

Rethinking the Cuban Adjustment Act and the U.S. national interest.

St. Thomas Law Review

March 2011

Copyright 2011 Gale Group, Inc.

All Rights Reserved

Business and Industry

Copyright 2011 St. Thomas Law Review

Section: Pg. 187; Vol. 23; No. 2

Length: 16286 words

Body

- I. Introduction
- II. Fidel Castro's Rise to Power and Cuba's Tension with the United States
- III. The Passage of, and Justification for the Cuban Adjustment Act
 - A. Cuban Immigration Prior to the Passage of the CAA: 1959-1966
 - B. The Cuban Adjustment Act of 1966
 - 1. Easing the Administrative Burden
 - 2. Integrating Cuban Exiles into the American Workforce
 - 3. Providing Refuge to Victim's of Communist Persecution
 - 4. Waging a Cold, Ideological War
- IV. Application of the CAA since Its Passage
 - A. 1980--Mariel Boatlift
 - B. 1994--Balseros Migration Crisis
- V. Criticism of the CAA and the Wet Foot / Dry Foot Policy
 - A. The Underlying Justifications for the Initial Passage of the CAA are No Longer Valid
 - B. The Cuban Government's Position--La Ley Asesina
 - C. The "Wet Foot / Dry Foot Policy" is Inconsistent with the Language of the CAA
 - D. The CAA is Unfair to Migrants of Other Nationalities
- VI. Conclusion

I. INTRODUCTION

Rethinking the Cuban Adjustment Act and the U.S. national interest.

This article argues that it is time for the United States to reconsider the continuing relevance of the Cuban Adjustment Act ("CAA") of 1966, (3) and to either modify or repeal it. The CAA allows Cuban migrants to "circumvent the usual methods used to determine refugee status," (4) and grants the "Attorney General discretion to adjust the status of a Cuban citizen admitted or paroled" into that of an "alien lawfully admitted for permanent residence" as long as the Cuban individual has been physically present in the United States for one uninterrupted year. (5) That is, under the terms of the CAA, Cubans are neither "required to qualify for a visa under the categories established for immigrants," nor are "they required to establish" refugee status, which is generally a prerequisite for obtaining asylum. (6)

This article takes the position that there is no longer any legitimate reason for granting Cubans special immigration privileges in light of the changes the world has undergone since the passage of the CAA in 1966. (7) Moreover, this article argues that a change in immigration policy towards Cuba is a necessary response to the espionage threat that Cuba's intelligence services pose to U.S. national security, as the policy of paroling nearly all Cubans touching U.S. soil provides a mechanism by which the Cuban government may infiltrate its spies into the United States. (8)

Although this article does not analyze the complex intricacies of U.S.-Cuba relations, an analysis of any U.S. immigration policy towards Cuba would be incomplete without any mention of the political context in which U.S.-Cuba relations have developed. (9) Indeed, one cannot attain a minimum understanding of U.S. immigration policy towards Cuba unless one also understands this policy as a means by which the United States has attempted to undermine the legitimacy of Fidel Castro's government. (10) Accordingly, Part II briefly chronicles the events leading to Fidel Castro's rise to power, and highlights the major events that have caused Cuba's strained relationship with the United States. Part III addresses the initial justifications for the passage of the CAA. Part IV explores the different ways the CAA has been applied since its passage. Part V describes critics' arguments against the CAA, and evaluates the validity of these arguments. Finally, Part VI concludes that whatever utility the CAA may have served, it is time for U.S. law to accord Cubans the same legal treatment that others wishing to immigrate to the United States receive because doing so is in the national security interest of the United States. (11)

II. FIDEL CASTRO'S RISE TO POWER AND CUBA'S TENSION WITH THE UNITED STATES

January 1, 1959 signaled the dawn of a new era for U.S.-Cuba relations. (12) On this date, Cuban dictator Fulgencio Batista fled Cuba as Fidel Castro and his fellow barbudos (13) descended victoriously from the Sierra Maestra mountains, where they had waged a guerrilla war against Batista since 1956. (14)

Previously, in 1953, Castro had led a failed revolt against Batista's government by attacking the Moncada military barracks in Santiago de Cuba. (15) After serving two years in prison, Castro traveled to Mexico, where he organized a second revolt against Batista. (16) In 1956, Castro and eighty-one other men departed Mexico in an overloaded thirty-eight foot yacht named the Granma, and landed in the Oriente Province of Cuba. (17) Upon their arrival in Oriente, Castro and his men dispersed into the Sierra Maestra Mountains. (18) As unlikely as it may seem, this group of eighty-two men began what would ultimately become the first socialist revolution in the Western Hemisphere. (19)

Although it may be tempting to think of U.S.-Cuba relations within the exclusive context of the Cold War, (20) one should note that U.S. relations with Cuba--and Cuban immigration to the United States--pre-date the Castro regime. (21) In 1890, there were approximately 20,000 Cubans living in the United States. (22) This number rose to 40,000 by 1910. (23) Jose Marti, the nineteenth-century leader of Cuba's independence movement, spent a considerable portion of his adult life in the United States, where he organized Cuban exile groups in New York and Florida against Spanish colonial rule from 1881 to 1895. (24)

In 1895, Marti led Cuba's final rebellion against Spain. (25) The United States intervened in this rebellion following the sinking of the American battleship U.S.S. Maine in Havana Harbor on February 15, 1898. (26) The U.S. hostilities' against Spain ended with the signing of the Treaty of Paris on December 10, 1898. (27) Under the terms of this treaty, Spain relinquished its claims to Cuba, and ceded Puerto Rico and the Philippines to the United States. (28)

Rethinking the Cuban Adjustment Act and the U.S. national interest.

Although Cuba ceased being a Spanish colony in 1898, it was not completely sovereign. The United States occupied Cuba militarily until 1902. (29) A provision of Cuba's 1901 constitution incorporated the Platt Amendment, which authorized the United States to intervene in Cuban affairs, among other things, "for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States." (30)

From 1901 to 1934, the Platt Amendment was a source of humiliation to many Cubans because it stymied the sovereignty they had worked so hard to achieve. (31) Under the legal cloak of the Platt Amendment, the United States militarily intervened in Cuba in 1906 and 1912, and politically intervened in internal Cuban affairs on a number of other occasions throughout the early twentieth century. (32) To add further insult to injury, the Platt Amendment served as "the basis for the U.S. acquisition of rights" to a portion of Guantanamo Bay--sovereign Cuban territory; the United States would ultimately establish a naval base on this piece of territory which, as of 2011, remains operational. (33) The U.S. military presence in Guantanamo can be terminated only by mutual agreement or unilateral U.S. withdrawal; that is, Cuba cannot exercise its sovereignty to expel the U.S. Navy from Guantanamo. (34)

Cubans' indignation with U.S. policy towards Cuba, coupled with the succession of corrupt governments following independence, set the stage for Castro's rise to power. (35) In 1959, "[t]he overwhelming majority of the Cuban people recognized Castro as a revolutionary hero, who, despite tremendous odds, had defeated [a] corrupt and brutal dictatorship." (36) Although the U.S. government did not immediately declare its enmity towards Castro's government, it soon became apparent that Castro would become a thorn in the side of the United States. (37) In 1960, Cuba nationalized U.S. businesses, and in 1961 the United States broke diplomatic relations with Cuba. (38) On April 17, 1961, over 1,000 U.S.-trained Cuban exiles invaded Cuba's Bay of Pigs with the goal of overthrowing Castro's government. (39) Castro's forces crushed the invaders, who surrendered within seventy-two hours. (40) Following the Bay of Pigs victory, Castro proclaimed the socialist nature of the Cuban Revolution during his May Day speech in 1961. (41)

Slightly over one year later, in October 1962, "U.S. reconnaissance planes discovered Soviet-made nuclear missiles in Cuba." (42) The United States responded by imposing a naval blockade around the island, resulting in a confrontation with the Soviet Union known as the Cuban Missile Crisis. (43) The United States and the Soviet Union successfully negotiated the withdrawal of the Soviet missiles on October 28, 1962. (44) In exchange for the Soviet withdrawal of its nuclear missiles from Cuba, the United States pledged to: (1) refrain from using military force against the island, (2) eliminate the naval blockade, and (3) withdraw U.S. strategic nuclear missiles from Turkey. (45)

As of February 2010, the Cold War has been over for nearly two decades and the Soviet Union no longer exists. (46) Fidel Castro has not officially been the leader of Cuba since he ceded control of the government to his brother, Raul, after falling ill in August of 2006. (47) Notwithstanding these changes, U.S. policy towards Cuba remains largely unchanged. (48) The economic embargo that President Kennedy instituted in 1962 remains in place, and was strengthened with the passing of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. (49) Moreover, despite some changes in the application of the CAA--which are discussed in later sections--Cubans remain the "special favorites" of U.S. immigration policy. (50)

III. THE PASSAGE OF, AND JUSTIFICATION FOR THE CUBAN ADJUSTMENT ACT

A. CUBAN IMMIGRATION PRIOR TO THE PASSAGE OF THE CAA: 1959-1966

Castro's rise to power witnessed an influx of emigration from Cuba to the United States. (51) The first wave of Cuban exiles consisted of "[o]ver 200,000 individuals who were highly educated, professional, managerial, and of upper-middle class socioeconomic status." (52) These individuals left Cuba between 1959 and 1962, and did not expect their exile to be permanent; that is, they expected to return home to Cuba upon the imminent dissolution or overthrow of Castro's government. (53) Although some within this initial group were followers of the deposed

Rethinking the Cuban Adjustment Act and the U.S. national interest.

Cuban dictator, Fulgencio Batista, many more were disaffected by Castro's having, among other things, "abolished the electoral system, closed private educational institutions, and silenced the Catholic Church." (54)

Upon learning of the presence of Soviet missiles in Cuba in 1962, the U.S. government suspended all direct flights between Cuba and the United States. (55) This resulted in a decrease in Cuban immigration to the United States. (56) Between 1962 and 1965, the years direct flights were renewed, only about 74,000 Cubans immigrated to the United States. (57)

In September 1965, Castro announced that all Cubans with relatives in the United States would be permitted to leave the island "if their relatives asked for them." (58) This announcement prompted Cubans in the United States to travel to the Cuban port of Camarioca by boat to retrieve their relatives. (59) "In contrast to the gradual flow of Cuban refugees to Miami during the previous six years, the Camarioca boatlift nearly doubled the number of Cuban exiles in the United States from 211,000 to 411,000 in just a few months." (60) Although President Lyndon B. Johnson initially declared that the United States would welcome the refugees, "as the boatlift intensified, negotiations to establish an orderly passage to the United States became a priority for the administration." (61) U.S. and Cuban officials established an agreement on November 6, 1965 whereby the United States was allowed to provide air transportation to Cubans departing for Miami. (62) Between 1965 and 1973, approximately 250,000 Cubans arrived in the United States via the airlift--also known as "Freedom Flights." (63) It is within this immigration context that Congress enacted the CAA. (64)

B. THE CUBAN ADJUSTMENT ACT OF 1966

Since practically the beginning of Castro's regime, the United States has had an open-door policy with respect to Cuban immigration. (65) Following Castro's rise to power, it became the policy of the United States to discredit the Cuban government ideologically by allowing Cubans the opportunity to choose capitalism and democracy over communism and dictatorship. (66) This open-door policy towards Cubans served as an important aspect of the U.S. propaganda war against communism. (67) It also helped undermine Castro's government by draining Cuba of its human capital. (68)

While the United States provided refuge to Cubans fleeing Castro's government, it did not have a policy to integrate them fully into American society or the American workforce, as there was no expectation that their stay in the United States would be permanent. (69) These Cubans gained entry into the United States through the parole power. (70) "[T]hat power was intended to provide for the temporary entry of an individual alien in emergency circumstances. But parole was used for Cubans as a 'highly politicized admission device' for massive numbers." (71)

It is important to note that a grant of "parole" is not admission as a lawful permanent resident under the Immigration and Nationality Act ("INA"). (72) Until the passage of the CAA, Cubans who had been paroled into the United States could adjust their status to that of a permanent resident only by "leaving the United States for an indefinite period of time in order to secure an immigrant visa at a U.S. consular office abroad, and then reentering as a permanent resident." (73) An analysis of the legislative history of the CAA reveals the following justifications for Congress' passage of the CAA: (1) ease the administrative burden of Cuban exiles who wanted to become legal permanent residents; (2) integrate Cuban exiles into the American workforce; and (3) provide refuge to victims of communist persecution. (74) In addition to the aforementioned three justifications--evident from the Congressional record--the CAA also served to further U.S. efforts in the ideological war against communism. (75) The sections that follow analyze each of the above-mentioned justifications.

