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Article

Cuban Migration to the United States in a Post-Normalized Relations World

Kevin J. Fandl*

Abstract

Relations between Cuba and the United States have ebbed and flowed between outright hostility and friendship. Recently, major steps have been taken by both countries to put the Cold War past behind them and work toward a sustainable relationship for the future. As economic and political relations between the two neighbors improve, it is imperative that immigration policy be part of the transitional process. Cubans have enjoyed special immigration status for half a century, largely as a result of the Cold War. The process of economic normalization must include a normalization of immigration policy, phasing out the unnecessary and unfair favoritism that is a vestige of a long-gone era of our history.

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I. INTRODUCTION

Although one cannot predict with certainty the reaction of the United States government to the start of Cuba's democratic transition, its immigration policy towards Cuba is unlikely to remain the same once the process gets under way. For over three decades, the United States has accepted hundreds of thousands of Cubans, bypassing the standard rules for granting asylum or admitting aliens as permanent residents. This preferential treatment given to Cuban immigrants will almost certainly cease with the end of communism in Cuba, unless the political conditions on the island remain unstable and warrant continuation of some program for the handling of refugees Since the immigration policy of this country is to provide uniform treatment to aliens seeking admission, regardless of their country of origin, Cuban nationals may well find themselves facing the same barriers that citizens from other countries presently experience in seeking to migrate to the United States.¹

These words were spoken by a Cuban attorney at a meeting on the Cuban economy in 1998.² The statement came three years after Cuba had enacted a major foreign investment law welcoming investments, even from Americans, to stimulate their economy.³ It was also made two years after the Helms-Burton Act passed the United States Congress, putting significant economic and political pressure on Cuba through economic sanctions tied to a democratic transition on the island.⁴ No doubt, the tone at the end of the decade was one of hope through action. And now, 18 years later we see that the hope was squandered. But is there new hope today in the face of a softening tone toward Cuba?

1. Matias F. Travieso-Díaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 251 (1998).

2. *Id.*

3. See Kevin J. Fandl, *Foreign Investment in Cuban Real Property: The Case for American Investors*, 45 REAL ESTATE L. J. 166, 180 (2016).

4. Andreas Lowenfeld & Brice Clagett, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 419 (1996).

The United States has a long history with its neighbor 90 miles south of Florida. And given its proximity, Cuba has been a part of United States foreign policy, national security, and migration since its independence from Spain in 1898.⁵ At that moment, the United States was directly involved in the establishment of a free Cuba under the auspices of the United States government, similar to Puerto Rico but without citizenship rights. Trade relations between the countries were strong through the first half of the twentieth century, with Cuba exporting sugar and other agricultural products and the United States exporting essential commodities.⁶

The relationship between the United States and Cuba dramatically changed following the coup d'état by Fidel Castro and the removal of Fulgencio Bautista from office. Castro installed himself as a dictator and quickly aligned himself with the communist movement led by the Soviet Union.⁷ What unfolded after this turn of events was the rapid deterioration of relations between the once friendly neighbors into proxy wars, subversive interventions, and ultimately a nonviolent standoff.⁸ Today, as a new generation with little connection to the cold war expresses their desire to bring Cuba back into the neighborhood on positive terms, there is hope that the two countries will once again engage with each other.⁹

The effects that the recent softening of United States-Cuba relations will have on Cuban and American markets, which I

5. See generally Marc-William Palen, *The Unequal US-Cuban Power Relationship Stretches Back to the Turn of the 20th Century*, HISTORYTODAY (Dec. 21, 2014, 9:50 AM), <http://www.historytoday.com/marc-william-palen/us-cuba-embargo-goes-beyond-cold-war> (describing United States-Cuba relations throughout history, with particular emphasis on the rise of American imperialism and economic nationalism vis-à-vis Cuba and other occupied colonies following the Spanish-American War in 1898).

6. See generally Louis A. Perez Jr., *As Cuba and the United States Reengage: The Presence of the Past*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE, June 2015, at paras. 22, 29–47, <https://origins.osu.edu/article/cuba-and-united-states-reengage-presence-past> (describing both the importance of Sugar to the Cuban economy in the late 19th Century and the creation of a “free” Cuba).

7. See generally Alan H. Luxenberg, *Did Eisenhower Push Castro into the Arms of the Soviets?*, 30 J. INT'L STUD. & WORLD AFF. 37, 42–45 (1988) (discussing Castro's rise to power and his allegiance to Communism).

8. See William Harvey Reeves, *The Cuban Situation*, 17 BUS. LAW. 980, 981, 986–88 (1962).

9. Spencer Parts, *'Optimistic' Cuban Youths Prepare to Welcome Obama*, MIAMI HERALD (Mar. 18, 2016, 7:15 PM), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article66980802.html>.

have discussed elsewhere,¹⁰ is uncertain but likely positive. And the likelihood of more significant change in the near future is also strong.¹¹ What is less certain, however, is what will happen to U.S. immigration policy toward Cuba. Cubans that fled the island after Castro seized power were welcomed to the United States as political refugees. They were afforded a special immigration status that provided them with privileges that other migrants did not (and do not) have. This special Cuban migrant policy has been in place both as a way to provide refuge from Cuban communism and also as a way to appease the significant Cuban-American population in the United States, a rare group of first generation immigrants with voting rights.¹² In the face of normalizing economic and political relations between the countries, the status of that special migration policy is likely to come under fire.

In this paper, I will attempt to explain the dilemma that policymakers will face when the following question arises: now that relations with Cuba have been normalized, should Cuban migrants be subjected to the same scrutiny as other migrants? To do so, I will provide some background on the Cuban migration story by discussing key events in Cuban history that drove Cubans to leave the island in search of refuge in the United States. Then, I will explain the corresponding United States immigration laws affecting those Cuban migrants and how they have changed over time. Finally, I will describe the impact that normalized relations might have on Cuban migration by looking at similar cases in other socialist countries.

10. See Fandl, *supra* note 3.

11. Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the United States Embargo on Cuba*, 54 AM. BUS. L. J. 1, 43 (forthcoming 2017).

12. See Travieso-Díaz, *supra* note 1, at 250–52 (noting that Cubans have enjoyed special immigration rights in the past due to their flee from communism and, in the future, legislators will have to take political ramifications into account when proposing new immigration policy).

II. THE CUBAN MIGRATION STORY

Following World War II, at a time when thousands of individuals were displaced from their home countries due to war and the rise of communism, the United States enacted the Displaced Persons Act of 1948.¹³ That Act served as a precursor to the refugee policy later adopted, but interestingly, it also highlighted the preference of the United States government to welcome people displaced by communism; it attempted to deal with the refugee crisis produced by the war in Europe, but “singled out those fleeing from communist or communist-dominated countries as the most deserving for refugee status.”¹⁴ That Act exemplified the United States interest in providing a home for those whose political ideals conflicted with the ideals of communist regimes. This approach led the United States to welcome and even to encourage political refugees from Soviet republics, China, Cuba, and elsewhere, throughout the Cold War.¹⁵ To better understand how the route from communism in Cuba to capitalism in the United States developed for Cuban migrants, we must start with the revolution.

Since its independence from Spain in 1898 and from the United States in 1902, Cuba was led by a series of largely United States-supported authoritarian leaders.¹⁶ Fidel Castro, who disagreed with the corrupt and brutal leadership of Fulgencio Batista, led a successful coup against the Cuban government in 1958.¹⁷ This alone did not break the relationship between the United States and Cuba. It was a mixture of President Eisenhower’s distaste for Castro and Cuba’s distaste for American interference in their politics since 1898 that largely led to the steps both governments took in subsequent years to consolidate their positions. Without American support, Cuba turned to the Soviets, who visited shortly after the revolution, according to CIA documents.¹⁸

13. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1010 (1948).

14. Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG. 253, 258 (1995).

