seriously understated the substantial public interests at issue in *Ray*.[140] Furthermore, the Court's decision did not adequately address the impact of the "derivative use" of requested information on the Exemption 6 balancing process.[141]

B. THE SUBSTANTIAL PUBLIC INTEREST IN THE NAMES OF HAITIAN RETURNEES INTERVIEWED BY THE STATE DEPARTMENT

The Haitian interdiction program has been the subject of considerable controversy.[142] Numerous Haitians have fled to the United States since the beginning of the interdiction program, but the majority have been interdicted and involuntarily repatriated.[143] Consequently, the public has

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face persecution). In fact, Haitian migrants who make a second attempt to enter the United States by boat, after having once been repatriated by the United States Coast Guard, stand a much greater chance of obtaining asylum. *See* Lennox, *supra* note 69, at 707 n.157 (noting that so-called "double-backers" are generally granted admission into the United States) (citing Howard W. French, *Dozens Flee Haiti a Second Time*, S.F. CHRON., Feb. 10, 1992, at A1).

136. Brief for Respondents, *supra* note 6, at 23.

137. The Eleventh Circuit found the privacy interest to be "significant." *Ray*, 908 F.2d at 1554. The Supreme Court stated that the privacy interest "must be given great weight." *Ray*, 112 S. Ct. at 548.

138. *Ray*, 908 F.2d at 1554. The court of appeals noted that disclosure was mandated under the FOIA because the public interest in disclosure outweighed the returnees' privacy interests. *Id.*

139. *Ray*, 112 S. Ct. at 550. *See supra* notes 98-110 and accompanying text (describing the Supreme Court's opinion and basis for reversal).

140. *See infra* notes 142-50 and accompanying text (noting the significant public interest in the disclosure of the names of Haitian interviewees).

141. *See infra* notes 151-60 and accompanying text (defining and discussing the derivative use issue).

142. *See supra* note 21 (noting widespread controversy generated by the Haitian interdiction program).

143. Helton, *Proposed Regulations*, *supra* note 7, at 18. Between 1981, the incep-

a number of substantial interests in obtaining the names of Haitians interviewed by the State Department.[144] First, the public has an interest in the safe relocation of forcibly repatriated Haitians who have unsuccessfully sought asylum in the United States.[145] Second, the public has an interest in ascertaining whether the United States has effectively monitored Haiti's obligation not to persecute returnees.[146] Finally, the public has an interest in evaluating the United States Government's basis for denying asylum to Haitian refugees[147] and the weight given to the

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tion of the interdiction program, and 1987, over 12,000 Haitian refugees were intercepted at sea and not one of them was granted asylum. *Id.* By November 1989, the Coast Guard had intercepted over 21,000 Haitians and only six were granted entry to the United States on asylum claims. Bill Frelick, *Double Dealings*, WASH. POST, Nov. 18, 1989, at A23. By May 1991, only 28 of over 24,000 Haitians intercepted since the beginning of the program had been allowed entry into the United States to apply for asylum. Freinkel, *supra* note 63, at 1; Helton, *Haitian Policy Implications*, *supra* note 2, at 330.

Following the overthrow of Aristide on September 30, 1991, Haitians fled to the United States in record numbers. 138 CONG. REC. S13095 (daily ed. Sept. 9, 1992) (statement of Senator Deconcini). In the eight month period following the coup, over 38,000 Haitians were intercepted by the Coast Guard. Helton, *Haitian Policy Implications*, *supra* note 2, at 330. By November of 1992, more than two-thirds of those Haitians had been forcibly repatriated. *Islands of Inequality*, WASH. POST, Nov. 4, 1992, at A18.

144. Brief for Respondents, *supra* note 6, at 14, 31. *See infra* notes 145-50 and accompanying text (outlining the specific public interests at issue).

145. *Ray*, 908 F.2d at 1555. The court of appeals noted that the government had conceded a legitimate public interest in the safe relocation of the Haitian returnees. *Id.* The government, however, argued that disclosure of the redacted information would not serve this interest. *Id.*

146. Brief for Respondents, *supra* note 6, at 14, 31. Courts have held that the public has a legitimate interest in the oversight of governmental actions. *See* IBEW Local Union No. 41 v. United States Dep't of Hous. & Urban Dev., 763 F.2d 435, 436 (D.C. Cir. 1985) (stating that the purpose of the FOIA is to permit the public to survey the operations of the government); Ditlow v. Shultz, 517 F.2d 166, 172 & n.24 (D.C. Cir. 1975) (stating that the main purpose of the FOIA is to provide "material for monitoring the Government's activities"); Citizens for Envtl. Quality v. United States Dep't of Agric., 602 F. Supp. 534, 537 (D.D.C. 1984) (holding that the public has an interest in learning whether the government is abiding by its commitment to effectively monitor the health effects of herbicide spraying); National Association of Atomic Veterans v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487 (D.D.C. 1984) (stating that the public has an interest in the government's effectiveness in disseminating health information to veterans).