1. Easing the Administrative Burden

As the Seventh Circuit noted in *Silva v. Bell*, (76) most Cuban exiles did not have the financial resources to make the trip abroad to apply for immigrant visas. (77) Additionally, the U.S. consulates in Canada and Mexico had a heavy administrative burden processing the visa applications of those Cubans who were able and willing to travel to these locations to obtain visas as a first step towards adjusting their status. (78) According to the 1966 statement of Assistant Secretary of State Douglas MacArthur II to the Senate Judiciary Committee, "[c]onsular officers located in areas adjacent to the United States" could process only those immigrant visa applications from Cubans who either

Rethinking the Cuban Adjustment Act and the U.S. national interest.

had close ties to U.S. citizens or permanent residents, or who suffered "specific hardship" in obtaining employment because of their lack of permanent resident status. (79)

At the time of the CAA's enactment, there were approximately 165,000 Cubans in the United States without permanent resident status. (80) Many of these Cubans had left Cuba after the United States broke diplomatic relations in 1961, and were unable to apply for immigrant visas while in Cuba because there was no U.S. consular representation on the island. (81) The only way these Cubans could apply for any type of U.S. visa, therefore, was by traveling to a third country. (82) Accordingly, the CAA was passed to alleviate the administrative burden on both Cuban exiles who wanted to become U.S. permanent residents, and U.S. diplomatic facilities in Canada and Mexico that lacked the resources to process the visa applications of Cubans paroled into the United States. (83)

2. Integrating Cuban Exiles into the American Workforce

Besides easing administrative burdens, Congress also intended the CAA to facilitate the integration of Cubans into the American labor force. (84) Many of the Cubans who comprised the initial wave of exiles belonged to "Cuba's cultural and economic elite," and "were ... well-educated and highly skilled workers whom the U.S. government viewed as an asset to the American labor [force]." (85) Nevertheless, their inability to adjust their status prevented these Cubans from obtaining employment in their professions "either because of conditions imposed independently by [their] employers, or because of restrictive statutes in many States which prevent[ed] the practice of one's profession ... by one who ha[d] not acquired full citizenship or ha[d] not filed a declaration of intention." (86) The CAA, accordingly, was enacted to: (1) allow Cubans to become self-sufficient; (2) reduce Cubans' dependence on the U.S. government assistance programs; and (3) put the skills of Cuban exiles to the service of the U.S. labor force. (87)

3. Providing Refuge to Victim's of Communist Persecution

The Congressional record suggests that humanitarian concerns served as another justification for the passage of the CAA. (88) In a written statement to the House Judiciary Committee in 1966, Undersecretary Ball stated, "[t]he granting of a permanent residence status to Cuban refugees would further demonstrate the desire of the United States to play a full and sympathetic role as a country of asylum for refugees from communism." (89) Indeed, by the time Congress enacted the CAA in 1966, providing refuge to Cubans fleeing communist Cuba had already become a well-settled U.S. policy. (90) The fact that the United States waived visa requirements for Cubans upon breaking diplomatic relations with Cuba in 1961, and maintained an open-door policy with regard to Cuban immigration demonstrates this fact. (91)

4. Waging a Cold, Ideological War

In light of the fact that removing Castro by force ceased being a viable policy option under the terms of the U.S.-Soviet agreement that resolved the Cuban Missile Crisis, anti-Castro propaganda efforts soon became a particularly important means by which the United States was able to express its disapproval of the Cuban regime. (92) Indeed, what better way to prove the moral and economic superiority of democracy and capitalism to communism and totalitarianism than to allow Cubans to decide for themselves which system they preferred?

"The United States policy against Communist expansion was promoted by allowing the Cubans who came to the United States to denounce communism through finding refuge in the democratic United States while at the same time draining Cuba of vital resources such as an educated labor force." (93) Aside from making it easier to provide long-term refuge to Cuban exiles, the CAA also facilitated the exodus of skilled professionals from Cuba, thereby depleting the Castro regime "of vital human capital, including physicians, teachers, engineers, and technicians." (94)

IV. APPLICATION OF THE CAA SINCE ITS PASSAGE

"In the late 1960s and early 1970s, Castro complained of the detrimental effect caused by the loss of so many well-educated and productive citizens." (95) As a means of maintaining Cuba's human capital inside of Cuba, Castro suspended the "Freedom Flights" in 1973. (96) Although the United States maintained an open-door policy for

Rethinking the Cuban Adjustment Act and the U.S. national interest.

Cubans, there was a period of reduced Cuban migration to the United States between 1973 and 1980. (97) During this time, only approximately 50,000 Cubans arrived in the United States. (98) In 1980, however, the U.S. open-door policy of providing refuge to all Cubans fleeing Castro's Cuba was severely tested. (99) This policy was tested again during the mass Cuban exodus of 1994. (100)

A. 1980--MARIEL BOATLIFT

On April 1, 1980, six Cubans crashed a bus into the Peruvian Embassy in Havana and sought asylum. (101) After Peru declined to turn these Cubans over to Cuban authorities to face criminal prosecution, Castro withdrew security guards from the embassy. (102) Within days, over 10,000 Cubans flooded the Peruvian Embassy seeking asylum. (103) The Cuban government responded by opening the Havana port of Mariel to all Cubans wishing to leave the island. (104) Shortly thereafter, President Jimmy Carter announced that the United States would "continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation brought about primarily by Fidel Castro and his government." (105) What resulted was an influx of 125,000 Cubans between April and September of 1980. (106)

The legal landscape in the United States, however, was not what it was during the initial waves of post-Castro Cuban immigration. (107)

Under the Refugee Act of March 1980, passed only five weeks before

Mariel, the United States had placed a yearly quota of 19,500

refugees from Cuba. In addition, individual case reviews were required before refugee status was granted. The law defined refugees as people who were "unable and unwilling" to return to their homeland because of political, racial, religious, or other persecution. Technically and legally, the Cubans were simply undocumented aliens seeking asylum, not refugees. (108)

The Mariel Cubans were the first mass group of Cubans who fled from Castro and encountered many of the same difficulties other immigrants encountered upon reaching the United States. (109) Although most Mariel Cubans were eventually paroled, many were detained. (110) Moreover, rather than hailing the Mariel Cubans as brave victims of communist oppression, much of the U.S. media maligned them, ironically, by using the same term Castro used to describe them--"social undesirables." (111) Mariel Cubans were also stereotyped as "criminals, homosexuals, or mentally ill" despite the fact that these actually "constituted less than 5% of the immigrants." (112)

Despite the stigmatization of the Mariel Cubans, most were eventually paroled and were able to avail themselves of the CAA to become permanent residents. (113) Nevertheless, the Mariel experience demonstrated that there were limits to the extent the United States would provide refuge to anybody fleeing communist Cuba. (114) Immigration officials considered 2,000 Mariel Cubans as having serious enough criminal records to justify continued detention. (115) Moreover, some Cubans who had been paroled initially, later became ineligible to adjust their status under the CAA because of criminal convictions in the United States. (116) Many Cubans who were ineligible to adjust their status remained in detention because of the Cuban government's refusal to allow them to be repatriated. (117)

In 2005, the U.S. Supreme Court held in *Clark v. Martinez* that the indefinite detention of these Cubans violated federal law, and that they must be either removed from the country within a reasonable amount of time, or released. (118) In light of the Supreme Court's decision in *Martinez*, several hundred long-term Cuban detainees were ordered released from the custody of the U.S. Immigration and Customs Enforcement. (119)

Although an analysis of the legal propriety of the indefinite detention of these Cubans is beyond the scope of this article, it is worth noting that the United States has not been shy to enforce its immigration laws against Cubans despite its "foreign policy and political motivations" for treating Cubans differently from other migrants. (120)

B. 1994--BALSEROS MIGRATION CRISIS

Rethinking the Cuban Adjustment Act and the U.S. national interest.

After a series of illegal departures from Cuba in 1994--some of which involved hijackings of vessels--the Cuban government instructed its security forces not to prevent Cubans from leaving the island. (121) Shortly thereafter, Castro made the following official statement:

If the U.S. does not take rapid, effective measures to stop

promoting illegal departures from our country, we will feel obliged

to instruct our border guards to do nothing to stop any vessel that
is trying to leave Cuba.... [W]e cannot continue to act as border
guards for the U.S. (122)

The announcement that Cuban authorities would not prevent anyone from leaving the island again prompted a mass exodus, as approximately 35,000 Cubans took to the high seas in just about anything that would float. (123) Unlike in 1980, however, the American reception would not be as welcoming. (124) This time, there would be no "open heart and open arms." (125) Instead, President Clinton directed the U.S. Coast Guard to intercept Cubans attempting to reach U.S. soil, and detain them at the U.S. base in Guantanamo Bay. (126) This broke with the United States' longstanding policy of welcoming all Cubans fleeing from Castro. (127)

The 1994 crisis ended with the signing of a Joint Communiqué between Cuba and the United States on September 9, 1994. (128) Under the terms of the Communiqué the United States agreed to: (1) disallow Cubans rescued at sea from entering the United States; (2) discontinue "its practice of granting parole to all Cuban migrants who reach the United States in irregular ways"; (3) cooperate with the Cuban government to prevent alien smuggling; and (4) issue a minimum of 20,000 immigrant visas annually through the Interest Section in Havana. (129) The Cuban government, for its part, agreed to: (1) "prevent unsafe departures using mainly persuasive methods"; (2) cooperate with the United States to prevent alien smuggling; (3) arrange for the voluntary return of Cubans "who arrived in the United States or in safe havens outside the United States on or after August 19, 1994"; and (4) continue discussions with the United States to address the repatriation of inadmissible Cubans. (130)

The Communiqué provided Cubans in Guantanamo Bay an incentive to agree to repatriation by providing for a possibility to emigrate from Cuba by applying for visas at the U.S. Interest Section in Havana, while denying them any possibility of entry into the United States from Guantanamo Bay. (131)

The Cuban American Bar Association ("CABA") challenged the policy of denying Cubans in Guantanamo Bay the right to apply for asylum in Cuban American Bar Association, Inc. v. Christopher. (132) The Haitian Refugee Center intervened to block the repatriation of Haitian migrants whom the United States also held in Guantanamo. (133) After the District Court for the Southern District of Florida granted a temporary restraining order against the government's repatriation, the government filed an appeal with the Eleventh Circuit. (134) On appeal, the question before the court was whether denying Cubans and Haitians in Guantanamo Bay the right to apply for asylum violated [section] 241(b)(3) of the Immigration and Nationality Act ("INA"). (135)

Relying on *Sale v. Haitian Centers Council*--a case in which the U.S. Supreme Court held that the INA did not apply extraterritorially--the Eleventh Circuit held that the United States was not required to afford the Cubans and Haitians in Guantanamo Bay an opportunity to apply for asylum because Guantanamo Bay was not U.S. territory. (136) The court also rejected the argument that the CAA and other congressional acts strengthening the U.S. embargo against Cuba conferred upon the Cubans in Guantanamo Bay a right to seek parole and asylum in the United States. (137) The court reasoned that:

[w]hile these acts acknowledge the political climate in Cuba,

provide for economic sanctions for dealing with Cuba, and allow for

certain fights for Cubans who reach the United States, they do not
address the fights of Cuban migrants to enter or to seek entry to
the United States initially, nor do they confer directly any fights
upon the Cuban migrants outside the United States. (138)

Rethinking the Cuban Adjustment Act and the U.S. national interest.