15. See Travieso-Díaz, *supra* note 1, at 239, 245 n.55.

16. See Fandl, *supra* note 3, at 166–67.

17. See, e.g., Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT’L L. 901, 908 (1995).

18. Memorandum from Sherman Kent, Chairman, Office of Nat’l

As part of its efforts to dispel support for the Castro regime, the United States took steps to encourage Cuban defections, especially of the elite and educated classes that might improve the Cuban economy.¹⁹

A. FREEDOM FLIGHTS: THE CUBAN AIRLIFT IN NOVEMBER
1965 – APRIL 1973

On September 29, 1965, Fidel Castro declared that any Cuban wanting to leave the island nation was free to do so.²⁰ He opened the Port of Camarioca and allowed Cubans wishing to depart to do so after filing a form with the state relinquishing title to all property in Cuba. Nearly 3,000 Cubans fled by boat into the rough seas on their way to the United States. The United States Coast Guard initiated a boatlift to rescue some of those migrants and to bring them safely to the United States.²¹

President Johnson, reiterating the United States policy to take in refugees fleeing communism, announced a few days later that the United States would begin twice-daily flights to Havana to bring those fleeing refugees to the United States.²² The Johnson Administration estimated as many as 100,000 Cuban refugees arriving during the airlift.²³ These flights became known as “freedom flights” and brought a mass surge of Cuban migrants to the United States.²⁴

American foreign policy at the time clearly favored support of Cuban migration from the Castro regime.²⁵ What was less clear was how United States immigration policy, which at the time was based on the 1952 Immigration and Nationality Act, would manage the large influx of Cuban arrivals.

To manage the surge of Cuban migrants fleeing Castro’s Cuba in the mid-1960s, Congress enacted the Cuban Adjustment

Estimates, to the Director of the CIA 6 (Feb. 21, 1961), https://www.cia.gov/library/readingroom/docs/DOC_0000132656.pdf.

19. See Bockley, *supra* note 14, at 262.

20. *Id.*

21. See, e.g., *The “Other” Boatlift: Camarioca, Cuba, 1965*, U.S. COAST GUARD, <https://www.uscg.mil/history/uscghist/camarioca1965.asp> (last updated Sept. 15 2015).

22. Robert Young, *Begin Miami Flights for Refugees Dec. 1*, CHI. TRIB., Nov. 7, 1965, at 1 (explaining that as many as 4,000 Cuban refugees monthly were expected during the airlift).

23. *Id.*

24. Joyce A. Hughes, *Flight From Cuba*, 36 CAL. W. L. REV. 39, 53 (1999).

25. Travieso-Díaz, *supra* note 1, at 239.

Act of 1966 (“Cuban Adjustment Act”).²⁶ This Act effectively turned Cuban migrants into a specially-protected class of migrants fleeing communism at the height of the Cold War. The Act put in place procedures allowing arriving Cubans as well as many Cubans already present in the United States to adjust to permanent resident status—the first step toward citizenship—after only one year of presence, regardless of how the individual arrived in the United States. The Cuban Adjustment Act, which will be discussed in more detail later, paved the way to surging demand by Cubans to make their way to the United States.

Cuban immigrants arriving in the United States prior to 1980 were largely white, upper-class, educated elites who had property in Cuba that Castro either seized or devalued through his socialist policies.²⁷ These Cuban migrants, who quickly became United States citizens in most cases, were active in politics and in pushing for United States actions against the Castro regime.²⁸ These immigrants differed greatly from the subsequent migrants, which included large numbers of working class, apolitical or pro-Castro Cubans fleeing dire economic circumstances similar to those in nearby Haiti or the Dominican Republic.²⁹ Yet, with the open door policy of the United States, they had a viable exit strategy.

B. THE 1980S NEW WAVE POLICY: SAY HELLO TO THE MARIELITOS³⁰

President Carter gave a significant speech on political refugees in 1980 in which he stated, “[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.”³¹ This became known as the “open arms”

26. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

27. John Grogan, *Early Cuban Refugees in Miami were Model of Success*, FLA. SUN SENTINEL (Aug. 21, 1994), http://articles.sun-sentinel.com/1994-08-21/features/9408190495_1_cuban-arrivals-cuban-immigrants-mariel.

28. See, e.g., Fandl, *supra* note 11 (noting that three Cuban-Americans were elected to Congress and took an active role in the policy of the United States towards Cuba).

29. See, e.g., Grogan, *supra* note 27.

30. A crude reference to the 1983 film *Scarface*, in which Al Pacino plays a criminal arriving in the United States from Cuba during the Mariel crisis. SCARFACE (Universal Studios 1983).

31. President Jimmy Carter, Remarks at a League of Nations Press

policy toward Cuban migrants.³² Castro responded by opening the Port of Mariel in Cuba, effectively permitting Cubans desiring to leave the island to do so freely.³³ One-hundred twenty-five thousand Cubans took advantage of this opening and fled from the port to the United States where many were, as Carter intimated, welcomed with open arms.³⁴ The exodus became known as the “freedom flotilla.”³⁵

Unlike in previous mass migrations, the majority of these Mariel migrants were working-class citizens, many of Afro-Cuban descent.³⁶ A smaller percentage were considered to be social outcasts, criminals, and those previously institutionalized for mental illness.³⁷ The latter group was portrayed in the film, *Scarface*, where Al Pacino played a former Cuban mobster who came to the United States through the Mariel boatlift to build a criminal enterprise in Miami.³⁸

Conference (May 5, 1980).

32. See Hughes, *supra* note 24, at 56.

33. *Id.*

34. *Id.*

35. Michelle A. Satin, *From Mariel into the Twenty-first Century: The Indefinite Detention of Cuban Excludable Aliens in the United States*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 139 (1996).

36. Hughes, *supra* note 24, at 56–57.

37. Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, 5 CUBA TRANSITION 311, 318 (1995).

38. SCARFACE (Universal Studios 1983); see also Damarys Ocaña, Opinion, *An Unfortunate Icon*, THE GUARDIAN (Dec. 10, 2008, 3:00 PM), <https://www.theguardian.com/commentisfree/cifamerica/2008/dec/10/scarface-al-pacino-anniversary-latinos> (pointing to Scarface's portrayal of Cuban immigrants who arrived on the Mariel boatlift as a negative reinforcement of stereotypes surrounding those immigrants).

Castro closed the port of Mariel following an agreement with the United States on October 31, 1980.³⁹ Between the closing of the port and the fall of the Berlin Wall, Cuban migration to the United States remained stable and relatively low. However, migration has recently trended to its highest levels since Castro's revolution (see Figure 1 below).⁴⁰

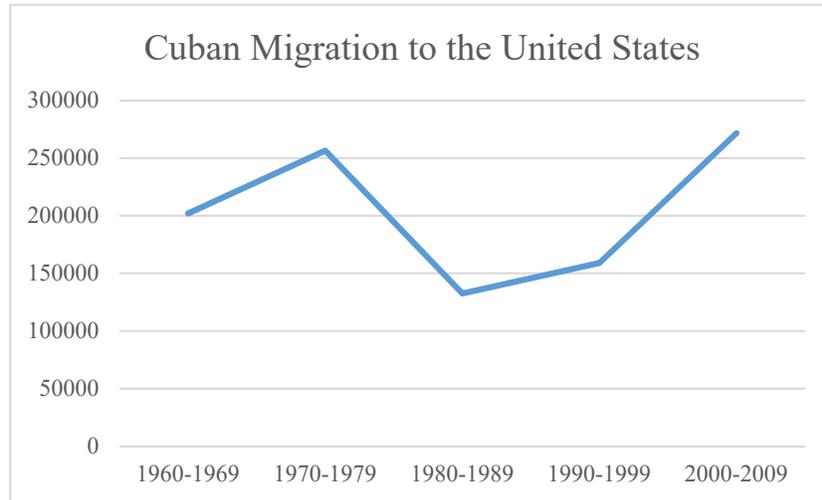


Figure 1. Periods of Cuban Migration to the United States.

Source: DHS Office of Immigration Statistics.

III. THE VEIL IS LIFTED

The Soviet-led communist empire collapsed when the Berlin Wall fell in 1989. Countries that depended upon the Soviet Union, including Cuba, saw a dramatic reduction in their

39. See, e.g., Andrew Glass, *Castro Launches Mariel Boatlift, April 20, 1980*, POLITICO (Apr. 20, 2009, 4:19 AM), <http://www.politico.com/story/2009/04/castro-launches-mariel-boatlift-april-20-1980-021421> (“Washington and Havana agreed the impromptu exodus would end Oct. 31, 1980.”).