147. Brief for Respondents, *supra* note 6, at 14, 31. Remarking on a predecessor bill to the FOIA, a member of Congress stated that freedom of information legislation was important because "fair and just administrative proceedings require [that individ-

interviews conducted by State Department personnel.[148] These public concerns raise the more general question of whether the United States is complying with international accords governing the treatment of refugees.[149] The only means of evaluating the veracity of the United States Government's assertions concerning its efforts to comply with international law regarding the *non-refoulement* of Haitian refugees is to obtain the names of Haitians interviewed by the State Department and to contact them in order to inquire about their experience with both State Department personnel and the Haitian Government.[150]

C. THE IMPORTANCE OF CONSIDERING "DERIVATIVE USES"

The use of material requested under the Freedom of Information Act

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uals] . . . be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter." 110 CONG. REC. 17,088 (1964) (comments of Senator Dirksen on S. 1666), *cited in* Rubin, *supra* note 119, at 1042 n.50 (1990).

148. *See supra* note 70 (describing the INS's reliance on State Department advisory opinions based, in part, on the interviews with repatriated Haitians). Although the interviews were discontinued in 1986, the State Department continues to rely on them. Brief for Respondents, *supra* note 6, at 3 n.2. In an affidavit filed with the Supreme Court, the State Department's Deputy Assistant Secretary for Inter-American Affairs stated that currently the interview summary reports "are not a major factor in evaluating present conditions in Haiti." Joint Appendix, *supra* note 4, at 58. The public's interest in the names of Haitians interviewed for these reports, however, is not limited by the degree of their present use. The public has an interest in determining whether the reports are accurate and whether the government, relying on those reports both in the past and in the present, is being truthful when it opines that Haitians returned since the start of the interdiction program have not suffered political persecution. *See supra* notes 69, 72 (noting that officials of the United States Government have repeatedly expressed the opinion that Haitian returnees were not being persecuted).

149. *See supra* note 57 (noting that the United States is obligated to comply with international agreements prohibiting that return of refugees facing political persecution).

150. The Supreme Court claimed that there was no public interest in ascertaining the veracity of the interview reports because there was no evidence suggesting they were untruthful. *Ray*, 112 S. Ct. at 550. *See supra* note 110 (quoting from the Supreme Court's opinion). Congress, however, has stated that the public interest in disclosure under the FOIA is "the right of an individual to be able to find out how his government is operating." H.R. REP. NO. 1497, 89th Cong. 2d Sess. § 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2423. This right is not lessened by the likelihood that the government is adequately fulfilling its obligations. Washington Post Co. v. United States Dep't of Health & Human Servs., 690 F.2d 252, 264 (D.C. Cir. 1982). *See supra* note 146 (noting that public oversight of governmental actions is a central aim of the FOIA).

to generate publicly valuable information not revealed by the disclosure itself has been referred to as "derivative use."[151] The resulting public benefits and private invasions have been called the "secondary effects" of disclosure.[152] Much of the litigation concerning derivative use is similar to *Ray* in that it involves requests for lists of names and addresses.[153] Generally, courts have found no public interest in cases where the requests were made for purely commercial purposes.[154] In cases where the requests for names were made for purposes other than commercial concerns, however, courts have found significant public interests which mandated disclosure.[155] Specifically, courts have ordered the disclosure of information used to identify particular persons when that information enabled the public to determine whether an agency's practices were fair and nondiscriminatory.[156] Thus, where the derivative

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151. *See supra* note 109 (defining "derivative use").

152. *See* Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (discussing the secondary effect of disclosure of information under Exemption 6 of the FOIA).

153. *See* FRANKLIN & BOUCHARD, *supra* note 8, § 109[5] (discussing cases which address the derivative use of information requested under the FOIA).

154. FRANKLIN & BOUCHARD, *supra* note 8, § 109[5]. *See, e.g.*, Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1411 (9th Cir. 1987) (holding that a physicians' professional organization was not entitled to the names and addresses of Medicare beneficiaries); Minnis v. Department of Agric., 737 F.2d 784, 788 (9th Cir. 1984) (protecting the names and addresses of rafting permit applicants from disclosure to a business located on a river), *cert. denied*, 471 U.S. 1053 (1985); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (holding that a distributor of wine-making equipment was not entitled to a list of the names and addresses of individuals licensed to produce wine at home).