In light of the court's holding in *Christopher*, the Clinton administration faced no legal obstacle in repatriating Guantanamo Bay Cubans. (139) Notwithstanding this fact, and despite prior statements that "Cubans at Guantanamo would have to return to Cuba before they would be considered for admission to the United States," the Clinton administration reversed course in May 1995. (140) On May 2, 1995, the White House issued the U.S.-Cuba Joint Statement on Migration. (141) Under its terms, the United States and Cuba agreed that most of the Cubans in Guantanamo Bay would be paroled into the United States. (142) Both governments also agreed that the United States could count up to 5,000 such paroles in any one year period towards the 20,000 visas per year that the United States agreed to issue through its Interest Section in Havana under the 1994 Joint Communiqué. (143) Lastly, the United States agreed to repatriate, and Cuba agreed to accept the return of, all Cubans whom the U.S. Coast Guard intercepted at sea. (144)

Ironically, the decision to allow the Guantanamo Cubans into the United States was not extended to Haitians. (145) Although the Clinton administration's policy reversal was a cause of joy for the Cubans in Guantanamo Bay, Cuban-American groups were displeased that the United States would enter into an agreement with the Cuban government that provided for the repatriation of any Cuban fleeing Castro. (146) This policy represented a major change in U.S. policy toward Cuba, as forced repatriation of Cubans "fleeing oppression" had long been considered unthinkable. (147) In explaining the rationale for the new policy to Cuban-Americans, President Clinton declared:

We simply cannot admit all Cubans who seek to come here.... We

cannot let people risk their lives on open seas in unseaworthy

rafts.... [R]egularizing Cuban migration also helps our efforts to promote a peaceful transition to democracy on the island.... For too long, Castro has used the threat of uncontrolled migration to distract us from this fundamental objective. With the steps we've taken, we will be able to devote ourselves fully to our real long-term goals. (148)

Indeed, while "those Cubans on Guantanamo in May 1995 were the 'beneficiaries of the American tradition of humanitarian concern and conduct,' those subsequently interdicted and returned to Cuba would benefit from no such tradition." (149)

C. APPLICATION OF THE CAA SINCE THE 1994 BALSERO CRISIS

Following the 1994 and 1995 migration agreements between the United States and Cuba, it remained unclear whether Cubans who reached U.S. soil illegally could adjust their status pursuant to the CAA. (150) Although the 1995 Joint Statement did not address whether Cubans arriving in the United States illegally would be permitted to remain, the 1994 Joint Communiqué did unequivocally state that the United States had "discontinued its practice of granting parole to all Cubans who reach U.S. territory in irregular ways." (151) Notwithstanding the U.S. agreements with Cuba and the INA's prohibition against admitting aliens entering the United States "at a time or place other than as designated by the Attorney General," (152) in 1999 Immigration and Naturalization Service ("INS") Commissioner Doris Meissner made clear that Cubans who touched land would continue to be paroled. (153)

In an April 19, 1999 memorandum to INS Regional and District Directors, Chief Patrol Agents, and Officers-in-Charge, Meissner acknowledged that CAA applicants must be "admissible" to be eligible for adjustment of status under the CAA. (154) Nevertheless, she explained that "[t]he policy of the Service is that the inadmissibility ground that is based on an alien's having arrived at a place other than a port-of-entry does not apply to CAA applicants." (155) Meissner stated that this policy was based on the rationale of a 1967 Board of Immigration Appeals ("BIA") decision, *Matter of Mesa*. (156)

In *Matter of Mesa*, the BIA considered whether CAA applicants who were "likely to become public charges" were ineligible for adjustment of status under CAA [section] 1 due to their inadmissibility under INA [section] 212(a)(15). (157) The BIA noted that at the time of the CAA's enactment, Congress was aware that most Cubans depended on

Rethinking the Cuban Adjustment Act and the U.S. national interest.

some form of public assistance, as they had been "impoverished by force of circumstances beyond their control." (158) The BIA held that precluding Cuban parolees from adjusting their status on the grounds they were likely to be public charges would defeat the CAA's purpose of helping Cubans paroled into the United States become self-sufficient. (159)

In light of the fact that Cubans arriving illegally had been eligible for CAA adjustment for many years, and in light of Congress' 1996 affirmation that the CAA would remain in force until there is a democratic government in Cuba, (160) Meissner determined that to deny Cubans the ability to become eligible for CAA adjustment on the grounds of their illegal entry would frustrate the purpose of the CAA. (161) That is, Meissner determined that the illegal entry grounds of inadmissibility, like the public charge ground, should not apply to Cubans. (162) Accordingly, Meissner's guidance to her subordinates was to parole Cubans so long as no other factors--such as a disqualifying criminal record--barred their CAA adjustment. (163)

Indeed, there is no sound justification for the U.S. policy of treating Cubans touching land differently from those interdicted at sea. (164) As will be addressed further in Part V, *infra*, the statutory language does not support Meissner's interpretation of the CAA as requiring that Cubans who enter the United States illegally be paroled. (165) Despite this, the policy that President Clinton instituted of paroling Cubans touching land while repatriating those interdicted at sea, survived throughout the administration of President George W. Bush and remains the policy of President Barack Obama. (166)

V. CRITICISM OF THE CAA AND THE WET FOOT / DRY FOOT POLICY

Between 1995 and 2008, the U.S. Coast Guard interdicted and repatriated over 10,000 Cubans trying to reach the United States by sea. (167) The policy of interdicting and repatriating Cubans captured at sea remains controversial. (168) Some argue that all Cuban migrants, whether captured on land or at sea, should receive the same treatment that migrants of other nationalities receive. (169) Others argue that as long as the United States maintains the position that the Cuban regime is a gross violator of human rights, no Cuban attempting to flee should be repatriated. (170) The following subsections describe and critique the most common arguments against the current interpretation and application of the CAA.

A. THE UNDERLYING JUSTIFICATIONS FOR THE INITIAL PASSAGE OF THE CAA ARE NO LONGER VALID
Perhaps the most compelling argument in favor of repealing the CAA is that it is the anachronistic product of an era that has long passed. (171) With the collapse of the Soviet Union and the end of the Cold War, many would probably agree that the threat of world communist domination is over. (172) Accordingly, there is no longer a need for the United States to wage an ideological war to prove the superiority of capitalism and democracy over communism and dictatorship. (173) That battle has already been won. (174)

Moreover, while integrating Cubans into the American workforce and easing the administrative burden on Cuban parolees may have justified the initial passage of the CAA, these are no longer justifiable purposes for maintaining the CAA. (175) Since 1977, the United States has maintained an Interest Section in Havana which is staffed with consular personnel. (176) Cubans no longer have to travel to a third-country to apply for U.S. visas; they can apply for and obtain U.S. visas from the U.S. Interest Section in Cuba. (177) Moreover, Cubans do not even have to leave Cuba to apply for refugee status; they may apply for refugee status through the special in-country refugee program that the United States operates through its Interest Section. (178)

Besides there no longer being a need to ease the administrative burden on Cuban parolees or on U.S. diplomatic facilities, there is also no longer a need to facilitate the integration of Cuban exiles into the American workforce. (179) The CAA has already fulfilled its function of integrating paroled Cubans by making them eligible to adjust their status after being present in the United States for one year. (180) A repeal of the CAA would not strip Cubans who have adjusted the status of their U.S. permanent residency. (181) Its effect merely would be to deny illegal Cuban arrivals the ability to be paroled automatically. (182)

Whereas few would argue that administrative concerns and integrating Cubans into the American workforce continue justifying the CAA, many still argue that providing safe haven to victims of the Cuban government's persecution continues to justify the CAA. (183) According to the U.S. Department of State, the Cuban government

Rethinking the Cuban Adjustment Act and the U.S. national interest.

continues to (1) imprison people for "dangerousness" "without being charged with any specific crime," (2) recruit mobs to beat, threaten, and harass political opponents; (3) restrict freedom of speech and religion; and (4) restrict workers' rights to form independent unions. (184)

The U.S. government is not alone in denouncing the Cuban regime's human rights violations. (185) In 2003, for example, Amnesty International, Human Rights Watch, Mexico, the European Union, and the 15-nation Caribbean Community--among others--condemned Cuba for secretly trying and summarily executing three Afro-Cubans who had hijacked a Havana ferry in hopes of reaching the United States. (186)

Indeed, in arguing that the U.S. government should either repeal or modify the CAA, the authors of this article do not pretend to minimize human rights violations in Cuba. Cuban migrants, like migrants of other nationalities, should be afforded the opportunity to establish refugee status and qualify for asylum. If they meet the standard, they should be allowed to remain in the United States. The problem with justifying the CAA on the grounds of Cuba's human rights violations, however, is that it presumes that all Cubans who arrive in the United States are fleeing persecution, when such is not the case. (187)

As early as 1965, the Central Intelligence Agency had assessed that most Cubans were "disaffected because of the economic situation and not political repression." (188) With the end of Soviet subsidies and the Cuban economy in shambles, it is undeniable that most people who flee Cuba do so for economic, rather than political, reasons. (189) The fact that many Cuban emigres return to Cuba for family visits and vacations demonstrates that they do not fear persecution in Cuba. (190) Economic reasons, alone, do not justify granting asylum, and should not be a valid reason for granting all persons of any particular nationality free admission into the United States. (191) "Persecution or a well-founded fear thereof must be because of race, religion, nationality, particular social group or political opinion." (192) Being Cuban, alone, does not establish the well-founded fear of persecution that is legally required for asylum eligibility. (193)

B. THE CUBAN GOVERNMENT'S POSITION--LA LEY ASESINA (194)

The Cuban government views the CAA as a means by which "[t]he United States has criminally incited Cubans to risk their lives in dangerous sea crossings with the sole, ignoble and repugnant purpose of slandering Cuba and grossly distorting its image." (195) That is, the Cuban government portrays the CAA as a murderous law whose main purpose is to discredit and undermine the Cuban Revolution. (196) Cuba accuses the United States of having a two-faced policy that rewards Cubans who undertake dangerous and illegal journeys to the United States, yet too often denies Cubans who seek visas at the U.S. Interest Section in Havana the opportunity to migrate legally. (197)

While the Cuban government raises a valid argument, it must also share responsibility for illegal emigration from Cuba because it routinely denies exit visas to Cubans who obtain the necessary immigration documents from the U.S. Interest Section in Havana. (198) Before being allowed to emigrate, the Cuban government requires that would-be Cuban emigres purchase high-priced exit visas and complete "exorbitantly priced" medical exams. (199) Cuban-imposed fees for exit visas, medical exams, passport costs, and airport taxes amount to the equivalent of \$625.00, or approximately three years' salary. (200)

In 2003, the Cuban government's administrative roadblocks in implementing the migration agreements prompted the United States to suspend bilateral discussions that had taken place since the mid-1990s. (201) These discussions were renewed on July 14, 2009. (202) Any hopes that renewed bilateral discussions would further efforts to implement orderly migration procedures suffered a setback following the February 2010 round of talks in Havana. (203) The Cuban Ministry of Foreign Affairs issued a statement condemning the U.S. delegation for allegedly supporting counterrevolutionaries in Cuba and maintaining misguided priorities. (204) The statement accused the U.S. delegation of convening "dozens of its mercenaries," and "demonstrating that its priorities are more connected to supporting the counterrevolution ... than to creating a conducive climate for a real solution to bilateral problems." (205) Although subsequent bilateral discussions have culminated in more cordial statements from Cuba's Foreign Ministry, (206) the Cuban government has made clear that "a legal, safe and orderly migration [cannot] be achieved ... as long as the Cuban Adjustment Act and the wet foot/dry foot policy--which encourage illegal departure of Cubans to the United States--remain in place." (207) Accordingly, so long as the CAA remains in

Rethinking the Cuban Adjustment Act and the U.S. national interest.

force, there is little reason to be optimistic that bilateral discussions between the U.S. and Cuban governments will promote greater cooperation.