40. See, e.g., Travieso-Díaz, *supra* note 1, at 242.

economic support.⁴¹ Similar to the Soviet Union, the veil was lifted from an artificially sustained economy.⁴²

Cuba's economic conditions worsened quickly as the government attempted to survive without the Soviet apparatus.⁴³ This economic crisis caused an increase in the number of Cubans seeking refuge in the United States (see Figure 1 above). One such effort of Cuban migrants fleeing the island made headlines when the Cuban Coast Guard sunk the migrants' ferryboat, killing those onboard.⁴⁴ This incident led to mass protests in Cuba against the Castro regime.⁴⁵ In response, Castro announced that the Cuban government would no longer block migrants from leaving the island.⁴⁶

Following Castro's announcement, 32,000 Cubans fled the island, principally on the grounds of economic (rather than political) need.⁴⁷ Per the Cuban Adjustment Act, Cubans admitted into the United States would be eligible to apply for permanent resident status and, ultimately, citizenship. All they had to do was reach the United States and claim asylum.⁴⁸ The United States government widely accepted Cuban migrants' asylum claims in the face of communism and under President Carter's open-arms policy.⁴⁹

The Cuban migrants in 1994, as noted above, were fleeing not necessarily communism but the economic consequences of a failed communist state. As exemplified in Figure 1, above, the number of Cuban migrants steadily rose beginning in 1990, following the end of the Cold War and the weakening of the

41. See, e.g., Carmelo Mesa-Lago, *The Economic Effects on Cuba of the Downfall of Socialism in the USSR and Eastern Europe*, in *CUBA AFTER THE COLD WAR* 133, 147 (Carmelo Mesa-Lago ed., 1993) ("Soviet economic aid to Cuba assumed three forms between 1960 and 1991: credits to cover trade deficits, development loans, and price subsidies . . . In 1992 all aid ended.")

42. See Travieso-Díaz, *supra* note 1, at 242–43.

43. See *id.*

44. See *id.* at 243.

45. See *id.*

46. See Geoffrey W. Hymans, *Outlawing the Use of Refugees as Tools of Foreign Policy*, 3 *ILSA J. INT'L & COMP. L.* 149, 153 (1996).

47. See *id.*

48. See Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1994)).

49. See Art Pine, *Cuba Refugees in U.S. Hold Special Immigration Status: Citizenship: Those Fleeing Castro Are Unique in Being Guaranteed Entry. Haitians, Whose Exodus Is Similar, Say They Are Victims of Discrimination*, *L.A. TIMES* (Aug. 19, 1994), http://articles.latimes.com/1994-08-19/news/mn-28796_1_immigrant-status.

Cuban economy. Migrants fleeing dire economic circumstances during this period could place themselves in the same boat as other emigrants looking for a better life in America and, to an extent, decouple themselves from the status of a refugee fleeing communism.

Recognizing this evolving political climate and also desiring to prevent another mass exodus, President Clinton sought to stop the raft migrants, or *balseiros*, from risking their lives crossing ninety miles of dangerous sea. On August 19, 1994, just over two weeks after Castro's announcement that he would not stop emigrants from leaving, President Clinton implemented a deterrence policy.⁵⁰ The new policy required the United States Coast Guard to turn around Cuban boats on the open sea and to transport them to Guantanamo Bay or to other refugee camps for eventual repatriation to Cuba.⁵¹

Yet, the migrants kept coming.⁵² It became clear to both the United States and Cuba that bilateral action was required to stop the *balseiro* crisis.⁵³ On September 9, 1994, roughly a month after the crisis was triggered, President Clinton and Fidel Castro entered into the Cuban Migration Agreement.⁵⁴ This agreement required Castro to take measures to prevent Cubans from departing in unsafe vessels. In exchange, the United States promised to admit at least 20,000 Cubans legally each year.⁵⁵ Note that this policy is the only immigration policy that sets a floor rather than a ceiling on the admission of migrants from a single country.⁵⁶ During a speech the following year, Clinton justified the policy:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts. . . . Regularizing 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

50. U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS 1 (1995).

51. *See id.*

52. *See* Travieso-Díaz, *supra* note 1, at 243–44.

53. *See U.S.-Cuba Joint Communique on Migration*, 5 U.S. DEPT ST. DISPATCH 603, 603 (1994).

54. *See id.*

55. Joint Communique on Immigration Matters, Cuba-U.S., Dec. 14, 1984, 35 U.S.T. 6479.

56. Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 61 (1999).

this fundamental objective. With the steps I have taken, we are now able to devote ourselves fully to our real, long-term goal.⁵⁷

Further complicating the new policy on Cuban migration, President Clinton reversed the former United States policy allowing the 21,000 *balseros* to be detained at Guantanamo Bay pending repatriation to Cuba to be admitted as asylees.⁵⁸

Cuban migrants who took their chances on the sea hoping to land in the United States and be granted asylum according to the Clinton Accord were met with resistance. Between May 2, 1995, and September 30, 1998, nearly 2,000 Cubans were interdicted at sea and returned to Cuba.⁵⁹ Cubans were expected to follow traditional visa application procedures. However, those who successfully landed in the United States were considered “legally present” and could apply for asylum.⁶⁰

Cuban migration throughout the first decade of the 21st century remained steady at roughly 27,000 migrants per year.⁶¹ President Obama addressed United States-Cuba relations as early as 2009, loosening restrictions on remittances and expanding opportunities to travel to Cuba for educational and scientific purposes.⁶² This was a significant break from the policy of his predecessor, George W. Bush, who maintained the economic embargo and focused on encouraging Cubans in Cuba to push for democratic change from the inside, without any significant outside change.⁶³

57. President William J. Clinton, Remarks to the Cuban-American Community (June 27, 1995).

58. See *Clinton Administration Reverses Policy on Cubans*, 72 INTERPRETER RELEASES 622, 622 (1995). See also Ann Devroy & Daniel Williams, *In Reversal, U.S. to Accept Cubans Held at Navy Base*, WASH. POST (May 3, 1995), <https://www.washingtonpost.com/archive/politics/1995/05/03/in-reversal-us-to-accept-cubans-held-at-navy-base/d793a7a3-bf06-4dea-94c7-f87499fee902/>.

59. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., R40566, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 9 (2009).

60. See Immigration and Nationality Act (INA) § 208, 8 U.S.C. § 1158(a)(1) (1999).

61. U.S. DEP'T. OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS 10 (2016).

62. Danielle Renwick, Brianna Lee & James McBride, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN REL. (Sept. 7, 2016), <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

63. See, e.g., *President Bush Outlines Cuban Policy Initiatives*, PBS NEWSHOUR (Oct. 24, 2007, 6:40 PM), http://www.pbs.org/newshour/bb/latin_america-july-dec07-cuba_10-24/ (quoting the President's speech

More dramatic changes began later in the Obama administration. In 2014, President Obama announced the restoration of diplomatic relations between the United States and Cuba.⁶⁴ In 2015, Cuba released fifty-three political prisoners as a sign of good will and progress toward improved human rights.⁶⁵ Each country opened its embassy in Havana and Washington later that same year.⁶⁶ And capping this series of executive actions, President Obama flew to Cuba—the first United States President to do so since Calvin Coolidge—to meet with Raúl Castro.⁶⁷

The changes taking place today in United States-Cuba policy are the most dramatic since the imposition of the congressional embargo in 1996.⁶⁸ The eventual termination of the economic embargo will likely bring substantial improvements to the Cuban economy. At the same time, there is a significant possibility that softening relations between the countries will result in a removal of Cuba's special immigration status.⁶⁹ This has stirred fear among many Cubans who worry that the door to the United States is closing. This fear is reflected in the increase in Cuban migration since President Obama began softening relations (see figure 2 below).

encouraging Cubans to initiate change).

64. Peter Baker, *U.S. to Restore Full Relations with Cuba, Erasing a Last Trace of Cold War Hostility*, N.Y. TIMES (Dec. 17, 2014), <http://www.nytimes.com/2014/12/18/world/americas/us-cuba-relations.html>.