155. FRANKLIN & BOUCHARD, *supra* note 8, § 109[5]. *See, e.g.*, Florida Rural Legal Servs., Inc. v. United States Dep't of Justice, Civil No. 87-1264, slip op. at 6 (S.D. Fla. Feb. 10, 1988) (ordering the disclosure of the names and addresses of illegal aliens to a legal services group for the purpose of informing them of a citizenship registration requirement); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984) (ordering the disclosure of the names and addresses of veterans involved in atomic testing due to the public interest in informing the veterans of benefits and health testing).

156. Brief *Amici Curiae* of American Newspaper Publishers Association; Gannet Co., Inc.; Reporters Committee for Freedom of the Press; American Society of Newspaper Editors; Society of Professional Journalists; National Association of Broadcasters; Newsletter Association; and the New York Times Co. at 18, United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (No. 90-747) [hereinafter *Amicus* Brief of Newspaper Publishers]. *See, e.g.*, IBEW Local Union No. 5 v. United States Dep't of Hous. & Urban Dev., 852 F.2d 87, 90-91 (3d Cir. 1988) (ordering the disclosure of the names and addresses of nonunion employees where the asserted public interest

use of information was considered and the public benefits of the secondary effects of that use outweighed the privacy interests at stake, courts have often held that lists of names and addresses must be released pursuant to a FOIA request.

The Supreme Court refused to squarely address the issue of derivative use.[157] Nonetheless, the Court did consider the secondary effects of disclosure on the Haitian returnees and found an invasion of privacy sufficient to justify withholding under Exemption 6.[158] The Court did not, however, consider the secondary effects of disclosure when weighing the public interest.[159] By failing to evaluate the public benefits gained from the derivative use of the names of Haitian interviewees, while considering the effect of secondary use on the possible invasion of privacy, the Court distorted the balancing between the public and private interests involved. As a result, the Court's opinion fails to enforce Congress' clear legislative intent toward heavily favoring disclosure under the Freedom of Information Act.[160]

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was in the prevention of unlawful competition for government construction contracts); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 530 (6th Cir.) (stating that the investigation of racial steering in real estate loans was a legitimate public interest), *cert. denied*, 469 U.S. 1034 (1984).

The interest in nondiscriminatory proceedings is particularly relevant with respect to Haitian migrants due to the widespread accusation of governmental racism in determining the eligibility of these migrants for American asylum. *See supra* 21 (noting allegations that the Haitian interdiction program is racist and discriminatory). *See also* Lennox, *supra* note 69, at 714-23 (arguing that racial discrimination is the driving force behind the Haitian immigration policy of the United States); Little, *supra* note 21, at 293 (noting that critics of the United States' Haitian immigration policy have argued that the denial of asylum to most Haitian migrants is racist).

157. *Ray*, 112 S. Ct. at 550. *See supra* notes 102-10 (discussing the Supreme Court's treatment of the derivative use issue).

158. *Ray*, 112 S. Ct. at 550. *See supra* notes 98-110 and accompanying text (discussing Supreme Court's basis for allowing the State Department to withhold the names of Haitian returnees).

159. *Ray*, 112 S. Ct. at 550. *See supra* note 110 (discussing the Supreme Court's refusal to apply "derivative use" considerations to the public interest side of FOIA Exemption 6 balancing). Justice Scalia, in a concurrence, refused to consider secondary effects at all and found that the simple disclosure of the names was enough to justify exemption. *Ray*, 112 S. Ct. at 551. *See supra* notes 111-15 and accompanying text (discussing Justice Scalia's concurrence).

160. *See supra* note 15 (noting Congress' legislative intent in enacting the Freedom of Information Act).

IV. DISTORTING THE BALANCE: THE RAMIFICATIONS OF *RAY*

The *Ray* opinion represents a considerable degree of deference toward the United States Government's interest in the non-disclosure of significant information.[161] Nothing in the text or legislative history of the Freedom of Information Act supports the contention that the public interest in requested information must be in the disclosure itself and not in any possible derivative use.[162] In fact, courts have considered secondary effects when balancing public and private interests under Exemption 6 of the FOIA.[163] Yet, the Supreme Court's inconsistent application of derivative use considerations in *Ray* broadens the scope of the Exemption 6 non-disclosure provision by considering the weight of secondary effects only with respect to the privacy interest side of the balance.[164] Such a skewed consideration of secondary effects heavily favors the withholding, rather than the disclosure, of information held by governmental agencies.[165]

In addition, the Court's creation of a "presumption of legitimacy" concerning the veracity of government reports[166] has the potential to further distort the balancing process mandated under FOIA Exemption 6. The fundamental purpose of the Freedom of Information Act is to "open