C. THE "WET FOOT / DRY FOOT POLICY" IS INCONSISTENT WITH THE LANGUAGE OF THE CAA

Many incorrectly assume that the CAA requires the automatic parole of Cubans who illegally enter the United States. (208) The truth is that nothing in either the INA or the CAA actually requires that illegal Cuban migrants be allowed into the United States. (209) The INA clearly stipulates that the Attorney General's parole power is discretionary. (210) Moreover, the CAA merely grants the Attorney General discretion to adjust the status of an admitted or paroled Cuban to that of a permanent resident. (211) It does not compel this result. (212)

Commissioner Meissner's interpretation of the CAA is inconsistent with U.S. obligations under the 1994 Joint Communique and the 1995 Joint Statement, and is unsupported by the plain language of the CAA. (213) Additionally, Meissner's reliance on the reasoning employed in Matter of Mesa to justify the policy of paroling illegal Cuban migrants is misplaced. (214) In Matter of Mesa, the BIA considered the applicability of the public charge ground of excludability to CAA applicants who had already been paroled into the United States. (215) These applicants had satisfied the most basic requirement of CAA [section] 1 by being Cuban natives who had been "admitted or paroled." (216) In extending the CAA's benefits to Cubans who have yet to meet this minimum requirement for eligibility for adjustment of status, Meissner's memorandum--and the resulting policy of paroling all Cubans who reach land--extends the reasoning in Matter of Mesa beyond a reasonable interpretation of the CAA. (217)

D. THE CAA IS UNFAIR TO MIGRANTS OF OTHER NATIONALITIES

Some academics have charged that the CAA promotes racial inequality and a racist immigration policy. (218) "[T]hey assert that the only significant difference between Haitian and Cuban refugees is that Cubans tend to be white, while Haitians tend to be black," and that the policy of welcoming Cubans while rejecting Haitians, who are fleeing equally miserable--if not worse--conditions, is unjustifiable. (219)

It is unfortunate that racism may have played a role in the formation of U.S. immigration policy, and has likely also been a motivating force behind restrictions placed on Cuban immigration over the last decade. (220) It is also unfortunate that judicial remedies to address racist immigration policies are lacking. (221) In Landon v. Plasencia, the U.S. Supreme Court reaffirmed the long-standing precedent that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." (222) In Alexis v. United States, the Eleventh Circuit relied on Landon in rejecting a Haitian migrant's claim that the CAA violated her equal protection rights because it afforded Cubans preferential treatment, while not affording Haitians any opportunities to remain in the United States. (223) The Court held that as an excludable alien, (224) the Haitian appellant had no legal ground to assert any equal protection rights. (225)

As is evidenced by the decisions in Landon, Alexis, and the body of case law, (226) there are few legal obstacles preventing the formulation and implementation of a racist immigration policy. Accordingly, only the political and legislative processes are capable of ensuring a more just and colorblind immigration policy. (227) Although political realities may have justified preferential treatment for Cubans at one point in time, those realities no longer exist. (228)

VI. CONCLUSION

A Latin maxim provides that when a law's rationale changes, the law ceases to exist--cessante ratione legis, cessat ipse lex. (229) In light of this maxim and the valid criticisms of the CAA, the U.S. government should either repeal it, or change its current interpretation of the Act. For too long, the United States has allowed the Cuban regime to benefit from U.S. immigration policy, which has allowed the regime to bid good riddance to political opponents and other Cubans whom Castro's government deems to be "undesirable." (230) Eliminating the free pass that, with few exceptions, all Cubans who reach U.S. soil have received for over half a century might further the goal of promoting the emergence of a more consolidated political opposition in Cuba.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

Another reason for repealing the CAA is one that is overlooked in academic circles. (231) The CAA threatens U.S. national security by providing a mechanism by which the Cuban government may easily infiltrate its agents and spies into the United States. (232) Cuba's intelligence services are extremely competent and they have "mounted a lasting, effective intelligence effort against the United States." (233) Cuba's proven ability to collect classified U.S. government information, and its alleged willingness to sell this information to U.S. foes represent potential threats to U.S. national security. (234)

Between the late 1990s and 2009, there were a number of reported instances of Cuban espionage against the United States. (235) Most recently, on June 4, 2009, Walter Kendall Myers--a former U.S. State Department employee--and his wife were arrested and charged with spying for Cuba for three decades. (236) Both pleaded guilty on November 20, 2009. (237) On July 16, 2010, Walter Kendall Myers was sentenced to life in prison, while his wife received an eighty-one month sentence. (238) Although many of the spies who have been arrested over the last decade are not of Cuban descent, one cannot dismiss the possibility that their U.S.-based Cuban handlers (239) were able to adjust their status under the CAA, and are now legal permanent residents or, perhaps, even U.S. citizens. (240)

Aside from targeting the U.S. government, Cuba's intelligence services have also infiltrated the Cuban emigre community and Cuban exile organizations. (241) In the mid-1990s, Cuban government agents infiltrated the Brothers to the Rescue ("BTTR") exile organization. (242) Before the Cuban government shot down two aircraft belonging to BTTR over international airspace in 1996, it had instructed its agents that had infiltrated the BTTR to provide details about the organization's flight plans. (243)

It is impossible to ascertain the extent to which the Cuban government has availed itself of the CAA to infiltrate its spies into the United States because of the obvious clandestine nature of intelligence operations. (244) However, in light of how aggressively Cuba's intelligence services target the United States, one cannot dismiss the possibility that the CAA has served, and continues to serve, as a vehicle for introducing Cuban government agents into the United States. (245) The threat to national security posed by Cuban intelligence operations justifies ending the free admission that Cubans receive upon touching U.S. soil.

Indeed, there are many reasons for which the United States should either repeal the CAA entirely, or interpret it in a way that would not require the near automatic parole of any Cuban who touches U.S. soil. Under either approach, illegal Cuban migrants would be permitted to apply for asylum or restriction on removal, as are illegal migrants from any other country. (246) Furthermore, the absurd "wet foot/dry foot" policy would be discontinued. (247)

One reason to favor a complete repeal of the CAA over a merely different interpretation is that adopting the latter approach would require that illegal Cuban migrants either be detained until they are removed from the country, or removed within one year of being paroled. (248) That is, if an illegal Cuban migrant were paroled, immigration authorities would have one year to decide whether to grant asylum or restriction on removal before the CAA's adjustment provision could take effect. (249) A complete repeal of the CAA would remove this one year window that immigration authorities would have to remove a paroled illegal Cuban migrant, and with it, the incentive to deny parole to an illegal Cuban migrant seeking asylum. (250) It would also avoid the need for immigration authorities to rush the processing of Cuban migrant's asylum applications unnecessarily. (251)

Notwithstanding the human rights concerns in Cuba, "[i]t should not be assumed that merely because one lives in a socialist country that one has been persecuted as required under the statutory provisions governing refugee status." (252) Whether a Cuban is a refugee should be a legal, rather than a political question. (253) The time has come for the United States to apply its immigration policies consistently. Such an application is in the national interest of the United States.

JOYCE A. HUGHES (1)

ALEXANDER L. ALUM (2)

(1.) Professor of Law, Northwestern University School of Law, Chicago, Illinois; B.A., Carleton College; J.D., University of Minnesota Law School.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(2.) J.D., Northwestern University School of Law, Chicago, Illinois; M.A., George Washington University Elliott School of International Affairs; B.A., Rutgers University.

(3.) Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. [section] 1255 (2008)).

(4.) Roland Estevez, Note, Modern Application of the Cuban Adjustment Act of 1966 and Helms Burton: Adding Insult to Injury, 30 HOFSTRA L. REV. 1273, 1277 (2002). Section 208 of the Immigration and Nationality Act ("INA") stipulates that an alien must establish refugee status to be eligible for asylum. See Immigration and Nationality Act [section] 208(b)(1)(B)(i), 8 U.S.C. [section] 1158(b)(1)(B)(i) (2006). To establish refugee status, a person must show a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. [section] 1101(a)(42)(A) (2006).

(5.) See 8 U.S.C. [section] 1255 (2008).

(6.) Joyce A. Hughes, Flight from Cuba, 36 CAL. W. L. REV. 39, 40 (1999) (stating how Cubans were known as "special favorites" because they were "not required to qualify for a visa under the categories established for immigrants" and "not required to establish individually that they were refugees who qualified for asylum").

(7.) See discussion infra Parts IV-V.

(8.) See infra text accompanying notes 229-31, 238-39.

(9.) See discussion infra Part II.

(10.) See, e.g., Note, The Cuban Adjustment Act of 1966: ?Mirando por los Ojos de Don Quijote o Sancho Panza?, 114 HARV. L. REV. 902 (2001) [hereinafter Don Quijote]. One reason Congress was motivated to enact the Cuban Adjustment Act was to "advance Cold War objectives by destabilizing a Communist dictatorship that posed a threat to American national security." Id at 908. "The success of Castro's revolution in 1959 had a profound impact on U.S. immigration policy and on the U.S. government's perception of Cuba." Id.

(11.) See infra text accompanying notes 229-41 for a discussion regarding immigrants under the CAA and their effect on the national security of the United States.

(12.) Leonard M. Salter, Time for a U.S. Policy Shift on Cuba?, 42 ORANGE CNTY. LAWYER 25, 25 (2000) (stating how Fidel Castro ascended into power on Jan. 1, 1959); Caudillo Castro, L.A. TIMES, Jan. 5, 1989, [section] 2, at 6 ("On Jan[uary] 1, 1959, ... Fidel Castro led his guerilla army into Havana.").

(13.) See, e.g., Jean Marbella, Fidel of Dreams, BALTIMORE SUN, Mar. 28, 1999, at 8G (referring to the "merry band of rebels staged after the revolution" as "Los Barbudos, or bearded ones"); Lee Geok Boi, You Can Chase the 8 Cs Here, STRAITS TIMES (Singapore), Nov. 6, 1999, at 16 (referring to "Fidel Castro and his barbudos (bearded ones)"); 1950's: March 8, 1959; An Intimate Lunch with Fidel, N.Y. TIMES, Apr. 14, 1996, [section] 6, at 104 (defining "barbudos" as the "bearded ones who fought with [Fidel Castro] in the Sierra").