65. Matt Spetalnick, David Adams & Lesley Wroughton, *Cuba Has Freed All 53 Prisoners as Agreed in U.S. Deal: U.S. Officials*, REUTERS (Jan. 12, 2015, 5:47 PM), <http://www.reuters.com/article/us-usa-cuba-prisoners-idUSKBN0KL10K20150112>.

66. Katherine Vargas, *Embassy Openings in Washington and Havana: On a Path Towards a Democratic, Prosperous Cuba*, WHITE HOUSE BLOG (July 21, 2015, 6:00 AM), <https://www.whitehouse.gov/blog/2015/07/21/embassy-openings-washington-and-havana-path-towards-democratic-prosperous-cuba>.

67. Julie Hirschfeld Davis & Randal C. Archibold, *Obama Meets Raúl Castro, Making History*, N.Y. TIMES (Apr. 11, 2015), http://www.nytimes.com/2015/04/12/world/americas/obama-cuba-summit-of-the-americas.html?rref=collection%2Fbyline%2Frandal-c.-archibold&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=34&pgtype=collection.

68. See, e.g., Fandl, *supra* note 11, at 17 (highlighting the significance of President Obama's visit to Havana and the congressional embargo).

69. See, e.g., *id.* at 40 ("Without lifting the congressional embargo, U.S. companies will continue to be excluded from the Cuban market and Cubans will likewise have no access to the U.S. market."); Susan Eckstein, *Time to End Special Privileges for Cuban Immigrants*, REUTERS: THE GREAT DEBATE (Jan. 6, 2015), <http://blogs.reuters.com/great-debate/2015/01/05/time-to-end-special-privileges-for-cuban-immigrants/>.

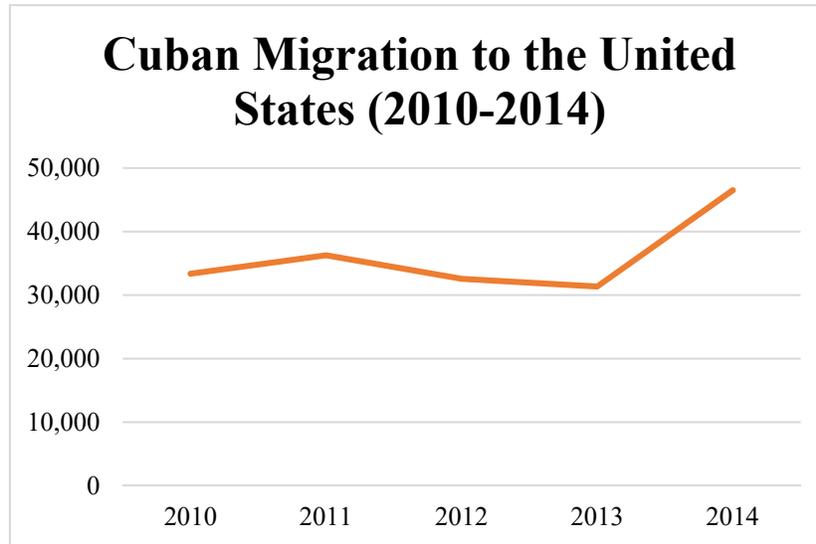


Figure 2. Cuban Migration to the United States (2010–2014).

Source: DHS Office of Immigration Statistics.

According to recent data from United States Customs and Border Protection, the number of Cubans coming to the United States has sharply increased in 2015 and 2016.⁷⁰ This reflects the rising concern among Cuban migrants that their window of opportunity is going to close. To better understand what the window has meant for the last fifty years, I will next examine the Cuban Adjustment Act in detail.

70. Jens Manuel Krogstad, *Surge in Cuban Immigration to U.S. Continues into 2016*, PEW RES. CTR. FACT TANK, <http://www.pewresearch.org/fact-tank/2016/08/05/cuban-immigration-to-u-s-surges-as-relations-warm/> (last updated Aug. 5, 2016).

IV. THE SPECIAL CASE FOR CUBAN MIGRANTS

A. THE CUBAN ADJUSTMENT ACT OF 1966⁷¹

Prior to Castro seizing power in 1959, Cubans wishing to enter the United States had to follow the same visa procedures as immigrants from other countries.⁷² This meant applying for a visa at the American Embassy in Havana and meeting the criteria for a lawful immigrant. However, Castro's new Cuba and the termination of diplomatic relations between Cuba and the United States led to a dramatic increase in the number of Cubans wishing to depart for the United States.

A 1965 speech by President Johnson laid the context for what would become the Cuban Adjustment Act the following year:

I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it. The dedication of America to our traditions as an asylum for the oppressed is going to be upheld. I have directed the Departments of State and Justice and Health, Education, and Welfare to immediately make all the necessary arrangements to permit those in Cuba who seek freedom to make an orderly entry into the United States of America.⁷³

As thousands of Cubans arrived in the United States without a visa, they were "paroled" into the country on a temporary basis while they sought legal admission. This meant that they were allowed to enter the country but not provided with any legal status yet. Under the immigration law at the time, these paroled Cubans would have to leave the United States and apply for a visa at a United States embassy in most cases, to qualify for a legal admission.⁷⁴ Doing so was very

71. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

72. Javier Talamo, *The Cuban Adjustment Act: A Law Under Siege?*, 8 ILSA J. INT'L & COMP. L. 707, 708 (2002).

73. President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill at Liberty Island, New York (Oct. 3, 1965) [hereinafter Johnson's Remarks].

74. Talamo, *supra* note 72, at 709; Immigration and Nationality Act, Pub. L. No. 86-648, sec. 10, 74 Stat. 504, 505 (1960) (prior to 1966 amendment).

difficult.⁷⁵ Accordingly, Congress passed legislation ensuring special protection for Cuban migrants to save them from having to apply for a visa.

The Cuban Adjustment Act was introduced by Senator Edward Kennedy in 1966 and passed with overwhelmingly bipartisan support, including a 300-25 vote in favor in the House of Representatives and an unchallenged voice vote in the Senate.⁷⁶ President Lyndon B. Johnson signed the act into law in November 1966.⁷⁷ The stated and largely supported purpose for the Act was to incentivize the end of communism in Cuba and protect those fleeing its grasp of communism.⁷⁸

The Cuban Adjustment Act amended the Immigration and Naturalization Act of 1952 as follows:

[N]otwithstanding the provisions of section 245(c) of the Immigration and Naturalization Act, the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least two years, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.⁷⁹

In essence, the Cuban Adjustment Act creates a special immigrant entry program just for Cubans whereby a Cuban emigrant can avoid the strict requirements of the INA.⁸⁰ Unlike other immigrants, a Cuban does not have to enter the United States legally at a port of entry. Unlike other immigrants, a Cuban does not have to be lawfully present in the United States prior to applying for permanent residence. And, unlike other

75. Talamo, *supra* note 72, at 709–10.

76. David Abraham, *The Cuban Adjustment Act of 1966: Past and Future* (University of Miami Legal Studies Research Paper No. 2015-11, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642451&download=yes.

77. *Id.*

78. *Id.*

79. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

80. *See generally* 8 U.S.C. §§ 1182, 1227 (1994).

immigrants, a Cuban arriving anywhere in the United States may receive the protections of an asylee without showing a well-founded fear of persecution.⁸¹

The Cuban Adjustment Act allows any Cuban in the United States, regardless of how they entered, to adjust their status to legal permanent resident after two years of presence.⁸² Doing so is the first step toward applying for citizenship and requesting visas for family members. This is a unique and prized status for migrants that affords Cubans privileges no other migrants enjoy.⁸³

The Cuban Adjustment Act became a beacon that Cubans looking for a better life pursued, many to their peril. Likely the most famous case relating to the Cuban Adjustment Act is that of Elián Gonzalez, a six-year-old Cuban boy who was taken by his mother, against the wishes of his father, to the United States.⁸⁴ The mother drowned en route to the United States but Elián arrived safely.⁸⁵ Given his age, Attorney General Janet Reno placed Elián with relatives in Miami who sought to keep him in the United States by petitioning on his behalf for asylum under the Cuban Adjustment Act. The father in Cuba fought the petition, claimed that only he could petition for his son, and argued that Elián should be returned to him in Cuba.⁸⁶ The federal district court judge and the 11th Circuit Court of Appeals agreed with the father's argument that only a parent could petition for a child under the Cuban Adjustment Act.⁸⁷ This led to the widely-publicized forcible taking of Elián from his relatives in Florida and his return to Cuba; an endeavor which involved 130 immigration agents, many armed. Years later, as an adult, Elián joined the Young Communist Party in Cuba and told Fox News Latino that “[the Cuban Adjustment Act led to the denial of] the right to be together with my father, the right

81. Abraham, *supra* note 76, at para. 3.

82. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

83. See, e.g., DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RESEARCH SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS 2–3 (2015).