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161. Arthur C. Helton, *Justices Seem to Give INS the Benefit of the Doubt*, NAT'L L.J., April 20, 1992, at 38. In fact, a number of recent decisions reflect the Supreme Court's deference to governmental interests regarding the claims of refugees and aliens, and a corresponding diminution of those claims. *Id. See* INS v. Doherty, 112 S. Ct. 719, 727 (1992) (holding that an asylum applicant can waive refugee protection); INS v. Elias-Zacharias, 112 S. Ct. 812, 816-17 (1992) (narrowing the ability of refugees to gain asylum by strictly construing the requirement of a "well-founded fear of persecution").

162. *Amicus* Brief of Newspaper Publishers, *supra* note 156, at 16. *See* 5 U.S.C. § 552 (1988) (text of the Freedom of Information Act); SENATE JUDICIARY COMM., SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (Comm. Print 1974) (reprinting the legislative history of the FOIA).

163. *See supra* notes 155-56 (noting cases that have considered the secondary effects of disclosure as part of Exemption 6 balancing).

164. *See supra* notes 98-110 and accompanying text (discussing the opinion of the Supreme Court).

165. *See supra* note 15 (explaining that the FOIA was enacted to foster full agency disclosure of information).

166. *Ray*, 112 S. Ct. at 550. *See supra* note 110 (discussing the Supreme Court's presumption as to the veracity of the agency reports at issue in *Ray*).

agency action to the light of public scrutiny."[167] Presuming the legitimacy of governmental action is a step toward defeating that purpose. The FOIA Exemption 6 balancing test was designed to allow the United States Government to protect personal privacy, as long as that protection was not at the expense of public interests.[168] By suggesting that the public does not have an interest in testing the veracity of the Government's reports, the *Ray* Court has dramatically reduced the weight that can be applied to the public interest side of Exemption 6 balancing. This will likely have the effect of permitting the Government to withhold information that, considering the history and purpose of the FOIA,[169] should be subject to disclosure.

CONCLUSION

The United States Government's policy of interdicting Haitian nationals at sea and forcibly returning them to Haiti has generated significant controversy.[170] The public has a number of legitimate interests in the Haitian interdiction program, which include an interest the safe return of Haitian migrants and in the validity of the United States Government's justification for their interdiction and forced repatriation.[171] The Freedom of Information Act was passed to allow "any person" the ability to scrutinize American governmental conduct,[172] subject to a few well-delineated and narrowly defined exemptions.[173] In *United States Department of State v. Ray*,[174] the Supreme Court defeated a FOIA request using a distorted application of Exemption 6.[175] By failing to

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167. Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

168. *See supra* note 14 and accompanying text (discussing Congress' intent that, under FOIA Exemption 6, courts balance an individual's right to privacy against the public's right to governmental information).

169. *See supra* notes 15, 22, 146 (describing the history and function of the Freedom of Information Act).

170. *See supra* note 21 (noting widespread public controversy concerning the Haitian interdiction program).

171. *See supra* notes 142-50 (discussing the public interest in the interdiction program).

172. 5 U.S.C. § 552(a)(3) (1988). *See supra* note 8 (noting that the phrase "any person" includes foreign citizens and aliens).

173. 5 U.S.C. § 552(b)(1)-(9) (1988). *See supra* note 74 (describing the FOIA disclosure exemptions).

174. 112 S. Ct. 541 (1991).

175. *See supra* notes 98-110 and accompanying text (discussing the Supreme Court's opinion in *Ray*).

consistently weigh the secondary effects of disclosure,[176] and by presuming the legitimacy of governmental reports,[177] the Court narrowed the scope of the Freedom of Information Act where privacy concerns can be implicated. Specifically, the Court allowed minimal and speculative privacy interests[178] to outweigh the substantial public interest[179] in disclosing the names of Haitian interviewees. As a result, the public lacks the ability to monitor the United States' attempt to comply with its obligation, under international law, to prevent the *refoulement* of Haitian migrants seeking asylum in America.[180]

176. *See supra* notes 102-10 and accompanying text (discussing the Supreme Court's treatment of the derivative use issue).

177. *See supra* notes 166-69 and accompanying text (discussing the implications of the Supreme Court's assertion that government records are presumed to be legitimate).

178. *See supra* notes 116-36 and accompanying text (discussing the privacy interests of the Haitian returnees).

179. *See supra* notes 142-50 and accompanying text (discussing the public interest in the information sought in *Ray*).

180. *See supra* note 57 (noting that the United States is prohibited by international law from forcibly returning aliens to a country where they will face persecution).