(14.) HUGH THOMAS, CUBA THE PURSUIT OF FREEDOM 894-924 (1971) (describing the beginning of Castro's rebellion in 1956 through the Sierra Maestra); Estevez, supra note 4, at 1273 (noting that the Cuban revolution began during the "predawn hours of December 2, 1956").

(15.) LOUIS A. PEREZ, JR., CUBA BETWEEN REFORM AND REVOLUTION 290 (1995) ("On July 26, 1953, a young Ortodoxo, Fidel Castro, led a nearly suicidal attack on the second largest army installation of Moncada in Santiago de Cuba.").

(16.) ROBERT E. QUARK, FIDEL CASTRO 119 (W.W. Norton & Co. 1993) (describing Castro's trip from Mexico to Cuba).

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(17.) *Id.* at 120-21; see also *id.* at 119-48 (offering a thorough account of the guerrilla war that Castro and his comrades waged from the Sierra Maestra mountains).

(18.) *Id.*

(19.) See Hughes, *supra* note 6, at 42 (characterizing Cuba's socialist revolution as the most "thorough and radical in twentieth-century Latin America").

(20.) See FELIX MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS: CUBAN MIGRATION TO THE U.S., 1959-1995, at 3 (1995). The Cold War refers to the political, military, and ideological tension that existed during the second half of the twentieth century between the Soviet Union and its communist allies on the one hand, and the United States and western democracies on the other. See, e.g., MERRIAM-WEBSTER ONLINE, <http://www.merriam0webster.com/dictionary/cold%20war> (last visited Mar. 1, 2011).

(21.) See Maryellen Fullerton, Cuban Exceptionalism: Migration and Asylum in Spain and the United States, 35 U. MIAMI INTER-AM. L. REV. 527, 539-41 (2004) (describing the way "Cuban emigration to the United States came alive in the nineteenth century").

(22.) See *id.* at 539.

(23.) *Id.*

(24.) *Id.* at 539-40 & n.72.

(25.) PEREZ, *supra* note 15, at 145-48.

(26.) John L. Offner, McKinley and the Spanish-American War, 34 PRES. STUD. Q. 50, 56 (2004).

(27.) Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris] (stating the purpose of the treaty was "to end the state of war now existing between the two countries"); see also Carmen Diana Deere, Here Come the Yankees! The Rise and Decline of United States Colonies in Cuba, 1898-1930, 78 HISP. AM. HIST. REV. 729, 739 (1998) (noting the Treaty of Paris "concluded the Spanish-American War").

(28.) Treaty of Paris, *supra* note 27, art. I-III; see also Deere, *supra* note 27, at 732.

(29.) PEREZ, *supra* note 15, at 191.

(30.) Treaty Between the United States and Cuba Embodying the Provisions Defining the Future Relations of the United States with Cuba, U.S.-Cuba, art. III, May 22, 1903, 33 Stat. 2248; MASUD-PILOTO, *supra* note 20, at 12-13 (explaining how the Platt Amendment "turned Cuba into an American protectorate").

(31.) See PEREZ, *supra* note 15, at 186-88, for a more thorough discussion of Cubans' reaction to the Platt Amendment.

(32.) See MASUD-PILOTO, *supra* note 20, at 13-15.

(33.) Hughes, *supra* note 6, at 43. Following the terrorist attacks in New York, N.Y., and Washington, D.C. on September 11, 2001, the Administration of George W. Bush built a detention facility in Guantanamo Bay to house individuals whom the Department of Defense classified as enemy combatants. See Steve Vogel, Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer to U.S. Base in Cuba, WASH. POST, Jan. 9, 2002, at A01. After taking office in 2009, President Barack Obama pledged to close the detention facility in Guantanamo Bay. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities. There is no sign, however, that the Obama Administration intends to cede control of Guantanamo Bay to the Cuban Government. See MARK P. SULLIVAN, CONG. RESEARCH SERV., R40193, CUBA: ISSUES FOR THE 111TH CONGRESS 47-48 (2009),

Rethinking the Cuban Adjustment Act and the U.S. national interest.

available at <http://www.fas.org/sqp/crs/row/R40193.pdf> (explaining that President Obama's Executive Order No. 13,492 "requires the closure of the Guantanamo detention facility (not the base itself)").

(34.) See MARK P. SULLIVAN, CONG. RESEARCH SERV., RL32730, CUBA: ISSUES FOR THE 109TH CONGRESS 40 (2006), available at <http://fpc.state.gov/documents/organization/78712.pdf>; see also **Cuban** Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1417 n.1 (11th Cir. 1995) (discussing the terms of the lease agreement between Cuba and the United States).

(35.) See generally Ana M. Otero, To the People Sitting in Darkness: A Resolve for Unity and Integration, 54 RUTGERS L. REV. 1133, 1145-48 (2002) (recounting the historical circumstances surrounding Castro's rise to power).

(36.) MASUD-PILOTO, supra note 20, at 19.

(37.) See id. at 20-22 (indicating Castro "declared that although he wanted good relations with the Eisenhower administration, he would not be submissive to Washington, nor would he sell himself to the United States"); see also LOUIS A. PEREZ, JR., CUBA AND THE UNITED STATES 241-43 (1990). Among the measures taken by Castro that annoyed the U.S. government were the establishment of economic and diplomatic relations with the Soviet Union and the expropriation of numerous North American properties and enterprises. Id.

(38.) MASUD-PILOTO, supra note 20, at 21; see also PEREZ, supra note 37 at 241-43.

(39.) MASUD-PILOTO, supra note 20, at 46.

(40.) Id.

(41.) Fidel Castro Ruz, Speech at Havana May Day Celebrations (May 2, 1961), available at <http://lanic.utexas.edu/project/castro/db/1961/19610502.html>.

(42.) Don Quijote, supra note 10, at 904; see also QUIRK, supra note 16, at 425.

(43.) QUIRK, supra note 16, at 430.

(44.) See Peter W. Rodman, The Missiles of October, in **CUBAN** COMMUNISM 74-76 (Irving Louis Horowitz ed., 6th ed. 1987).

(45.) Id.

(46.) ELISABETH GAY'NOR ELLIS & ANTHONY ESLER, WORLD HISTORY: CONNECTIONS TO TODAY 827 (Tom Barber, et al. eds., 1997).

(47.) See, e.g., James C. McKinley, Jr., **Cuban** Officials Say Castro is Recovering and the Nation is Stable, N.Y. TIMES, Aug. 8, 2006, at A4.

(48.) See MARK P. SULLIVAN, CONG. RESEARCH SERV., R40193, CUBA: ISSUES FOR THE 111TH CONGRESS 16-25 (2010), available at <http://www.fas.org/sqp/crs/row/R40193.pdf> (analyzing U.S. policy towards Cuba as of 2010).

(49.) See **Cuban** Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 [section] 102, 22 U.S.C. [section] 6032 (2006) (promulgating a policy for the "enforcement of the economic embargo of Cuba"); see also id. at [section] 6064 (requiring Congressional action before sanctions may be lifted); Hughes, supra note 6, at 48 (depicting the LIBERTAD Act as "strengthening the economic embargo"). President Clinton signed the LIBERTAD Act in response to the **Cuban** government's downing of civilian planes over international waters in 1996, which killed three U.S. citizens and one permanent resident. Id.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(50.) GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945-PRESENT*, at 66 (1986).

(51.) ELLIS & ESLER, *supra* note 46, at 956.

(52.) Larry Nackerud et al., *The End of the Cuban Contradiction in U.S. Refugee Policy*, 33 INT'L MIGR. REV. 176, 184 (1999).

(53.) See *id.*

(54.) See *id.*

(55.) MASUD-PILOTO, *supra* note 20, at 59; see also ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* 86 (1985).

(56.) See MASUD-PILOTO, *supra* note 20, at 59; see also PORTES & BACH, *supra* note 55, at 86.

(57.) PORTES & BACH, *supra* note 55, at 86.

(58.) MASUD-PILOTO, *supra* note 20, at 57; see also Don Quijote, *supra* note 10, at 904.

(59.) See MASUD-PILOTO, *supra* note 20, at 57-58.

(60.) Don Quijote, *supra* note 10, at 904.

(61.) *Id.*

(62.) MASUD-PILOTO, *supra* note 20, at 61-62.

(63.) *Id.* at 65, 68.

(64.) See discussion *infra* Part III.B.

(65.) See Nackerud et al., *supra* note 52, at 177; see also Hughes, *supra* note 6, at 40.

(66.) See Adjustment of Status for Cuban Refugees: Hearings on H.R. 15182, H.R. 15183, H.R. 16908, H.R. 10808, and H.R. 13393 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary, 89th Cong. 3-4 (1966) [hereinafter Adjustment of Status Hearing] (Statement of Hon. George Ball, Undersec'y of State) (supporting the enactment of H.R. 15183 to "further demonstrate the desire of the United States to play a full and sympathetic role as a country of asylum for refugees from communism").

(67.) See Nackerud et al., *supra* note 52, at 177. "[T]he massive wave of Cubans who came after Castro undoubtedly influenced a series of steps undertaken by the United States to isolate diplomatically, deprive economically, discredit ideologically, and--prior to 1965--overthrow violently the Castro regime." Hughes, *supra* note 6, at 51 (citing John Scanlan & Gilbert Loescher, U.S. Foreign Policy, 1959-80: Impact on Refugee Flow from Cuba, 467 ANNALS AM. ACAD. 117, 127 (1983)).

(68.) See Nackerud et al., *supra* note 52, at 166-67.

(69.) See *id.* at 184-85; Scanlan & Loescher, *supra* note 67, at 118.

(70.) See Hughes, *supra* note 6, at 53.

(71.) *Id.*

(72.) Immigration and Nationality Act, 8 U.S.C. [section] 1101(a)(13) (2006) (defining "admission" as "the lawful entry of an alien into the United States after inspection and authorization by an immigration officer"); see also Silva

Rethinking the Cuban Adjustment Act and the U.S. national interest.

v. Bell, 605 F.2d 978, 980 (7th Cir. 1979) ("[P]arole admittance is temporary and a paroled alien must eventually either secure a visa through regular procedures or return to his country of origin....").

(73.) H.R. REP. NO. 89-1978, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 3792, 3794. At the time of the enactment of the CAA, INA [section] 245(c) precluded "natives of any country of the Western Hemisphere ... from applying for adjustment to permanent resident status while in the United States." *Id.* at 1.

(74.) See Don Quijote, *supra* note 10, at 908 (discussing four predominant reasons that motivated Congress to enact the CAA).

(75.) See *id.* ("Congress sought to advance Cold War objectives by destabilizing a Communist dictatorship that posed a threat to American national security.").

(76.) 605 F.2d 978 (7th Cir. 1979).

(77.) *Id.* at 981.

(78.) See *id.*

(79.) H.R. REP. NO. 89-1978, at 3-4 (1966), reprinted in 1966 U.S.C.C.A.N. 3792, 3795-96.

(80.) *Id.* at 2.

(81.) *Id.* at 6.

(82.) See *id.*

(83.) See Don Quijote, *supra* note 10, at 910; Silva, 605 F.2d at 981 (explaining that the U.S. consulates in Canada and Mexico "had lengthy waiting lists, which exacerbated the problem").

(84.) See Don Quijote, *supra* note 10, at 908.

(85.) *Id.* at 910-11.