84. See *A Chronology of the Elián Gonzalez Saga*, FRONTLINE PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/elian/etc/eliancron.html> (last visited Nov. 5, 2016).

85. *Id.*

86. *Id.*

87. See *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

to keep my nationality and to remain in my cultural context.”⁸⁸ Following Fidel Castro’s death in 2016, Elián called Fidel a father figure to him.⁸⁹

The Gonzalez case highlights the controversial nature of the Cuban Adjustment Act. While its goal appears to have been to provide safe haven to Cuban migrants fleeing communism, it has effectively turned into an open door policy allowing Cubans to seek opportunity in the United States for any reason. It incentivizes Cubans desperate for a better life to take their chances at sea on their way to the United States. As political and economic relations evolve between the United States and Cuba, the Cuban Adjustment Act must also evolve to reflect the new reality of Cuban migration.

B. THE 1994 CUBAN MIGRATION AGREEMENT

Migration from Cuba escalated into the early 1990s, especially following dramatic speeches made by Fidel Castro about United States imperialism and the migration crisis, which he blamed on the United States’ policies toward migrants.⁹⁰ By 1994, the number of Cuban migrants had climbed to 40,000 (see Figure 1).⁹¹ This led the United States to negotiate with Cuba over the establishment of a “safe, legal, and orderly” migration process.⁹²

The accord reached by President Clinton and Fidel Castro applied a carrot and stick approach by which Cubans intercepted at sea would no longer be brought to the United States to take advantage of the Cuban Adjustment Act, but rather they would be taken to Guantanamo Bay, a United States-controlled naval base on the island of Cuba. Additionally, the United States

88. *Elián González: My Time In The U.S. ‘Marked Me For My Whole Life’*, FOX NEWS LATINO (Nov. 19, 2013), <http://latino.foxnews.com/latino/politics/2013/11/18/elian-gonzalez-my-time-in-us-marked-me-for-my-whole-life/>.

89. Kristine Guerra, ‘Fidel was a Friend’: Elián González Remembers Castro as a Father Figure, *Wash. Post* (Nov. 27, 2016).

90. See Mortimer B. Zuckerman & Linda Robinson, *Castro in 1994: U.S. Needs to Change ‘Old, Obsolete Policy’ Toward Cuba*, U.S. NEWS & WORLD REP. (Dec. 17, 2014, 3:37 PM), <http://www.usnews.com/news/articles/2014/12/17/castro-in-1994-us-needs-to-change-old-obsolete-policy-toward-cuba> (explaining that Castro said that the fact that more illegal than legal Cuban immigrants were being accepted shows a flaw in U.S. immigration law).

91. RENNACK & SULLIVAN, *supra* note 83, at 2.

92. *See id.*

offered a minimum of 20,000 visas to eligible Cuban migrants each year.⁹³

By May of 1995, 33,000 Cubans were detained at Guantanamo Bay with questionable legal status—they could not claim United States residency since they had never set foot on United States soil but they also refused to return to Cuba.⁹⁴ Ultimately, President Clinton decided to “parole” those Cubans into the United States in an effort to meet the 20,000 minimum quota set in the 1994 accord, which was a difficult target for the United States to reach with qualified migrants. As part of a new agreement between the heads of state in Cuba and the United States, the United States agreed to stop taking Cuban migrants to Guantanamo Bay and instead took Cubans interdicted at sea back to Cuba. The new policy, which returned Cubans captured at sea to Cuba and admitted Cubans who reach the United States’ shores under the Cuban Adjustment Act, became known as the “wet foot/dry foot” policy.⁹⁵

The open arms policy of President Carter had largely disappeared from the American public’s perception of Cuban migrants by the late 1990s. Following the *balseo* exodus, anti-immigrant sentiment in the United States grew. Under Republican Governor Pete Wilson, California enacted Proposition 187 in 1994, also known as the “Save Our State Initiative.”⁹⁶ The law barred undocumented immigrants from access to public services, including health and education. The law passed by large margins and was challenged three days later in federal court, where a federal judge struck it down as an unconstitutional usurpation of federal power. Judge Mariana Pfaelzer stated in her opinion that, “California is powerless to enact its own legislative scheme to regulate immigration. It is likewise powerless to enact its own legislative scheme to regulate alien access to public benefits.”⁹⁷

93. See Paul Lewis, *Cuba Vows to End Exodus in Return for a Rise in Visas*, N.Y. TIMES (Sept. 10, 1994), <http://www.nytimes.com/1994/09/10/world/cuba-vows-to-end-exodus-in-return-for-a-rise-in-visas.html>.

94. See WASEM, *supra* note 59, at 3.

95. See *id.* at 4 (noting that the requirement to grant automatic asylum to Cubans under the Cuban Adjustment Act at the time the migrant reaches dry land, not U.S. territorial waters); see also *Yang v. Maugans*, 68 F.3d 1540, 1549 (3d Cir. 1995) (discussing that aliens must reach dry land to satisfy the “physical presence” requirement).

96. See *Prop. 187 Approved in California*, MIGRATION NEWS (Dec. 1994), <https://migration.ucdavis.edu/mn/more.php?id=492>.

97. *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244,

Following on the actions of California, Florida, which faced the brunt of Cuban migration, initiated a lawsuit against the federal government seeking reimbursement in the amount of \$1.5 billion for expenses associated with providing services for unlawful immigrants.⁹⁸ Florida lost the initial suit and the appeal but claimed victory in drawing attention to the issue of immigration policy and the need for reform.⁹⁹ Even though the suit was dismissed, Chiles, the Government of Florida, claimed that the “lawsuit was successful in that it raised awareness of the extraordinary impact of illegal immigration on border-states, like Florida.”¹⁰⁰

It is worth noting that in 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) as an attempt at broad immigration reform under President Bill Clinton.¹⁰¹ IIRIRA established many new elements in the immigration law system, including employment verification to prevent the hiring of immigrants without the lawful right to work in the United States.¹⁰² As part of IIRIRA, Congress included a provision that would terminate the benefits of the Cuban Adjustment Act automatically once the President certified to Congress that Cuba had successfully transitioned to a democracy in accordance with the Helms-Burton Act.¹⁰³ However, as discussed elsewhere, the likelihood of the President invoking this provision is minimal as compared to the likelihood of repealing the embargo on Cuba.¹⁰⁴

Other attempts were made to repeal the Cuban Adjustment Act in the midst of the growing American distaste for migrants in the 1990s. But strong Cuban voices in politics helped to overcome any such attempts. Consider, for example, that in

1261 (C.D. Cal. 1997).

98. *Chiles v. United States*, 874 F. Supp. 1334, 1335–36 (S.D. Fla. 1994), *aff'd* 69 F.3d 1094 (11th Cir. 1995).

99. See, e.g., Megan O'Matz & Sally Kestin, *Florida Politicians Protect Special Status for Cubans*, SUN SENTINEL (Oct. 1, 2015), <http://www.sun-sentinel.com/us-cuba-welfare-benefits/sfl-us-cuba-welfare-benefits-part-3-htm1story.html> (detailing the protections and benefits provided to Cuban asylees).

100. See Travieso-Díaz, *supra* note 1, at 245–46.

101. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

102. See *id.* § 401.

103. See *id.* § 606; see also Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act), Pub. L. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–91.

104. See Fandl, *supra* note 11, at 39–40.

February 1994, Democrat Michael Kopetski from Oregon introduced legislation to repeal the Cuban Adjustment Act, but the bill was not enacted.¹⁰⁵ Later that same year, Cuban-American and anti-Castro advocate Senator Robert Menendez from New Jersey argued that Congress should modify the Cuban Adjustment Act to prevent Cubans adjusting under the Act from returning to Cuba prior to being naturalized as United States citizens.¹⁰⁶ As recently as March 2016, bipartisan legislation to repeal the Cuban Adjustment Act was introduced in the House of Representatives, though with little chance of passage.¹⁰⁷

V. WHAT ARE CUBAN MIGRANTS FLEEING?

The Cuban Adjustment Act capitalized on the belief that emigrants from Cuba would come to the United States to fight the Castro regime, and communism generally, by draining the Cuban economy of its best and brightest, and by taking positions as Cuban-Americans against the regime. Prior to the Mariel Port Crisis in the 1980s, this was largely the case. Cubans that came to the United States tended to be white, educated, and often wealthy.¹⁰⁸ Those Cuban migrants left Cuba to protest the Castro regime and to support anti-Castro movements in the United States. Some of these migrants eventually entered United States politics, pushing for more aggressive anti-Castro policies, including the 1996 Helms-Burton Act.¹⁰⁹

Beginning with the Mariel crisis, the typical Cuban coming to the United States had changed. They were less often white, educated or wealthy. They were, as scholar David Abraham noted, “much more like other immigrants from poor Latin countries”.¹¹⁰ Perhaps more importantly, these migrants were less politically active, less opposed to the Castro regime, and more interested in economic opportunity. This new migration context changed the Cuban-American community from an anti-Castro and largely Republican base to a pro-reform and increasingly Democratic base. According to the Pew Research

105. See H.R. 3854, 103d Cong. (1994).

106. See 140 CONG. REC. 23,338 (1994).

107. See Correcting Unfair Benefits for Aliens Act of 2016, H.R. 4847, 114th Cong. (2016).

108. Abraham, *supra* note 76, para. 6.

109. See *generally* Abraham, *supra* note 76 (describing Cuban migrants as “extraordinarily well-situated exile leaders”).

110. Abraham, *supra* note 76, para. 6.

Center, while 64% of Cuban-Americans identified as Republican in 2002, only 47% did so in 2013.¹¹¹

Cuban emigration shifted dramatically from political refugees to economic refugees in the 1990s.¹¹² The Anti-Castro Cuban-American community has taken note of this shifting dynamic. In 2013, Florida Senator Marco Rubio told reporters that it is “very difficult to justify someone’s status as an exile and refugee when a year and a half after they get here they are flying back to that country over and over again.”¹¹³ High profile Cuban-American politicians began calling for the repeal of the Cuban Adjustment Act or at least modifications that prevented Cubans who did not oppose the regime from taking advantage of the law.¹¹⁴

While it may seem to some that fleeing a difficult economic situation can be just as essential to a migrant as fleeing a difficult political situation, economic circumstances will not usually qualify a migrant for asylum or refugee status.¹¹⁵ Were it the case that the economic environment in a country would justify granting asylum to a migrant in the United States, we would likely see a significant increase in the number of asylum applicants from poor countries such as Haiti, the Dominican Republic, or even Mexico. However, the Cuban Adjustment Act has far less stringent requirements for granting arriving Cubans admission than any other country, meaning that a Cuban fleeing a poor economic environment could seek protection in the United States.

According to the Cuban Adjustment Act, Cubans did not have to show a fear of persecution since it was assumed that they were fleeing a communist country for political reasons (even

111. Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting Toward the Democratic Party*, PEW RES. CTR. FACT TANK (June 24, 2014), <http://www.pewresearch.org/fact-tank/2014/06/24/after-decades-of-gop-support-cubans-shifting-toward-the-democratic-party/>.

112. See generally Travieso-Díaz, *supra* note 1, at 238–51 (explaining the post-revolution immigration trends and policies).

113. Alex Leary, *Sen. Marco Rubio Says He Wants to Re-Examine Cubans’ Fast-Track Status but Immigration Bill Doesn’t*, TAMPA BAY TIMES (June 25, 2013, 6:19 PM), <http://www.tampabay.com/news/politics/national/sen-marco-rubio-says-he-wants-to-re-examine-cubans-fast-track-status-but/2128556>.

114. See Abraham, *supra* note 76, para. 17 (“[O]ther old timers also suddenly called for changes to the law.”).

115. See, e.g., Jonathan L. Falkler, *Economic Mistreatment as Persecution in Asylum Cases: Towards a Consistent Standard*, 2007 U. CHI. LEGAL F. 471, 483 (2007) (explaining that extreme economic hardship may in some cases qualify a migrant for asylum but economic circumstances alone are usually insufficient).

though the same would not hold true for migrants fleeing China or Vietnam). “Congress in effect decided that because Cuba under Castro was Communist, in general no Cuban should be deported. The nationals of no other country have the same screening exemption.”¹¹⁶

Perhaps no one is more outspoken against the continuation of the Cuban Adjustment Act than Fidel Castro himself. Castro called the Cuban Adjustment Act the “Killer Law” because it encouraged Cubans to partake in a dangerous journey across the sea to the United States with the expectation of a better life while breaking apart families and Cuban society. He said:

The United States does not have any right to promote the death of people from this country, whether they are criminals or not. The diabolical killing machine that claims lives and provokes tragedies is nothing other than the Cuban Adjustment Act . . . We will fight against this vicious law, this heinous and criminal law. We will keep fighting until it is repealed. Only then can we be certain that thousands of innocent children will not be illegally uprooted from their homeland, from their schools, from their identities, and subjected to extreme dangers or even death.¹¹⁷

VI. ALIGNING CUBAN IMMIGRATION POLICY WITH REALITY

The economic embargo the United States enacted against Cuba in 1962 has come under significant criticism recently and attitudes towards the embargo, in many ways, have softened.¹¹⁸ The arguments underlying the push to end the embargo are quite similar to those underlying the push to end the Cuban Adjustment Act. As the United States moves closer to normalization of economic relations with Cuba, it must also end the special immigration status Cubans have enjoyed since 1966.

116. *Refugees*, FEDERATION FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/Refugees> (last updated Feb. 2003).

117. Fidel Castro Ruz, President of the Republic of Cuba, Remarks at the Rally of Youth and Students Marking the Closing Session of the 7th Congress of the Federation of Cuban Women (Mar. 8, 2000).

118. *E.g.*, Renwick, Lee & McBride, *supra* note 62 (“Polls conducted shortly after the U.S.-Cuba announcement in December 2014 found that a majority of Americans supported reestablishing diplomatic ties.”).

Communism posed an ideological threat to the liberal democratic ideals of the United States throughout the Cold War. Ideas about private property and resource management collided in these two systems and created a seemingly incompatible barrier to global relations. Citizens in a communist state could not become consumers of foreign exports or participants in the global economy, and therefore stymied the global economic goals of a capitalist world, led by the United States. One of the systems had to change for the world order to survive.

When the dust settled from the fall of the Berlin Wall in 1989, the economic catastrophe of the Soviet Union was revealed for the world to see.¹¹⁹ Weak oil prices, lack of trade, and disincentivized production were largely to blame for the failed economy.¹²⁰ But the demise of the centerpiece of the communist architecture signaled a win for the liberal economic approach of the United States. Similarly, it motivated other countries with models similar to the Soviet model to implement reforms.

Cuba shares its designation as a socialist state with three other nations today—China, Vietnam and Laos. The communist party has been in power in China since 1949, Cuba since 1966, Vietnam since 1976, and Laos since 1975.¹²¹ Each of these four socialist states began with austerity and strong state control and each has since bent to the will of free markets and economics.

Vietnam was the first to open its door to free market policies. The end of the Vietnam War in April 1975 left a battered Vietnam with an economy in ruins. The Guardian newspaper lamented:

The US left Vietnam in a state of physical ruin. Roads, rail lines, bridges and canals were devastated by bombing. Unexploded shells and landmines littered the countryside, often underwater in the paddy fields where peasants waded. Five million hectares of forest had been

119. See, e.g., Leon Aron, *Everything You Think You Know About the Collapse of the Soviet Union Is Wrong*, 187 FOREIGN POL'Y 64, 65 (2011) (describing the economic instability in the USSR before its demise).