(86.) H.R. REP. NO. 89-1978, at 6 (1966), reprinted in 1966 U.S.C.C.A.N. 3792, 3798.

(87.) See *id.*

(88.) See Don Quijote, *supra* note 10, at 910.

(89.) Adjustment of Status Hearing, *supra* note 66, at 4.

(90.) See Don Quijote, *supra* note 10, at 904.

(91.) *Id.* at 916-17.

(92.) See LOUIS A. PEREZ, JR., CUBA AND THE UNITED STATES 249 (3d ed. 2003) (describing the "revolution betrayed argument" as "the linchpin of the North American propaganda campaign against Cuba"); DON BOHNING, THE CASTRO OBSESSION: US COVERT OPERATIONS AGAINST CUBA 1959-1965, at 1 (2005) ("From ... 1959 until the mid-1960s, the U.S. government resorted to economic and political destabilization, propaganda, manipulation, sabotage, and assassination plots to remove [Castro]."); Hughes, *supra* note 6, at 47.

(93.) Estevez, *supra* note 4, at 1279-80.

(94.) Don Quijote, *supra* note 10, at 909-10.

(95.) *Id.* at 909.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(96.) *Id.* at 905 n.22, 909.

(97.) See Nackerud et al., *supra* note 52, at 188 tbl.1 (charting the annual patterns of Cuban migration from 1959 to 1980).

(98.) *Id.*

(99.) *Id.* at 186 (stating that the mass exodus during the Mariel Crisis overwhelmed the United States, prompting the U.S decision "to deny them automatic refugee status").

(100.) See Don Quijote, *supra* note 10, at 907.

(101.) MASUD-PILOTO, *supra* note 20, at 78. This incident resulted in the death of a Cuban security officer. *Id.*

(102.) *Id.* at 79.

(103.) *Id.*

(104.) *Id.* at 83.

(105.) Hughes, *supra* note 6, at 56 n.140 (noting President Jimmy Carter's response to a question from a representative of the League of Women Voters at a May 5, 1980 press conference).

(106.) See MASUD-PILOTO, *supra* note 20, at 87-88.

(107.) See Hughes, *supra* note 6, at 56.

(108.) MASUD-PILOTO, *supra* note 20, at 84 (footnote omitted).

(109.) See Hughes, *supra* note 6, at 56.

(110.) See *id.* at 56; see also *Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982) (stating that of the 125,000 Cuban immigrants that arrived, about 2,000 were detained).

(111.) See Brian Hutker & Gray Cavender, *From Freedom Flotilla to America's Burden: The Social Construction of the Mariel Immigrants*, 31 SOC. Q. 321, 321 (1990) (noting the use of this term arose amidst speculation Castro was "sweep[ing] Cuban society clean of its dregs"); see also QUIRK, *supra* note 16, at 808. Cubans seeking to leave through the Mariel boatlift also suffered harassment in Cuba. *Id.* The authors observed:

The Committees for the Defense of the Revolution organized a

campaign of vituperation against the 'common scum'.... Student

groups marched through Havana shouting inflammatory slogans

attacking the country's homosexuals. In the

schoolrooms children were encouraged to assault classmates whose

parents had signified their intent to leave.

Id.

(112.) Hutker & Cavender, *supra* note 111, at 321.

(113.) See *Palma*, 676 F.2d at 101 & n.1 (noting that of the 125,000 Cuban aliens that arrived, 122,000 had been paroled by the summer of 1981); see also Don Quijote, *supra* note 10, at 906 ("The CAA authorizes the Attorney General to grant permanent-resident status to any alien from Cuba who was admitted or paroled into the United States after January 1, 1959, and who has been physically present in the United States for at least two years.").

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(114.) See Palma, 676 F.2d at 102 (describing the procedures for granting parole to those deemed to have criminal backgrounds serious enough to warrant continued detention). The court described the procedures as follows:

The current plan ... calls first for a review of the detainee's

file. If parole cannot be recommended on that basis, a panel composed of Immigration and Department of Justice officials personally interviews the detainee ... [to] determine if the detainee should be recommended for parole, considering such factors as his past criminal history, his record of disciplinary infractions while in custody, and his cooperativeness in institutional work and vocational programs. Release cannot be recommended unless the panel members agree that (1) the detainee is presently a nonviolent person, (2) he is likely to remain nonviolent, and (3) he is unlikely to commit any criminal offense following his release. Panel recommendations ... must be approved by the Commissioner of the Immigration and Naturalization Service.

Id.

(115.) See id. at 101. "Exclusion proceedings were [instituted] against the 2,000 ... who were not [eligible] for immediate parole" and detained based on serious criminal backgrounds. Id. Of the 2000 detained, over eight hundred had been approved for parole by December 1981, 500 had actually been released and the remaining three hundred were awaiting sponsorship. Id. at 101 n.1.

(116.) See Fernandez-Roque v. Smith, 622 F. Supp. 887, 891 (N.D. Ga. 1985) ("[M]any class members who were initially paroled into the United States have had their paroles revoked for varying offenses ranging from relatively minor infractions to serious crimes."). The court further noted:

Beginning in May 1982, the general [INS parole revocation] policy

provided for revocation of the parole of any Mariel Cuban (1) who has been convicted in the United States of a felony or a serious misdemeanor and who has completed the imprisonment portion of the sentence; or (2) who presents a clear and imminent danger to the community or himself.

Id. at 895 (citation omitted); see also Pena v. Thornburgh, 770 F. Supp. 1153, 1155-57 (E.D. Tex. 1991) (revoking the petitioner's parole as a result of his criminal activities, including convictions for robbery with a pistol and aggravated assault with a pistol).

(117.) See Palma, 676 F.2d at 102; Safonts v. Thornburgh, No. 90-3536-RDR, 1993 WL 455287, at *1 (D. Kan. Oct. 29, 1993). In Safonts, the court noted:

In 1984, the United States and Cuba entered a migration agreement

under which Cuba agreed to repatriate 2746 named Mariel Cubans.

However, following the repatriation of approximately two hundred Cubans, Cuba suspended the agreement in May 1985. In 1987, Cuba and the United States agreed to reinstate the agreement ... [which] resulted in riots by Cuban detainees ending in considerable destruction to federal facilities in Atlanta, Georgia, and Oakdale, Louisiana.... [N]ew immigration parole and repatriation review programs were developed by the Attorney General. Safonts, 1993 WL

Rethinking the Cuban Adjustment Act and the U.S. national interest.

455287, at *1.

(118.) *Clark v. Martinez*, 543 U.S. 371, 377-78 (2005) (citing *Zadvydas v. Davis*, 533 U.S. 678, 697-701 (2001)). The Clark Court held:

[T]he statute ... permit[s] only detention that is related to the

statute's "basic purpose [of] effectuating an alien's removal...."

"[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized." ... [T]he presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future."

Id. (citations omitted).

(119.) See Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigr. Serv., to Reg'l Dirs. et al. (Mar. 7, 2005) (on file with U.S. Citizenship & Immigr. Sere.), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/mariels030705.pdf (describing the procedures by which U.S. Customs and Immigration Services should adjudicate the employment authorization applications of Cubans released pursuant to *Clark*).

(120.) Hughes, *supra* note 6, at 55 (noting that in some instances, existing immigration laws were impartially applied to ***Cuban*** migrants resulting in their inadmissibility into the United States).

(121.) See JESUS ARBOLEYA, *HAVANA-MIAMI: THE US-CUBA MIGRATION CONFLICT* 2-3 (1996).

(122.) Nackerud et al., *supra* note 52, at 178 (quoting Fidel Castro: *Comparecencia Ante La Lelevision Cubana* el 24 de agosto del 1994 (Granma television broadcast Aug. 24, 1994)).

(123.) Hughes, *supra* note 6, at 58 ("[Cubans]" set out in foam boxes, inner tubes and packing crates that pass for rails"); see also ARBOLEYA, *supra* note 121, at 3. Those who took to the sea were "confident that as had been customary in the past they would be picked up by U.S. ships a few miles offshore and taken to the United States where they would be accepted immediately." *Id.*

(124.) See Hughes, *supra* note 6, at 58; see also MASUD-PILOTO, *supra* note 20, at xix. The author explained:

They were trying to do what tens of thousands of Cubans had done

since 1959. They expected, like their precursors, to be received as

heroes and welcomed in the U.S. with open arms and open hearts.

... [But] [o]n August 19, 1994, President Bill Clinton closed the doors that had been opened to Cubans for more than thirty-five years.

MASUD-PILOTO, *supra* note 20, at xix; see also ARBOLEYA, *supra* note 121, at 3. The author explained:

[T]hings [did not] turn out that way since, for the first time in

35 years, the United States not only did not accept them, but also

confined them in virtual concentration camps.... IT]he ***Cuban*** illegal emigres ... lost their special status under U.S. immigration policy.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

ARBOLEYA, *supra* note 121, at 3.

(125.) Hughes, *supra* note 6, at 56-59 (quoting President James Carter, Address at the League of Women Voters' Biennial National Convention (May 5, 1980), available at <http://www.presidency.ucsb.edu/medialist.php?presid=39> (follow "League of Women Voters Remarks and a Question-and-Answer Session at the League's Biennial National Convention" hyperlink)) (contrasting the policy by President Carter prior to the 1980 "Freedom Flotilla" to that of President Clinton's refusal to allow entry to the "balseros" of the 1994 exodus). The author explained:

Before the Freedom Flotilla in 1980, President Carter ... announced

the U.S. would "continue to provide an open heart and open arms to
refugees seeking freedom from Communist domination and from
economic deprivation brought about primarily by Fidel Castro and
his government."

Id. at 56.

(126.) See Nackerud et al., *supra* note 52, at 178; Hughes, *supra* note 6, at 58-59; MASUD-PILOTO, *supra* note 20, at xix (noting that approximately 32,000 of the over 35,000 who took to the sea in an attempt to reach the U.S. were detained in Guantanamo Bay).

(127.) See Hughes, *supra* note 6, at 59 (noting that "the reversal of long-standing U.S. policy to welcome fleeing Cubans [] respond[ed] 'to criticism that [the U.S.] had been treating Cuban refugees differently from Haitian refugees"); Estevez, *supra* note 4, at 1277 (explaining that the CAA was the basis from which Cuban refugees were welcomed and afforded "preferential" treatment); Don Quijote, *supra* note 10, at 908. (discussing the longstanding policies underlying the preferential treatment historically given to Cuban refugees).

(128.) Joint Communiqué Between the United States and Cuba Concerning Normalizing Migration Procedures, U.S.-Cuba, Sept. 9, 1994, State Dep't No. 94-232, 1994 WL 621517 [hereinafter Joint Communiqué].

(129.) *Id.*

(130.) *Id.* For a list of categories of inadmissible aliens, see Immigration and Nationality Act [section] 212(a), 8 U.S.C. [section] 1182(a) (2006).

(131.) Joint Communiqué, *supra* note 128. In conjunction with the Joint Communiqué, the Attorney General "ordered that no Cuban who ... accepted safe haven in Guantanamo Bay or Panama would be allowed to apply ... for asylum in the United States...." Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1418 (11th Cir. 1995); see also Hughes, *supra* note 6, at 61.

(132.) See Christopher, 43 F.3d at 1419.

(133.) *Id.* at 1420. Between 1992 and 1994, the U.S. Coast Guard interdicted Haitians bound for the United States on the high seas and repatriated them. *Id.* at 1419. In July 1994, the United States began providing safe haven at Guantanamo Bay to the Haitian migrants. *Id.* The district court granted the Haitian Refugee Center's motion to intervene on November 2, 1994. *Id.* at 1420-21 n.6.

(134.) *Id.* at 1421.

(135.) Immigration and Nationality Act, 8 U.S.C. [section] 1231(b)(3)(A) (2006) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

(136.) Christopher, 43 F.3d at 1425-26 (citing *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993)).

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(137.) Id. at 1425.

(138.) Id. at 1426.

(139.) Id. at 1427-28 ("Aliens may be excluded or denied parole on grounds that might be 'suspect in the context of domestic legislation,' because 'there are apparently no limitations on the power of the federal government to determine ... what procedures will be used to determine [aliens'] admissibility.'" (citation omitted)).

(140.) Clinton Administration Reverses Policy on Cubans, 72 INTERPRETER RELEASES 622 (1995) [hereinafter Policy Reversal]; Hughes, *supra* note 6, at 61.

(141.) See Joint Statement on Normalization of Migration, Building on the Agreement of Sept. 9, 1994, U.S.-Cuba, May 2, 1995, 35 I.L.M. 327 (1996) [hereinafter Joint Statement].

(142.) Id.

(143.) Id.

(144.) Id.

(145.) Hughes, *supra* note 6, at 62.

(146.) See Policy Reversal, *supra* note 140, at 624.

(147.) Id.

(148.) Clinton Defends Cuba Policy, ASSOCIATED PRESS, June 27, 1995; see also John Lantigua, Clinton Defends Policy, MIAMI HERALD, June 28, 1995, at 1B, cited in Matias F. Travieso-Diaz, Immigration Challenges and Opportunities in a Post-Transition Cuba, 16 BERKELEY J. INT'L L. 234, 245 n.56 (1998).

(149.) Hughes, *supra* note 6, at 63 (citations omitted).

(150.) See Javier Talamo, Note & Comment, The **Cuban** Adjustment Act: A Law Under Siege?, 8 ILSA J. INT'L & COMP. L. 707, 718 (2002) (discussing the confusion that particular U.S. legislation created regarding Cubans who enter the U.S. through irregular and illegal means).

(151.) Joint Communiqué, *supra* note 128.

(152.) Immigration and Nationality Act, 8 U.S.C. [section] 1182(a)(6)(A)(i) (2006).

(153.) See Memorandum from Doris Meissner, Comm'r, U.S. Immigr. and Naturalization Serv., to INS Regional Directors et al. (Apr. 19, 1999) [hereinafter Meissner Memo], available at <http://www.acf.hhs.gov/programs/orr/policy/s107-14.htm> (on file with the U.S. Dep't of Health and Human Servs.) (explaining that Cubans arriving at a port other than a designated port-of-entry remain eligible for adjustment of status under the **Cuban** Adjustment Act).

(154.) Id.

(155.) Id.

(156.) Id. See Matter of Mesa, 12 I. & N. Dec. 432 (BIA 1967), for the complete decision discussing this policy.

(157.) See Matter of Mesa, 12 I. & N. Dec. at 434 (reversing denial of aliens' applications for adjustment of status under the INA); Immigration and Nationality Act [section] 212(a)(15), recodified as [section] 212(a)(4)(A), 8 U.S.C. [section] 1182(a)(4)(A) (2006) ("Any alien who in the opinion of the consular at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.").

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(158.) Matter of Mesa, 12 I. & N. Dec. at 434.

(159.) See id. at 434-35.

(160.) See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, [section] 606(a), 110 Stat. 3009-546, 3009-695 (1996) (codified as amended in scattered sections of 8 U.S.C.).

(161.) See Meissner Memo, supra note 153.

(162.) Id.

(163.) Id.

(164.) The vernacular term for the policy of repatriating Cubans interdicted at sea, while paroling those touching U.S. soil is the "wet foot, dry foot" policy. See RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS (Jun. 2, 2009), available at <http://www.fas.org/sgp/crs/row/R40566.pdf>.

(165.) See discussion infra Part V.C (explaining the inconsistency between Meissner's interpretation of the CAA, and the applicable statutory language).

(166.) See Educating About Immigration: History Lesson 9: Refugees from the Caribbean: Cuban and Haiti "Boat People," CONST. RTS. FOUND., <http://crfimmigrationed.org/index.php/lessons-for-teachers/148-h19> (last visited Mar. 1, 2011).

(167.) See WASEM, supra note 164, at 10 fig. 1. U.S. Coast Guard interdictions of Cubans have trended upward since the May 1995 agreement, as there were slightly over four hundred in the years immediately following the agreement, and over 2,000 interdictions in each year since 2005. See id. at 9 (providing exact numbers of U.S. Coast Guard interdictions for particular years).

(168.) See Alberto J. Perez, Note, Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy, 28 NOVA L. REV. 437, 461 (2004).

(169.) See, e.g., Don Quijote, supra note 10, at 914-17.

(170.) See, e.g., Talamo, supra note 150, at 715; Estevez, supra note 4, at 1282-84.

(171.) See Wasem, supra note 164, at 17 ("Some maintain that the 1966 Cuban Adjustment Act is obsolete and locked into the mindset of the Cold War era, as well as unnecessary since Cubans may seek asylum under the refugee laws enacted since 1966.").

(172.) See Fall of the Soviet Union, COLD WAR MUSEUM, http://www.coldwar.org/articles/90s/fall_of_the_soviet_union.asp (last visited Mar. 1, 2011) (discussing the end of the Cold War).

(173.) See id.

(174.) See id.

(175.) See Don Quijote, supra note 10, at 917 (discussing how Castro is taking advantage of the CAA and using the U.S. as a dumping grounds for people who cannot assimilate to the U.S. workforce, such as criminals and mental patients).

(176.) See LOUIS A. PEREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION 344 (3d ed. 2006); see also Don Quijote, supra note 10, at 914 (explaining that a maximum of 20,000 immigrant visas to the United States may be issued annually through the U.S. Interests Section in Havana).

(177.) Don Quijote, supra note 10, at 914.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(178.) Refugee Admissions Program for Latin America and the Caribbean, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, U.S. DEPT OF STATE, (Feb. 6, 2009), <http://www.state.gov/g/prm/rls/117282.htm>. Cubans eligible to apply through the in-country refugee program include the following: (1) former political prisoners; (2) members of persecuted religious minorities; (3) human rights activists; (4) forced labor conscripts during the period of 1965-1968; (5) persons receiving disproportionately harsh treatment because of their religious or political beliefs; and (6) persons who fear harm because of their relationship to an individual failing under one of the above-mentioned categories. *Id.*

(179.) See *supra* note 175 and accompanying text.

(180.) See Green Card for a **Cuban** Native or Citizen, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov> (search "Search" for "Green Card for a **Cuban** Native or Citizen"; then follow "Green Card for a **Cuban** Native or Citizen" hyperlink) (last visited Mar. 1, 2011).

(181.) See H.R. 5670, 109th Cong. [section] 1 (2d Sess. 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5670ih.txt.pdf (illustrating that Congressional motions to repeal the **Cuban** Adjustment Act do not intend on affecting aliens admitted or paroled into the United States prior to the bill's passage).

(182.) See U.S. Cuba Policy Rewards Illegal Immigration, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/site/PageServer?pagename=iic_cuba_policy (last visited Mar. 1, 2011).

(183.) See Estevez, *supra* note 4, at 1285-86; Talamo, *supra* note 150, at 723-24.

(184.) 2009 Human Rights Report: Cuba, Bureau of Democracy, Hum. Rts., and Lab., U.S. Dep't of State, (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136108.htm> (last visited Mar. 1, 2011) [hereinafter Human Rights Report].

(185.) See WASEM, *supra* note 164, at 16 (explaining that numerous international human rights groups denounce human rights violations in Cuba).

(186.) *Id.* See generally New Castro, Same Cuba: Political Prisoners in the Post-Fidel Era, HUM. RTS. WATCH (Nov. 1999), http://www.hrw.org/sites/default/files/reports/cuba1109web_l.pdf (detailing accounts of alleged instances of Cuba's human rights abuses).

(187.) See WASEM, *supra* note 164, at 2.

(188.) MASUD-PILOTO, *supra* note 20, at 60.

(189.) *Id.*; Estevez, *supra* note 4, at 1282.

(190.) See Ted Henken, Of Rafters and Refugees, in CUBA TODAY: CONTINUITY AND CHANGE SINCE THE 'PERIODO ESPECIAL' 149 (Mauricio A. Font ed. 2004) ("Few recent migrants can legitimately claim to have suffered personal persecution while in Cuba... or fear it upon their return to the island as visitors.").

(191.) See Hughes, *supra* note 6, at 74-75.

(192.) *Id.* at 74.

(193.) *Id.* at 75.

(194.) See THE OXFORD SPANISH DICTIONARY 67, 454 (1994) (defining "ley" as "law" and "asesina" as "murderous"). The English translation of "la ley asesina" is "the murderous law." *Id.*

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(195.) Proclamation by the National Assembly of People "s Power of the Republic of Cuba on the Cuban Adjustment Act, DIGITAL GRANMA INT'L (Cuba), July. 12, 2000, available at <http://www.granma.cu/documento/ingles00/026-i.html>.

(196.) See id. According to a Cuban government-run web publication, "Cuba will continue to publicly identify the Cuban Adjustment Act as 'the murderous law,' and will continue warning of the risks and dangers it provokes, and will not cease in denouncing those who are responsible for its continued application." La ley de ajuste cubano, INSTITUTO CUBANO DE AMISTAD CON LOS PUEBLOS (2007), http://www.icap.cu/medidas/ajuste_cubano.html (last visited Mar. 1, 2011) (translated by author).

(197.) See, e.g., id. During an interview with ABC News, the President of the Cuban National Assembly, Ricardo Alarcon, claimed that the Cuban Adjustment Act is a way to "distort reality." Interview by Sam Donaldson with Ricardo Alarcon, President, Cuban National Assembly, This Week (ABC News television broadcast Jul. 2, 2000), cited in Talamo, supra note 150, at 721.

(198.) Human Rights Report, supra note 184.

(199.) Id.; WASEM, supra note 164, at 5.

(200.) Human Rights Report, supra note 184.

(201.) SULLIVAN, supra note 33, at 52. Sullivan noted:

At the time [of the suspension of bilateral migration discussions],

the State Department maintained that Cuba refused to discuss five

issues identified by the United States: (1) Cuba's issuance of exit permits for all qualified migrants; (2) Cuba's cooperation in holding a new registration for an immigrant lottery; (3) the need for a deeper Cuban port used by the U.S. Coast Guard for the repatriation of Cubans interdicted at sea; (4) Cuba's responsibility to permit U.S. diplomats to travel to monitor returned migrants; and (5) Cuba's obligation to accept the return of Cuban nationals determined to be inadmissible to the United States.

Id.

(202.) Id. at 53.

(203.) Id.

(204.) Statement from the Ministry of Foreign Affairs, DIGITAL GRANMA INT'L (Cuba), Feb. 22, 2010, available at <http://www.granma.cu/ingles/2010/febrero/lun22/statement-ministry-foreignaffairs.html>.

(205.) Id.

(206.) See Press Release, Ministry of Foreign Affairs of Cuba, Cuban Delegation Statement on the Washington Migration Talks with the United States (June 18, 2010), <http://www.cubaminrex.eu/english/Aktualidad/2010/junio/press.html>; Press Release, Ministry of Foreign Affairs of Cuba, Cuban Delegation Statement on the Havana Migration Talks with the United States (Jan. 12, 2011), <http://www.cubaminrex.eu/english/Statements/Articulos/> StatementsMINREX/2011/PRESS.html.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(207.) Press Release, Ministry of Foreign Affairs of Cuba, Cuban Delegation Statement on the Havana Migration Talks with the United States (Jan. 12, 2011), <http://www.cubaminrex.cu/englishb./Statements/Articulos/StatementsMINREX/2011/PRESS.html>.