120. *Id.*

121. See *Lao People's Revolutionary Party - LPRP*, U.S. LIBRARY OF CONGRESS, <http://countrystudies.us/laos/85.htm> (last visited Nov. 7, 2016); *The People's Republic of China*, U.S. LIBRARY OF CONGRESS, <http://countrystudies.us/china/24.htm> (last visited Nov. 7, 2016); *Vietnam*, U.S. LIBRARY OF CONGRESS, <http://countrystudies.us/vietnam/51.htm> (last visited Nov. 7, 2016); *Communist Party of Cuba*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Communist-Party-of-Cuba> (last updated Apr. 20, 2011).

stripped of life by high explosives and Agent Orange. The new government reckoned that two-thirds of the villages in the south had been destroyed. In Saigon, the American legacy included packs of orphans roaming the streets and a heroin epidemic. Nationally, the new government estimated it was dealing with 10 million refugees; 1 million war widows; 880,000 orphans; 362,000 war invalids; and 3 million unemployed people.¹²²

Following the war, the United States enacted a trade embargo on Vietnam, much like the present embargo on Cuba, and influenced international agencies to limit their support of the socialist government there.¹²³ By the late 1980s, Vietnam's economy was barely breathing. The Vietnamese government moved quickly toward a market-oriented socialist policy that allowed private business, foreign investment, and free exchange. By 1994, the United States lifted the trade embargo and allowed money to flow back into Vietnam.¹²⁴ In 2000, Vietnam began privatizing its state-owned enterprises and by 2006, it had acceded to the World Trade Organization (WTO).¹²⁵ The government remains socialist, but is largely free-market friendly.

Laos similarly struggled to survive after the Vietnam War, which was significantly constrained within its neighbor's borders but often spilled over into its territory.¹²⁶ At the same time, it had been fighting its own civil war for independence against the constitutional monarchy in place since 1953. The King conceded power in 1975 to the Marxist government that led the fight against the monarchy.¹²⁷

From 1975–85, Laos functioned as a traditional socialist government, with centralized social and economic policies. However, lack of skilled laborers and challenging geographic

122. Nick Davies, *Vietnam 40 Years On: How a Communist Victory Gave Way to Capitalist Corruption*, GUARDIAN (Apr. 22, 2015, 1:00 PM), <https://www.theguardian.com/news/2015/apr/22/vietnam-40-years-on-how-communist-victory-gave-way-to-capitalist-corruption>.

123. *See id.*

124. *Id.*

125. *Id.*

126. *See* Mai Der Vang, *Heirs of the 'Secret War' in Laos*, N.Y. TIMES (May 27, 2015), http://www.nytimes.com/2015/05/28/opinion/heirs-of-the-secret-war-in-laos.html?_r=0.

127. *See Lao People's Revolutionary Party - LPRP, supra* note 121.

circumstances limited the economic growth of Laos.¹²⁸ In 1986, the government, taking note of the success of Vietnam in doing so, began adopting market-oriented economic reforms.¹²⁹ Like Vietnam, Laos privatized state-owned enterprises and opened their doors to foreign investment. Also similar to Vietnam, growth was strong following market-oriented reforms. Laos joined the WTO in 2013.¹³⁰

The elephant in the room is China—a major economic powerhouse that still embraces socialist values. Mao Zedong established the People's Republic of China in 1949 with an emphasis on socialist principles and rural economic development.¹³¹ Differences of opinion between Mao's approach and the approach of Nikita Khrushchev of the Soviet Union led the two neighbors to part ways on communist ideologies during the Cold War.¹³² Following Mao's death in 1976, communist party leader, Deng Xiaoping, instituted Chinese economic reforms and argued that a socialist country and a market economy could coexist.¹³³

The Chinese model of market socialism was largely based on the idea that China would only be able to modernize if it traded with the West. China began implementing laws allowing foreign investment and foreign ownership as early as 1978, beginning a period of rapid economic development and growth.¹³⁴ Today, China is growing rapidly and may soon surpass the United States in terms of economic size.¹³⁵ But, the consumerist culture evident in the United States may not yet be

128. See Hatthachan Phimpphanthavong, *Economic Reform and Regional Development of Laos*, 3 MOD. ECON. 179, 179 (2012).

129. See *id.*; see also Henry Kamm, *Communism in Laos: Poverty and a Thriving Elite*, N.Y. TIMES (July 30, 1995), <http://www.nytimes.com/1995/07/30/world/communism-in-laos-poverty-and-a-thriving-elite.html?pagewanted=all>.

130. *Lao People's Democratic Republic and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/lao_e.htm (last visited Nov. 7, 2016).

131. See *The People's Republic of China*, *supra* note 121.

132. See W. Gary Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213, 222–23 (1988).

133. See *id.* at 223–24.

134. See *id.* at 224–26.

135. See, e.g., *China Stumbles in Race to Pass U.S. as World's Biggest Economy*, BLOOMBERG NEWS (Jan. 29, 2016, 11:33 AM), <http://www.bloomberg.com/news/articles/2016-01-29/china-stumbles-in-race-to-pass-u-s-as-world-s-biggest-economy> (explaining that China has lost ground since the U.S. recovery from the recession).

fully reflected in the Chinese marketplace.¹³⁶ Nevertheless, its transition from an economically-struggling to an economically-thriving socialist state maintains the perception that a country need not abandon socialist principles to achieve economic growth.

Some have argued that China's transition from a strong communist country to a country centered on market-socialism may be appealing to Cuba as it considers its next move.¹³⁷ China has not abandoned its socialist principles and yet has embraced free markets as vigorously as the United States. This model presents a viable mechanism for Cuba to stay true to its revolutionary roots and yet build a sustainable future for economic growth.

The changes taking place in the Cuban economic and political structures, as well as those taking place in United States foreign policy toward Cuba, are entwined with immigration policy. Currently, Cuban immigrants in the United States are treated as political exiles fleeing communism and seeking protection from oppression.¹³⁸ As Cuba transitions from a rigid socialist state to a market-oriented socialist state like China, the flight from communism argument dissipates rapidly. These economic changes in Cuba must eventually lead to the revocation of the Cuban Adjustment Act and the grouping of Cuban migrants with other migrants. Removal of the Cuban Adjustment Act and the lifting of the economic embargo are both highly likely in the near future. The question is whether the Cuban Adjustment Act will disappear before or after lifting the economic embargo.

One of the conditions of the Helms-Burton Act to lift the economic embargo on Cuba is the establishment of a transitional government in Cuba.¹³⁹ The policy statements underlying the Act clearly refer to the desire to remove Castro from the Cuban political system.¹⁴⁰ Raúl Castro has already pledged to step down

136. See, e.g., Doug Bandow, *China Not Yet Free Market*, CATO INST., <http://www.cato.org/publications/commentary/china-not-yet-free-market> (last visited Nov. 7, 2016).

137. See, e.g., Larry Cata Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 337, 342 (2004).

138. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

139. See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-91, Pub. L. No. 104-114.

140. The Act mentions Castro 35 times. See *id.*

from power in 2018.¹⁴¹ Upon relinquishing power, a younger and more market-friendly party member is expected to take control. The United States President may determine this to be a transitional move.

The rationale underlying the application of the Cuban Adjustment Act to Cuban migrants, which was originally to protect Cubans fleeing Castro's communist regime, would diminish dramatically with a market-oriented socialist government in place.¹⁴² In signing the Cuban Adjustment Act, President Johnson said:

[I] declare this afternoon to the people of Cuba that those who seek refuge here in America will find it. The dedication of America to our traditions as an asylum for the oppressed is going to be upheld.

The lesson of our times is sharp and clear in this movement of people from one land to another. Once again, it stamps the mark of failure on a regime when many of its citizens voluntarily choose to leave the land of their birth for a more hopeful home in America. The future holds little hope for any government where the present holds no hope for the people.¹⁴³

There would be little room left to distinguish a migrant fleeing persecution in Cuba from one fleeing persecution in China. An immigrant fleeing persecution in China must demonstrate a well-founded fear in order to be considered for refugee or asylee status in the United States.¹⁴⁴ An immigrant fleeing Cuba for any reason need only enter the United States and apply to adjust his or her status to a lawful permanent resident.¹⁴⁵ Though the political conditions would be nearly identical, the process for entering migrants would differ

141. See Damien Cave, *Raúl Castro Says His New 5-Year Term as Cuba's President Will Be His Last*, N.Y. TIMES (Feb. 25, 2013), <http://www.nytimes.com/2013/02/25/world/americas/raul-castro-to-step-down-as-cubas-president-in-2018.html>.

142. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

143. Johnson's Remarks, *supra* note 73.

144. See 8 U.S.C. § 1101(a)(42) (2016).

145. See, e.g., *Green Card for a Cuban Native or Citizen*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-cuban-native-or-citizen> (last updated Mar. 22, 2011).

dramatically if the Cuban Adjustment Act were to remain in place.

Of course, dismantling the Cuban Adjustment Act would mean closing the door to a pipeline of migrants from Cuba that has been open for half a century. Improving economic relations with Cuba have already begun signaling to the Cuban people that the open door policies of the past may soon be coming to an abrupt end, leading to substantial increases in the number of Cubans fleeing to the United States.¹⁴⁶ This surge in Cuban migrants could be exacerbated further by shocks to the economy in the face of rapid economic reforms on the island. “[T]here is a significant risk of a mass exodus of Cubans to the United States if economic conditions take a turn for the worse [in Cuba]: this is a common occurrence in countries during the early phases of their free-market transitions.”¹⁴⁷ Given the importance of Cuba in our history and in our immigration policy, it is critical that United States policy take a holistic approach to prepare for a new day in Cuba. I will address that recommendation in my conclusion.

VII. CONCLUSION AND RECOMMENDATIONS

The coming storm of Cuban migrants may be unlike anything seen before as Cubans face economic change, political transition, and the threat of being tossed into the much more rigid and limited immigration categories of their Latin American neighbors. Congress must act quickly to get ahead of this crisis by having a succession plan in place for a new United States-Cuba relationship. This should include a phase-out of the Cuban Adjustment Act with predictable and transparent requirements, an economic development plan that emphasizes a rebuilding of the Cuban economic infrastructure, and a resumption of trade relations that encourage joint ventures and investment in Cuba’s growing private sector.

The normalization of relations between the United States and Cuba has had positive effects on trade and investment, and this has led to both new opportunities and new hope for an improved Cuban economy.¹⁴⁸ But, it has also stirred panic among some Cubans that normalization will mean an end to

146. See Hymans, *supra* note 46; see also Krogstad, *supra* note 70.

147. Travieso-Díaz, *supra* note 1, at 236.

148. See Fandl, *supra* note 3, at 180.

their special immigration benefits.¹⁴⁹ The fear has grown to significant levels, leading to a doubling in the number of rafters encountered by the United States Coast Guard between December 2013 and 2014 (see figure Figure 3, below).¹⁵⁰ The Coast Guard released an announcement directed at would-be Cuban migrants reminding them that there have been no changes to immigration policy—yet.¹⁵¹

149. *E.g.*, Greg Allen, *As Rumors Spread, More Cubans Try to Reach the U.S. by Sea*, NPR (Jan. 9, 2015, 4:36 PM), <http://www.npr.org/sections/parallels/2015/01/09/376094930/as-rumors-spread-more-cubans-try-to-reach-the-u-s-by-sea>.

150. *Id.*

151. *See Coast Guard Repatriates 121 Cuban Migrants Interdicted at Sea in Past Week*, U.S. COAST GUARD NEWSROOM (Jan. 5, 2015), <http://www.d7.uscgnews.com/go/doc/4007/2442054/>.

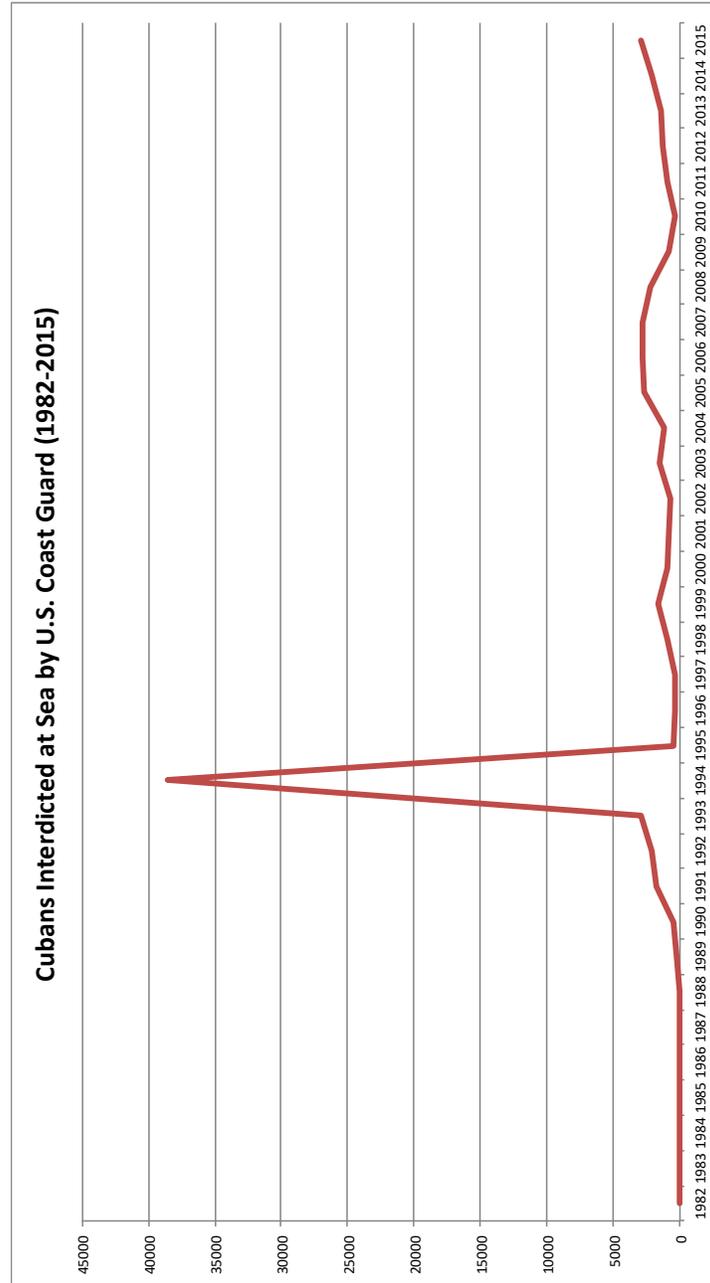


Figure 3. Cubans Interdicted at Sea (1982-2015).
Source: U.S. Coast Guard.

The United States embargo on Cuba today reflects a fixation with Fidel and Raúl Castro and with a period of our history that has largely disappeared from reality. Tying the lifting of the embargo to the departure of the Castro family and the replacement of a communist government with a democracy belies the point that Cuba poses no threat—either as a communist or a democratic state—to the United States or to the world. Nevertheless, the language of the Helms-Burton Act clearly ignores the possibility that a communist regime might become a market economy without abandoning socialist principles.¹⁵²

Immigration policy toward Cuba, like economic policy, must change. Cuba has already shown significant steps toward market reforms that will allow a quicker pace for economic growth on the island. Removal of the travel ban by the United States and resumption of flights in 2016 will begin to boost interest, investment, and ultimately, once regulations change a bit more, tourism on the island. All of these developments create an incentive to invest in Cuba for both Cubans and foreigners. As the market economy continues to develop, United States policy must focus on the Cuba of today—not the Cuba of the Cold War era. This means implementing sensible economic policies that facilitate sustained growth on the island after decades of isolation, as well as encouragement for Cuban-Americans to return to the island to facilitate its transition to a productive and strategic regional partner. Phasing out the Cuban Adjustment Act and removing the economic embargo are the first step in achieving this goal.

152. See Rolando J. Santiago, *Y2K, The Millennium for a Revised U.S.-Cuba Trade Policy: Grounds for Removing the Embargo*, 6 NAFTA L. & BUS. REV. AM. 169, 170–71 (2000).