(208.) See Henken, *supra* note 190, at 148-49.

(209.) See *id.* (explaining that the attorney general's authority to grant parole to Cuban migrants is discretionary).

(210.) See Immigration and Nationality Act, 8 U.S.C. [section] 1182(d)(5).

(211.) See Cuban Adjustment Act of 1966, Pub. L. No. 89-732 [section] 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. [section] 1255).

(212.) See Henken, *supra* note 190, at 149 (noting that granting parole to all Cuban arrivals is not mandated by the CAA).

(213.) Compare Meissner Memo, *supra* note 153 (explaining that Cubans who touched land would continue to be paroled), with Joint Communique, *supra* note 128 (stating explicitly that the U.S. had "discontinued its practice of granting parole to all Cuban migrants who reach the U.S. territory in irregular ways"), Joint Statement, *supra* note 141 (omitting any discussion about whether Cubans arriving illegally in the U.S. would be allowed to remain), and 8 U.S.C. [section] 1255(a) (2006) (providing that the Attorney General only has discretion to adjust the status of a Cuban citizen admitted or paroled).

(214.) See *supra* notes 156-59 and accompanying text.

(215.) *Matter of Mesa*, 12 I. & N. Dec. 432 (BIA 1967).

(216.) See Cuban Adjustment Act of 1966 [section] 1 (providing the basic requirements for an alien to be considered for adjustment by the Attorney General).

(217.) Compare Meissner Memo, *supra* note 153 (relying on the reasoning employed in *Matter of Mesa* to justify the policy of paroling all Cubans who reach land), with *Matter of Mesa*, 12 I. & N. Dec. at 437-38 (stating that the decision reached by the BIA in *Mesa* would not necessarily preclude the Attorney General from exercising discretion to deny parole into the United States); see also Cuban Adjustment Act of 1966 [section] 1.

(218.) See, e.g., *Don Quijote*, *supra* note 10, at 914-17.

(219.) *Don Quijote*, *supra* note 10, at 915-16. Such facial inequality and charges of racism have served to tarnish the legitimacy of U.S. immigration policy. *Id.* at 916.

(220.) See Hughes, *supra* note 6, at 72 (arguing that changing racial demographics in Cuba may have prompted a change in the U.S. policy of automatically welcoming Cubans); Estevez, *supra* note 4, at 1292.

(221.) See Terry Coonan, Comment, *America Adrift: Refoulement on the High Seas*, 63 U. CIN. L. Rev. 1241, 1267 (1995) ("The clear inadequacy of national remedies is perhaps the foremost reality of the current global refugee crisis.").

(222.) 459 U.S. 21, 32 (1982).

(223.) 431 F.3d 1291, 1295 (11th Cir. 2005).

(224.) See *id.* The petitioner in the case had attempted to enter the United States by presenting a fraudulent passport. *Id.* at 1293. Under the INA any alien who attempts to enter the United States by fraud is inadmissible. *Id.* Immigration and Nationality Act, 8 U.S.C. [section] 1182(a)(6)(C)(i) (2006).

(225.) See Alexis, 431 F.3d at 1295-96.

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(226.) See, e.g., *Sale v. Haitian Ctrs Council, Inc.*, 509 U.S. 155 (1993) (holding that U.S. immigration laws do not apply extraterritorially); *Haitian Refugee Ctr., Inc. v. Christopher*, 43 F.3d 1431 (11th Cir. 1995) (holding that refugees given safe-haven abroad enjoy no rights under U.S. law).

(227.) See John Freer, Plenary Power: Should Judges Control U.S. Immigration Policy, *BACKGROUND, CTR. FOR IMMIG. STUD.*, 1 (Feb. 2009), <http://www.cis.org/articles/2009/back209.pdf>. Under the plenary power doctrine, the legislative and executive branches have power to dictate immigration laws without judicial intervention. *Id.* As such, immigration policies are made by politically accountable actors based on political, social, economic, or other such concerns. *Id.*

(228.) See *supra* notes 188-90 and accompanying text. See also WASEM, *supra* note 164, at 17

(suggesting that the CAA is locked into the Cold War Era); Alice Barrett & Kelsey Cary, Disparities in U.S. Immigration Policy Toward Haiti and Cuba: A Legacy to be Continued?, *COUNCIL ON HEMISPHERIC AFFAIRS*, <http://www.coha.org/disparities-in-u-s-immigration-policy-toward-haiti-and-cuba-a-legacy-to-be-continued> (last visited Mar. 1, 2011) (arguing that Cubans should not receive a warmer welcome into the United States than Haitians because the Cold War ended twenty years ago).

(229.) See *Zavvydas v. Davis*, 533 U.S. 678, 699 (2001).

(230.) See *Don Quijote*, *supra* note 10, at 916--17 (explaining that the CAA has served as a shield that has protected Cuba by enabling the island to export undesirables); *MASUD-PILOTO*, *supra* note 20, at 100--01; *supra* note 175 and accompanying text.

(231.) Cf. *Don Quijote*, *supra* note 10, at 908 (stating that the CAA's historical justification is based on the promotion of, rather than opposition to, national security); *Talamo*, *supra* note 150, at 723 (explaining that legal academia is challenging the CAA based on the outdated intent of the Act as well as its antiquated justifications).

(232.) See KENNETH J. FRANZBLAU, U.S. COMMISSION ON IMMIGRATION REFORM, IMMIGRATIONS IMPACT ON U.S. NATIONAL SECURITY AND FOREIGN POLICY, <http://www.utexas.edu/lbj/uscir/respap-t.html> (analyzing the security threat caused by migrants and refugees in their host country).

(233.) See SCOTT W. CARMICHAEL, *TRUE BELIEVER: INSIDE THE INVESTIGATION AND CAPTURE OF ANA MONTES, CUBA'S MASTER SPY* viii (2007). Scott Cannichael is a counterintelligence officer employed by the United States Defense Intelligence Agency. *Id.* at vii. In his book, Carmichael describes his role in the capture of Ana Belen Montes, a Pentagon analyst who was convicted of spying for Cuba in 2002. See *id.* at viii. Montes was sentenced to twenty-five years imprisonment for her espionage activities. *Id.* at 133.

(234.) See James Roberts, *Cuba at the Crossroads: The Threat to U.S. National Security*, *HERITAGE FOUND.*, 1 (Oct. 18, 2007), <http://www.heritage.org/research/reports/2007/10/Cuba-atthe-crossroads-the-threat-to-us-national-security> (last visited Mar. 1, 2011) ("U.S. intelligence secrets collected by Cuba have been sold to or bartered with Russia, China, North Korea, Iran, and other enemies of the United States.").

(235.) See Press Release, Bureau of Western Hemisphere Affairs, U.S. Dep't of State, **Cuban** Espionage Against the U.S. (July 31, 2003), available at http://www.latinamericanstudies.org/cuba/cuban_espionage_03.htm (providing a brief description of each publicly known instance of **Cuban** espionage against the United States as of 2003); see also SULLIVAN, *supra* note 33, at 37-39 (discussing **Cuban** spies in the United States).

(236.) Press Release, Fed. Bureau of Investigation, Former State Department Official and Wife Plead Guilty in 30-year Espionage Conspiracy (Nov. 20, 2009) [hereinafter *Espionage Conspiracy*], available at <http://washingtondc.fbi.gov/dojpressrel/pressrel09/wfo112009a.htm>.

(237.) *Id.*

Rethinking the Cuban Adjustment Act and the U.S. national interest.

(238.) Press Release, Fed. Bureau of Investigation, Former State Department Official Sentenced to Life in Prison for Nearly 30-year Espionage Conspiracy (July 16, 2010), available at <http://washingtondc.fbi.gov/dojpressrel/pressre110/wfo071610.htm>.

(239.) See DAVID OWEN, HIDDEN SECRETS: A COMPLETE HISTORY OF ESPIONAGE AND THE TECHNOLOGY USED TO SUPPORT IT 221 (2002). In intelligence parlance, a "handler" is an employee of a foreign intelligence service whose job it is to recruit spies operating in an assigned location. See *id.* It is public knowledge that Aria Montes, who was a highly valued asset of the Cuban intelligence service, met with her Cuban handlers in the United States. *Id.*; see also The Case of the Cuban Spy, FED. BUREAU OF INVESTIGATION (Sept. 12, 2008), http://www.fbi.gov/page2/sept08/montes_091208.html. FBI agents did not arrest Montes immediately after learning of her espionage activities as they hoped to conduct surveillance of her for as long as necessary to identify her Cuban handlers. *Id.* She was arrested, however, following the terrorist attacks of September 11, 2001. *Id.* As she was to have access to U.S. war plans to strike Afghanistan, law enforcement officials decided to arrest her before she could compromise these plans to the Cuban government. *Id.*

(240.) See Cuban Adjustment Act of 1966, Pub. L. No. 89-732 [section] 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. [section] 1255) (providing for adjustment of status of Cuban refugees).

(241.) See *United States v. Campa*, 529 F.3d 980, 987-88 (11th Cir. 2008) (describing the activities of Cuban intelligence agents operating in South Florida against the Cuban emigre community); Sullivan, *supra* note 33, at 37-38 (discussing the penetration of Cuban exile groups by Cuban intelligence agents).

(242.) *Campa*, 529 F.3d at 987-88.

(243.) *Id.* at 988.

(244.) See *id.* at 987-98 (describing the activities of Cuban intelligence agents operating in South Florida against the Cuban emigre community); see also *Espionage Conspiracy*, *supra* note 236.

(245.) See *Campa*, 520 F.3d at 980 (affirming convictions of Cuban government agents for conspiracy to commit espionage and murder).

(246.) Immigration and Nationality Act, 8 U.S.C. [section] 1231(b)(3)(A) (2006) (preventing the Attorney General from "remov[ing] an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

(247.) See Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 YALE L.J. 458, 508 (2009). Under the wet foot-dry foot policy, Cubans interdicted at sea are returned to Cuba, but Cubans who step foot on U.S. soil are paroled into the United States, after which they usually can adjust their status under the Cuban Adjustment Act within a year, at the discretion of the Attorney General. *Id.*

(248.) See Cuban Adjustment Act of 1966, Pub. L. No. 89-732 [section] 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. [section] 1255).

(249.) See *id.*

(250.) See *id.*

(251.) See *id.*

(252.) Hughes, *supra* note 6, at 75.

(253.) *Id.* at 74-75.

Classification

Language: ENGLISH

Document-Type: Fulltext

Publication-Type: Journal

Journal Code: 5934

Acc-No: 7118967

Subject: IMMIGRATION (89%); PUBLIC POLICY (89%); REFUGEES (89%); ESPIONAGE (86%); US-CUBA DIPLOMATIC RELATIONSHIP (78%); ANTI-CASTRO CUBANS (78%); HISPANIC AMERICANS (77%); MIGRATION ISSUES (77%); NATIONAL SECURITY (71%); INTELLIGENCE SERVICES (60%); LABOR FORCE (56%)

Product: 970000 (National security and international affairs); 971000 (National security)

Person: FIDEL CASTRO (58%)

Geographic: CUBA (98%); UNITED STATES (94%)

SPECIAL FEATURE: Table

Load-Date: July 20, 2011